

**आयकर अपीलीय अधिकरण, “एस.एम.सी” न्यायपीठ,कटक**

IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH CUTTACK

श्री जार्ज माथन, न्यायिक सदस्य के समक्ष ।

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER

आयकर अपील सं/ITA No.56/CTK/2023

(निर्धारण वर्ष / Assessment Year :2014-2015)

Rashi Agrawal, C/o: Ramesh Enterprises, At-Naya Sarak, PO: Chandni Chowk Cuttack-753002	Vs	ITO, Ward-1(1), Cuttack
PAN No. : <b>AJGPG 2032 B</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
निर्धारिती की ओर से /Assessee by	:	Shri Keshav Dubey, CA
राजस्व की ओर से /Revenue by	:	Shri S.C.Mohanty, Sr. DR
सुनवाई की तारीख / <b>Date of Hearing</b>	:	04/05/2023
घोषणा की तारीख/ <b>Date of Pronouncement</b>	:	04/05/2023

**आदेश / O R D E R**

This is an appeal filed by the assessee against the order of the Id. CIT(A), National Faceless Appeal Centre (NFAC), Delhi, dated 31.01.2023, passed in DIN & Order No.ITBA/NFAC/S/250/2022-23/1049275665(1), for the assessment year 2014-2015.

2. It was submitted by the Id. AR that the assessee is an individual, who is deriving income from capital gains from purchase and sale of shares. It was the submission that the assessee has purchased 1 lakh shares of M/s Panchshul Marketing Ltd. on 29.03.2012 @Rs.1/- per share. It was the submission that in view of the decision of the Hon'ble Bombay High Court the said company was amalgamated with M/s Kailash Auto. on 24.01.2013. Consequent to the amalgamation 1 lakh shares of M/s Kailash Auto was issued to the assessee in lieu of 1 lakh shares in M/s Panchshul Marketing Ltd. held by the assessee. This was done by M/s LKP Securities Pvt. Ltd.. The shares were in the demat form and in

the demat account of the assessee. The shares of M/s Panchshul Marketing Ltd. had been purchased by the assessee from M/s Brijdhara Mercantile Pvt. Ltd. The purchase of shares of M/s Panchshul Marketing Ltd. was an off-market purchase. It was the submission that subsequently the shares of M/s Kailash Auto were sold on various dates i.e. from 18.02.2014 to 06.03.2014 at an average price of about Rs.38/- per share. The assessee had consequently disclosed Rs.38 lakhs received by the assessee as exempt u/s.10(38) of the Act. The shares were sold through Inter Connected Stock Exchange of India Ltd. and STT (Securitisation Transaction Tax) had also been paid. The Inter Connected Stock Exchange of India Ltd. had sold the shares through BSE. It was the submission that under identical circumstances, the coordinate bench of the Tribunal in the case of Deepansu Mohapatra & Others in ITA Nos.42&43/CTK/2020 along with other connected appeals, vide order dated 21.12.2021 had following the various decisions of the Hon'ble High Courts, held that the assessee, having purchased the equity shares through account payee cheques, the shares have been held in demat account and shares have been held for 12 months and sold through recognized stock exchange after payment of STT, was entitled to the exemption u/s.10(38) of the Act. It was the submission that in the said case also it was the sale of equity shares of M/s Kailash Auto, which has been considered by the coordinate bench of the Tribunal. It was the submission that the coordinate bench of the Tribunal had in para 19.6 to 19.9 held as under :-

19.6 Similar view was also taken by Coordinate Bench Mumbai, The relevant finding of Coordinate Bench Mumbai in case of Ramprasad Agarwal vs. ITO vide ITA No.1228/M/2018 has held 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."*

*Thus, it is clear that the Tribunal in the said case has analyzed an identical issue wherein the shares allotted in the private placement @ Rs. 10 at par of face value which were dematerialized and thereafter sold by the assessee and accordingly the Tribunal after placing reliance on the decision of Hon'ble Supreme Court in case of [CCE vs. Andaman Timber Industries](#) (supra) as well as the decision of Hon'ble jurisdiction High court in case of [CIT vs. Smt. Pooja Agarwal](#) (supra) as held that when the Assessing Officer has not brought any material on record to show that the assessee has paid over and above purchase consideration as claimed and evident from the bank account then, in the absence of any evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. Similar in the case in hand the assessee has produced the relevant record to show the allotment of shares by the company on payment of consideration by cheque and therefore, it is not a case of payment of consideration by in cash. But the transaction is established from the evidence and record which ITA No.1228/M/2018 Mr. Ramprasad Agarwal cannot be manipulated as all the entries are part of the bank account of the assessee and the assessee dematerialized the shares in the D-mat account which is also an independent material and evidence cannot be manipulated. Therefore, the holding of the shares by the assessee cannot be doubted and the finding of the AO is based merely on the suspicion and surmises without any cogent material to show that the assessee has introduction his unaccounted income in the shape of long term capital gain. We find that the Id. CIT(A) has also referred to SEBI enquiry against the M/s Anand Rathi Share and Stock Brokers Ltd. However, we note that*

*the said enquiry was regarding financial irregularities and use of fund belonging to the clients for the purpose other than, the purchase of shares on behalf of the clients. Therefore, the subject matter of the enquiry has no connection with the transaction of bogus long term capital gain. The decisions relied upon the Id. DR in case of [Sanjay Bimalchand Jain vs. Pr. CIT](#) (supra) is not applicable in the facts of the present case as the said decision is in respect penny stock purchase by the assessee from a persons who was found to be indulged in providing bogus capital gain entries whereas in the case of the assessee the shares were allotted to the assessee by the company at par of face value. Hence, in view of the facts and circumstances when we hold that the order of the Assessing Officer treating the long term capital gain as bogus and consequential addition made to the total income of the assessee is not sustainable. Hence, we delete the addition made by the AO on this account."*

*10. It is clear from the above that the facts of the case of the assessee are identical with the facts in the above case wherein the co-ordinate bench of the Tribunal has deleted the addition. We, therefore, respectfully following the same set aside the order of Ld. CIT(A) and direct the AO to not to treat the long term capital as bogus and delete the consequential addition.*

*11. In the result, appeal of the assessee is allowed.*

*19.7. Similar view was also taken by Coordinate Bench Indore. The relevant finding of Coordinate Bench Indore in case of Shivnarayan Sharma & Ors vide ITANo.889/Ind/2018 & others dated 28.06.2021 reads as follows:*

*19. Subsequently Co-ordinate Bench of Jaipur in the case of Ashok Agrawal V/s ACIT in ITA No.124/JP/2020 dated 18.11.2020 has followed the decision of Hon'ble Mumbai Tribunal in the case of Dipesh Ramesh Vardhan (supra) while dealing with the same issue of Long Term Capital Gain from sale of equity shares of M/s Sunrise Asian Limited claimed to be exempt u/s 10(38) of the Act and decided in favour of the assessee observing as follows:-*

*"23. In the aforesaid decision, it has been held that it is SEBI who monitors and regulates the stock exchanges & stock market and when their investigation did not reveal any price or volume manipulation by the assessee and these transactions are in the normal course through proper & legal channels. Then the allegations of the IT Department fall flat and denial of deduction u/s 10(38) of the Act is arbitrary and addition of sale proceeds of shares of PAL u/s 68 is against the provisions of Act. In the case*

*in hand, the Id. AO has referred to SEBI enquiry against M/s Sunrise Asian Ltd. However, we note that the said enquiry was regarding failure to comply with certain disclosure requirements and therefore, the subject matter of the enquiry has no connection with the transaction of bogus long term capital gain and has no bearing in judging the genuineness of the transaction undertaken by the assessee or for that matter, the price and realization on sale of shares so undertaken by the assessee through the stock exchange. Further, it has been held in the aforesaid case that the findings of investigation & modus operandi in other cases narrated by the AO and also CIT(A) nowhere prove any connection with the assessee nor the assessee's involvement or connection or collusion with the brokers, exit providers, accommodation providers or companies or directions etc and for making the addition, it is necessary to bring on record evidence to establish ingenuity in transactions or any connection of the assessee or its transaction with any of the alleged parties. In the instant case, as we have discussed earlier, there is no finding which proves assessee's connection, involvement or collusion with so called accommodation entry providers. Further in the aforesaid case, the issue as to whether the legal evidence produced by the assessee has to guide our decision in the matter or the general observations based on statements, probabilities,' human behavior and discovery of the modus operandi adopted in earning alleged bogus LTCG and STCG, that have surfaced during investigations, should guide the authorities in arriving at a conclusion as to whether the claim is genuine or not has been discussed at length. And referring to legal proposition laid down by the Hon'ble Supreme Court that the burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidence held that the modus operandi, generalisation, preponderance of human probabilities cannot be the only basis for rejecting the claim of the assessee unless specific evidence is brought on record to controvert the validity and correctness of the documentary evidences produced, the same cannot be rejected. We are in complete agreement with the said view and in the instant case, we find that evidence produced by the assessee in support of his claim of purchase and sale of shares on the stock exchange have not been refuted by any adverse findings or material which could demonstrate involvement of the assessee or collusion with so called accommodation entry providers to obtain bogus LTCG as so alleged by the authorities below.*

*24. We also find that while analyzing sale of shares of similar scrip of M/s Sunrise Asian Ltd and claim of exemption of long term capital gains u/s10(38), the Mumbai Benches of the Tribunal in case of Anraj Hiralal*

*Shah (HUF) vs ITO (supra) has upheld the claim of the assessee's claim of exemption under section 10(38) of the Act and the relevant findings of the Coordinate Bench contained at Para 8 read as under:-*

*"8. The assessee has earned speculation profit in the immediately preceding year through M/s Eden Financial Services also and the said profit has been used to purchase the shares of M/s Sunrise Asian Ltd. The assessee has offered the speculation profit for income tax purposes in the immediately preceding year and It has been accepted. Further the assessee has shown the purchase of impugned shares as investment in the Balance Sheet. Hence the purchase of shares has been accepted. Further the shares have been received in the D-mat account of the assessee and they have been sold through the Dmat account only. Hence the delivery of shares a/so stand proved. The AO has not brought any material on record to show that the assessee was part of fraudulent price rigging. Accordingly, in the absence of any evidence to implicate the assessee or to prove that the transactions are bogus I am of the view that the capital gains declared by the assessee cannot be doubted with. In that View of the matter the addition made towards expenses is not also sustainable.*

*25. In light of above discussions and in the entirety of facts and circumstances of the case and following the decisions of the Hon'ble jurisdictional High Court and of that of the Coordinate Benches in cases referred supra, we are of the considered view that the assessee has discharged the necessary onus cast on him in terms of claim of exemption of long term capital gains u/s 10(38) of the Act by establishing the genuineness of transaction of purchase and sale of shares and satisfying the requisite conditions specified therein and the gains so arising on sale of shares therefore has been rightly claimed as exempt u/s 10(38) of the Act. Accordingly, in the facts and circumstances of the case, we set-aside the order of the Id. CIT(Appeals) and the claim of the assessee u/s 10(38) is allowed. The matter is thus decided in favour of the assessee and against the Revenue. In the result, the ground of appeal so taken by the assessee is allowed.*

*26. In the result, the appeal of the assessee is allowed."*

*20. We have also observed that the above referred decision of Co-ordinate Bench of Mumbai and Jaipur has dealt in the issue of relating Long Term Capital Gain eared from sale of equity shares of M/s SAL holding it to be a genuine gain and in this context we also note that in the case of Shri Shivnarayahn Sharma and Prayank Jain the alleged company is M/s Conart Traders Ltd subsequently merged with M/s SAL under the order of Hon'ble Mumbai High Court and therefore the above stated decision will be*

*squarely applicable in the case of these two assessee(s).*

*21. Further we observe that in the case of Govind Harinarayan Agrawal HUF, Manish Govind Agrawal HUF alleged issue of gain from share is from sale of equity shares of Turbotech. Similar type of issue of the alleged bogus of Long Term Capital Gain from sale of shares of Turbotech came up before the Co-ordinate Bench held in the case of Swati Luthra wherein the Co-ordinate Bench has decided in favour of the assessee allowing both the grounds raised on merits as well as legal observing as follows:-*

*12. We have heard the rival submissions and perused the orders of the lower authorities and materials available on record. We find that the transactions of the assessee of purchase of shares of M/s Esteem Bio and M/s Turbotech., holding of the shares for more than one year and the sale of shares through a registered share broker in a recognized Stock Exchange and payment of Securities Transaction Tax thereon, all were supported by documentary evidences which were placed before the lower authorities. The Revenue could not point out any specific defect with regards to the documents so submitted by assessee. In our considered view, effect of a transaction which is supported by documentary evidences cannot be brushed aside on suspicion or probabilities without pointing out any defect therein.*

*13. In the instant case, the Assessing Officer himself observed that the movement in price of shares of M/s Esteem Bio and M/s Turbotech were without any backing of financial performance of the said companies. In our considered view, the above factor at best was a pointer or cause for careful scrutiny of the transaction by the Assessing Officer but from it cannot be concluded that transactions were sham. It is a matter of common knowledge that prices of shares in the share market depends upon innumerable factors and perception of the investor and not alone on the financial performance of the company. Further, we also find from record that Ld. AO also didn't confront copies of statements recorded by Investigation Wing, Kolkata of Sh, Nikhil Jain, Sh. Sanjay Vora, Sh. Rakesh Somani, Sh. Anil Kumar Khemka and Sh. Bidyoot Sarkar to the appellant during assessment proceedings and merely extracted copies of their statement in the assessment order only. The Ld. AO has not confronted any material to the assessee nor provided any adequate opportunity to the assessee to defend her case. Since the statements were not confronted to the assessee, she was deprived of her right to cross examine the witnesses. Also whatever they have stated in their statement is no gospel truth and cannot be applied blindly*

to all the persons who have brought the scrips in the entire country. Thus, under these circumstances, atleast some inquiry should have done from these persons, whether they have provided any entry to the assessee, if the request for cross examination was not possible at that stage. Cross examination of a person in whose basis any adverse inference is drawn, then it cannot be primary evidence or material to nail the assessee and simply based on the statement no addition can be made. This has been held so by various courts, and also by Hon'ble Apex Court in the case of M/s Andaman Tiimber Industries vs. CCE (SC) reported in 127 DTR 241 has held as follows:

"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 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. 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 17.03.2005 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. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal."

22. As regards the judgment of Hon'ble Delhi High Court in the case of Suman Poddar V/s ITO (supra) delivered on 17.09.2019 relied by Ld. Departmental Representative, we find that Hon'ble High Court of Delhi in its recent judgment dated 15.1.2021 in the case of PCIT V/s Krishna Devi & Others ITA No.125/2020 dealing with the similar issue of claim of exemption u/s 10(38) of the Act for Long Term Capital Gain from sale of equity shares has duly considered the judgment of Hon'ble Delhi High Court in the case of Suman Poddar V/s ITO (supra) and has decided against the revenue confirming the order of the Tribunal stating it to be the last fact finding authority who on the basis of evidence brought on record has rightly came to the conclusion that the lower tax authorities are not able to sustain the addition without any cogent material on record. Relevant extract of the judgment of Hon'ble Delhi High Court in the case of PCIT V/s Krishna Devi & Others is reproduced below:-

"10. We have heard Mr. Hossain at length and given our thoughtful consideration to his contentions, but are not convinced with the same for the reasons stated hereinafter.

11. On a perusal of the record, it is easily discernible that in the instant case, the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites, the AO observes that the quantum leap in the share price is not justified; the trade pattern of the aforesaid company did not move along with the sensex; and the financials of the company did not show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an

*agreement to convert unaccounted money by claiming fictitious LTCG, which is exempt under Section 10(38), in a pre-planned manner to evade taxes. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income Tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of providing entries of bogus LTCG. However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued under Sections 133(6)/131 of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh. Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from demat account and the consideration has been received through banking channels." The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material*

*that could support the case put forth by the Appellant, the additions cannot be sustained.*

*12. Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent. With regard to the claim that observations made by the CIT(A) were in conflict with the Impugned Order, we may only note that the said observations are general in nature and later in the order, the CIT(A) itself notes that the broker did not respond to the notices. Be that as it may, the CIT(A) has only approved the order of the AO, following the same reasoning, and relying upon the report of the Investigation Wing. Lastly, reliance placed by the Revenue on Suman Poddar v. ITO (supra) and Sumati Dayal v. CIT (supra) is of no assistance. Upon examining the judgment of Suman Poddar (supra) at length, we find that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. On such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the factual matrix at hand. Similarly, the case of Sumati Dayal v. CIT (supra) too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue.*

*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.*

*14. In this view of the matter, no question of law, much less a substantial question of law arises for our consideration.*

*15. Accordingly, the present appeals are dismissed.*

*23. We therefore in the light of above judgments which are squarely applicable in the issues raised in the instant appeals are of the considered view that the claim of Long Term Capital Gain made by the respective assessee(s) deserves to be allowed as they have entered into the transactions of purchase and sales duly supported by the documents which have not found to be incorrect. The*

conditions provided u/s 10(38) of the Act have been fulfilled by the assessee(s) namely Shivnarayan Sharma, Sapan Shaw, Prayank Jain, Govind Harinarayan Agrawal (HUF) and Manish Govind Agrawal (HUF) as they have sold the equity shares held in Demat account and transactions performed on a recognised stock exchange through registered broker at the price appearing on the exchange portal and at the point of time of sale of equity shares, companies were not marked as shell companies by SEBI and nor the trading of these scrips were suspended. The assessee also deserves to succeed on the legal ground as no opportunity was awarded to cross examination the third person which were allegedly found to be providing accommodation entries and therefore no addition was called for in the hands of the assessee without providing opportunity of cross examination in view of the ratio laid down by Hon'ble Apex Court in the case of *Andaman Timber Industries vs. CCE 281 CTR 241 (SC)* that "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".

24. We accordingly in view of our above discussions, facts and circumstances of the case and respectfully following judicial precedents and the decisions of Co-ordinate benches squarely applicable on the instant cases, are of the considered view that in the case of the assessee(s) namely Shivnarayan Sharma, Sapan Shaw, Prayank Jain, Govind Harinarayan Agrawal (HUF) and Manish Govind Agrawal (HUF), the claim of exempt income u/s 10(38) of the Act of Long Term Capital Gain from sale of equity shares deserves to be allowed and no addition is called for the estimated brokerage expenses made in the hands of the assessee(s). Thus finding of Ld. CIT(A) is set aside and the Grounds raised by the assessee(s) in ITA Nos.889/Ind/2018, 474/Ind/2019, 206/Ind/2019, 60/Ind/2019, 61/Ind/2019 and 987/Ind/2019 are allowed.

19.8. Recently coordinate Bench Mumbai in the case *Kamlesh Gupta vs. DCIT ITA No.1462/Mum/2020* dated 25.11.2021, the relevant finding of this case reads as follows:

11. We shall now advert to the documentary evidence/material that was placed on record by the assessee in order to drive home his claim of having carried out genuine transactions of purchase/sale of shares of JMD Telefilms Industries Ltd. As is discernible from the orders of the lower authorities, we find that the

assessee had on 26.02.2009 by way of an off-market transaction purchased one lac equity shares of JMD Telefilms Industries Ltd. of a face value of Rs.10/- each at a premium of Rs. 7/- per share i.e for a total consideration of Rs. 17 lac by way of a preferential allotment in physical form. The payment of the purchase consideration of Rs. 17 lac was made by the assessee vide account payee Cheque no. 168253, dated 15.01.2009 drawn on his Saving Bank A/c No. 06130100003249 with Bank of Baroad, Branch: Mittal Tower, Nariman Point, Mumbai in favour of JMD Telefilms Industries Ltd. Our attention was drawn by the Id. A.R to the copy of the share application form, copy of the bank account a/w the copy of the cheque vide which payment of the purchase consideration of the aforementioned shares was made. Also, the assessee had filed before the lower authorities the copy of the share allotment letter and share certificate as regards allotment of one lac shares bearing distinctive nos. 3214601 to 3314600. On 30.06.2009 the one lac shares were dematerialized by the assessee via Motilal Oswal Securities. Thereafter, the aforesaid shares were split in the ratio of 10:1 and the assessee had 10 lac shares. Out of the 10 lac shares the assessee had in March, 2010 i.e in the period relevant to the immediately preceding year sold 1,32,500 shares and the LTCG arising on the same was claimed by him as exempt u/s 10(38) of the Act. On a specific query by the bench as regards the treatment given by the department to the LTCG on sale of 1,32,500 shares of JMD Telefilms Industries Ltd. by the assessee in the immediately preceding year i.e A.Y 2010-11, it was submitted by the Id. A.R that the department had on a similar footing declined the assessee's claim for exemption u/s 10(38) of the LTCG arising from the sale of shares during the said year and, had added the sale consideration of shares as an unexplained cash credit u/s 68 of the Act. It was submitted by the Id. A.R that the assessee had challenged the said assessment order and the same as on date is pending before the CIT(A). Out of the balance 8,67,500 shares the assessee had transferred 1,00,000 shares to his wife Mrs. Mridulla Gupta through an unregistered gift deed. The balance 7,67,500 shares were sold by the assessee during the year under consideration i.e over the period June, 2010 to October, 2010 and the LTCG of Rs. 5,93,15,038/- arising therefrom was claimed by him as exempt u/s 10(38) of the Act. Copies of the contract notes and the transaction report of Motilal Oswal Securities Ltd. evidencing the aforesaid transaction of sale of shares was filed by the assessee before the lower authorities. As regards the initial off-market purchase of one lac shares of JMD Telefilms Industries Ltd. by the assessee, we may herein observe that an off-market transaction for purchase of shares is not illegal. As

observed by us hereinabove, the purchase transaction of shares was carried out by the assessee vide account payee cheque and the sale of shares have suffered STT, service tax, total turnover tax, stamp duty charge etc. As is discernible from the orders of the lower authorities, we find that neither of them had dislodged the authenticity of the aforesaid documentary evidence that was filed by the assessee to support his claim of having carried out genuine transactions of purchase/sale of shares of JMD Telefilms Industries Ltd.

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

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

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

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

*11. On a perusal of the record, it is easily discernible that in the instant case, the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites, the AO observes that the quantum leap in the share price is not justified; the trade pattern of the aforesaid company did not move along with the sensex; and the financials of the company did not show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an agreement to convert unaccounted money by claiming fictitious LTCG, which is exempt under Section 10(38), in a pre-planned manner to evade taxes. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income Tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of providing entries of bogus LTCG. However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued under Sections 133(6)/131 of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh. Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking*

*fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from demat account and the thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjectures made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provision of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from demat account and the consideration has been received through banking channels." The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material that could support the case put forth by the Appellant, the additions cannot be sustained.*

*12. Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The*

*theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent. With regard to the claim that observations made by the CIT(A) were in conflict with the Impugned Order, we may only note that the said observations are general in nature and later in the order, the CIT(A) itself notes that the broker did not respond to the notices. Be that as it may, the CIT(A) has only approved the order of the AO, following the same reasoning, and relying upon the report of the Investigation Wing. Lastly, reliance placed by the Revenue on Suman Poddar v. ITO (supra) and Sumati Dayal v. CIT (supra) is of no assistance. Upon examining the judgment of Suman Poddar (supra) at length, we find that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. On such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the factual matrix at hand. Similarly, the case of Sumati Dayal v. CIT (supra) too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue.”*

*Also, a similar view had been taken by the Hon“ble High Court of Bombay in the case of CIT Vs. Shyam R. Pawar (2015) 229 Taxman 256 (Bom). In its aforesaid judgment, the Hon“ble High Court referring to the facts of the case before them observed, that while for the department had extensively referred to the correspondence and the contents of the report of the Investigation, what was however important and vital for the purpose of the present case was whether the transactions in shares were genuine or sham and bogus. It was observed by the Hon“ble High Court, that if the purchase and sale of shares that were reflected in the assessee“s de-mat account were to be termed as arranged transactions, and projected to be real, then, such conclusion of the CIT(A) and the A.O required a deeper scrutiny. It was further observed that the Tribunal had rightly concluded that there was something more which was required, which would connect the assessee to the transactions and which are attributed to the Promoters/Directors of the two companies. Observing that the Tribunal after extensively referring to certain facts/documents, viz. the sale of 20,000 shares of Mantra Online Ltd for a total consideration of Rs.25,93,150/- by the assessee a/w the details as to how they were sold, on what dates and for what consideration, and the fact that the sale consideration was received vide account payee cheques; copy of de-mat account of the assessee showing*

*the share transactions; contract notes of the brokers (which are system generated documents prescribed by the stock exchange) giving details of transactions; the Hon'ble High Court observed that the Tribunal had rightly concluded that the transaction of purchase/sale of shares was not an accommodation transaction for conversion of cash into accounted or regular payment. Insofar the discrepancy as pointed out by the stock exchange as regards the client code was concerned, the Hon'ble High Court upheld the view taken by the Tribunal that the same would not suffice to prove that the share transactions were bogus or sham.*

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

*19.9 We, therefore, respectfully following the above judicial precedence and discussion made hereinabove are satisfied that the assessee has fulfilled necessary conditions to claim the exemption u/s 10(38) of the Act for the Long Term Capital Gain earned from sale of equity shares of M/s Kailash Auto Finance Ltd. and M/s Lifeline Drugs & Pharma Ltd. Therefore, we hold that the assessee has rightly claimed the exemption u/s 10(38) of the Act before the conclusion of assessment proceedings. We, therefore, find no reason to interfere in the finding of Id. CIT(A) and the same is confirmed. Thus, ground no.3 & 6 raised by the revenue's appeals are dismissed.*

3. It was the submission of the Id.AR that the appeal filed by the revenue to the Hon'ble Jurisdictional High Court of Orissa against the said

order has also been dismissed vide order dated 08.02.2023 passed in ITA Nos.11-22 of 2022. It was the submission that the addition as made by the AO and as confirmed by the Id. CIT(A) may be deleted.

4. In reply, Id.Sr. DR filed his written submissions as follows :-

Submission

a. **Suman Poddar v. ITO (2019) 112 Taxmann.com 330 (SC)**

...

*4. We have, therefore, at the outset put it to learned counsel for the Appellant that since there are consistent findings of fact and the entire dispute raised by the Appellant is factual, there is no reason for the Court to entertain the present appeal and no question of law arises for our determination.*

*5. Counsel for the Appellant has submitted that the findings returned by the Assessing Officer; the CIT (Appeals), and; the ITAT are perverse...*

*6.... Thus, it cannot be said that the findings of fact are perverse.*

*7. The Tribunal goes on to observe in the impugned order as follows:*

*"...11. This cannot be a case of intelligent investment or a simple and straight case of tax planning... The fact that in spite of earning such steep profits, the assessee never ventured to involve himself in any other transaction with the broker cannot be a mere coincidence of lack of interest. Reliance is placed on the judgment in the case of Nipun Builders and Developers Pvt. Ltd. (supra), where it was held that it is the duty of the Tribunal to scratch the surface and probe the documentary evidence in depth, in the light of the conduct of assessee and other surrounding circumstances in order to see whether the assessee is liable to the provisions of section 68 or not.... Similarly, the bank statements provided by the assessee to prove the genuineness of the transactions cannot be considered in view of the judgment of Hon'ble court in the case of Pratham Telecom India Pvt. Ltd., wherein, it was stated that bank statement is not sufficient enough to discharge the burden. Regarding the failure to accord the opportunity of cross examination, we rely on the judgment of Prem Castings Pvt. Ltd.*

*8.... No question of law, therefore arises in the present case and the consistent finding of fact returned against the Appellant are based on evidence on record.*

b. *Pooja Ajmani v. ITO (ITA no. 5714/DEL/2018 dt. 25/04/2019)*

*5.... AO... concluded that the modus operandi adopted by the assessee followed the pattern discovered by the Investigation wing during various search and survey operations.... apart from being based on evidences gathered during search and survey operations, analysis of the material on record and analysis of information from*

various sources, the findings of the Assessing Officer are also based on strong surrounding circumstances, preponderance of probability and human conduct in the light of detailed analysis of the modus operandi adopted by brokers and operators engaged in the business of providing entries of long term capital gains to the interested beneficiaries which has come to surface as a result of deep and wide investigation. ... investment in a company of unknown credentials and subsequent jump in the share price of such a company cannot be an accident or windfall... the contention of the assessee that long term capital gains cannot be treated as bogus merely because some investigation with regard to certain company and broker or investigation has been carried out by the Directorate of Investigation, Kolkata only proves that the appellant wants to take shelter under such documentary evidences which themselves have been created as masks to cover up the true nature of transaction. A genuine transaction must be proved to be genuine in all respect. The onus was on the appellant to prove that the transaction leading to claim of long term capital gains was distinctly genuine transaction and not bogus, premeditated transaction arranged with a view to evade taxes. The onus was on the assessee to contradict the findings that Kappac Pharma Ltd. was a company whose scrip was capable of being traded at high price as it was the appellant who had traded in the shares of the this company which resulted into claim of long term capital gains which is exempt under section 10(38). Once the assessee was made aware of the result of the investigation which proved that trading of shares leading to long term capital gains was not genuine, as per section 101 of the Indian Evidence Act, 1972, the onus was on the assessee to prove that she had earned genuine long term capital gains as it was the assessee who has made a claim that she was engaged in genuine share transactions.

I find that in the case of Charan Singh v. Chandra Bhan Singh AIR 1988 SC 6370, the Hon'ble Supreme Court have clarified that the burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. It has been further held that the party cannot, on failure to establish a prima facie case, take advantage of the weakness of his adversary's case. The party must succeed by the strength of his own right and the clearness of his own proof. He cannot be heard to say that it was too difficult or virtually impossible to prove the matter in question. In the case under consideration, since it is the appellant who had made the claim that she had earned genuine long term capital gain, all the facts were especially within her knowledge. Section 102 of Indian Evidence Act makes it clear that initial onus is on person who substantially asserts a claim. If the onus is discharged by him and a case is made out, the onus shifts on to deponent. It is pertinent to mention here that the phrase "burden of proof" is used in two distinct meanings in the law of evidence viz, 'the burden of establishing a case', and 'the burden of introducing evidence'. The burden of establishing a case remains throughout trial where it was originally placed, it never shifts. The burden of

evidence may shift constantly as evidence is introduced by one side or the others. In this case, once the evidence that assessee has claimed bogus long term capital gain was introduced by the Assessing Officer, the burden of evidence shifted to the assessee. During the assessment proceeding and even during the assessee proceeding, the assessee has failed to produce any evidence to prove that the long term capital gain claimed by her was genuine. In the present case, it is seen that the assessee has failed to discharge her burden of proof and the Assessing Officer, on the other hand, has proved that the claim of the appellant was incorrect. ... The statement of brokers engaged in providing bogus long term capital gains clearly proves that Kappac Pharma Ltd. is one of such companies whose scrips have been manipulated to provide bogus long term capital gains. ... on similar facts and circumstances, Hon'ble ITAT A-Bench, Chandigarh in the case of Abhimanyu Soin v. ACIT [IT Appeal No. 951 (CHD.) of 2016, dated 18-4-2016], have ...held as under:—

"14....The fact that inspite of earning 3072% of profits, the assessee never ventured to involve himself in any other transactions with the broker which gave him even much lower profits during the period which cannot be a mere coincidence or lack of interest or absence of advice...

**5.1** On the issue of circumstantial evidence and in the matters related to the discharge of 'onus of proof' and the relevance of surrounding circumstances of the case, the Hon'ble Supreme Court in the case of CIT v. Durga Prasad More [1972] 82 ITR 540, have observed as under:

"...that though an appellant's statement must be considered real until it was shown that there were reasons to believe that the appellant was not the real, in a case where the party relied on self-sewing recitals in the documents, it was for the party to establish the transfer of those recitals, the taxing authorities were entitled to look into the surrounding circumstances to find out the reality of such recitals. Science has not yet invented any instrument to test the reliability of the evidence placed before a Court or Tribunal. Therefore, the Courts and the Tribunals have to judge the evidence before them by applying the test of human probability.

**5.2** I further find that the above ratio as laid down by the Hon'ble Supreme Court has been reiterated and applied by the Hon'ble Apex Court in the case of Sumati Dayal (supra). It is essential on the part of the Assessing Officer to look into the real nature of transaction and what happens in the real world and contextualize the same to such transactions in the real market situation. Further, in the case of McDowell & Co. Ltd. (supra), the Hon'ble Supreme Court have observed as under:

"Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is

wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges."

**5.3** Every person is entitled to so arrange his affairs as to avoid taxation but the arrangement- must be real and genuine and not a sham or make believe.

**5.4** Keeping in view of the aforesaid discussions, I am of the view that documents submitted as evidences to prove the genuineness of transaction are themselves found to serve as smoke screen to cover up the true nature of the transactions...I further find that the share transactions leading to long term capital gains by the assessee are sham transaction entered into for the purpose of evading tax. I note that the landmark decision of the Hon'ble Supreme Court in the case of McDowell and Co. Ltd. (supra) is squarely applicable in this case

c. Anip, Anju Rastogi v. ITO, W 1(1), Meerut ITA No. 3809, 3810/DEL/2018.

'...regarding the statement of Sh. Jai Kishan Poddar the assessee has only stated that in the statement there is no specific link with the claim of exemption in respect of Long Term Capital Gain of Rs. 22,78,172/- u/s. 10(38) by him. He has not stated a thing with respect to the statement of Sh. Jai Kishan Poddar in which he has accepted that facilitation of accommodation entries of long term capital gain / long term capital loss through his share banking firm has been done to few beneficiaries with the help of different accommodation entry operators, promoters of the scripts of various penny stocks other brokers etc. Sh. Jai Kishan Poddar also gave details of different bogus scripts/ penny stocks which have been used for providing the accommodation entries of LTCL and LTCL to different beneficiaries using his brokerage company Consortium Capital Pvt. Ltd. and the name of CCL International Limited having scrip name CCL Inter appears in the list whose 12 shares were sold by the assessee and exemption on LTCL amounting to Rs. 22,28,172/- claimed u/s. 10(38) of the Act. After perusing the records, I find that in the instant case the investment in shares made by the assessee reveals that he has not been dealing in shares on a regular basis and the entries of LTCL have also been taken by other members of the assessee company and the purchase of these shares were claimed to be through off market deals and not through Stock Exchange. The financials of penny stock company M/s CCL International Ltd. and movement of its price are abrupt, unrealistic and based upon any realistic parameters. From the perusal of financial statements of the aforesaid company M/s CCL International Ltd. from the Ministry of Corporate Affairs website (MCA) examining the information available in the public domain from where it was observed that there is no extraordinary increase in the profits of the company to justify the increase in value of the shares. I further note that Investigation Wing had recorded the statement of Sh. Jai Kishan Poddar who is

one of the Director of M/s Consortium Capital Pvt. Ltd. which is one of the entities utilised for providing entry of bogus long term capital gain of M/s CCL International Ltd. who had admitted that he was involved in scam of providing bogus long term capital gains through shares of M/s CCL International Ltd. had also admitted that they were also 13 involved in trading of these Jamakharchi Companies through which manipulative transactions in securities to either artificially raise or lower the market rate of the shares are being done. I also note that the independent findings of the AO, which are corroborated by the information given by the Investigation Wing, the assessee has failed to substantiate the genuineness of alleged share transactions in respect of long term capital gain u/s. 10(38) of the Act. In view of above discussions, the landmark decision of the Hon'ble Supreme Court in the case of McDowell and Company Limited, 154 ITR 148 are squarely applicable in this case wherein it has been held that tax planning may be legitimate provided it is within the framework of the law and any colourable devices cannot be part of tax planning...'

d. Satish Kishore v. ITO, W-47(2), New Delhi [2019] 110 taxmann.com 307 (Delhi - Trib.).

**6.4** When the documentary evidence containing contract notes of purchase, demat account, contract note of the sale and receipt of sale proceeds in bank account are seen vis-à-vis the observations of the AO on transactions, in our opinion, the documents are not sufficient to discharge the burden of proof that the purchase and sale transactions of the assessee were genuine. The onus was on the assessee to explain astronomical rise in prices of all the scrips purchased by him, that too without any financial rational. The assessee has failed to discharge his onus in this regard. ...The assessee has not demonstrated of earning such huge profits from shares of any listed companies purchased from the stock exchange either in the earlier years or in the subsequent years and huge profit has been shown only from off-line purchases.

e. **Summary.** In cases where ITAT has held the decision in favour of the Revenue, High Courts or the Supreme Court have held no substantial question of law emerging [Suman Poddar v. ITO (2019) 112 Taxmann.com 330 (SC), Sanjay Bimalchand Jain v. PCIT (2018) 89 Taxmann.com 196 (Bom), Udit Kalra v. ITO ITA no. 220/2019 (Del) dt. of order 08/03/2019] whereas in cases decided by ITAT in favour of assesses, High Courts have remanded theses to tribunals for adjudication in accordance with law [Jasvinder Kaur v. CIT (2013) 37 Taxmann.com 286 (Guwahati)] or dismissed assessee's appeals [Chandan Gupta v. CIT (2015) 54 Taxmann.com 10 (P & H)].

Sovesh C. Mohanty, IRS  
Addl. Commissioner of Income Tax (ITAT)-1,  
Cuttack, DR.

5. Ld.Sr. DR has relied upon the various decisions and also submitted the copies of the same. Ld. Sr. DR has specifically relied on the decision of the Hon'ble Kolkata High Court in the case of Swati Bajaj, reported in [2022] 139 taxmann.com 352 (Calcutta), wherein the crux of the issue was as to whether not providing of the investigation report to the assessee violated the principle of natural justice especially when such investigation report was available in the public domain. He also relied upon the various other decisions and even in his written submission the basic principle being challenged by the Id. Sr. DR is in regard to the granting of cross examination and whether it is necessary. It was further alternatively submitted by the Id. Sr. DR that as admittedly the assessee is in the business of purchase and sale of IPOs, the said transaction done by the assessee is an one off transaction, the same is liable to be treated as an "Adventure in the nature of trade". It was, therefore, the submission of the Id. Sr. DR that the order of the AO and that of the CIT(A) is liable to be upheld.

7. I have considered the rival submissions. At the outset, the argument of the Id. Sr.DR that opportunity of cross-examination need not be granted, does not come out of the order of the AO or the CIT(A). Neither of the lower authorities have relied upon any statement or any investigation report for the purpose of the making the addition or confirming the same. It is an admitted fact that the assessee is doing the business of purchase and sale of shares. As pointed out by the Id. Sr. DR the assessee is doing purchases in IPOs. Thus, there is no dispute that

the assessee earns her income from transaction in shares. Just because the assessee has shifted from the IPOs and has made a purchase of the shares in M/s Panchshul Marketing Ltd., would not shift the head of income from “capital gains” to the “Adventure in the nature of trade”, insofar as the assessee is an investor in the shares and is not in the business of dealing in shares. This being so, the decision relied on by the Id. Sr. DR would no more survive for consideration.

8. Now, I am faced with the decision of the coordinate bench of the Tribunal in the case of Deepansu Mohapatra, referred to supra, wherein the coordinate bench of the Tribunal in the case of that assessee has also dealt with the shares in the case of M/s Kailash Auto Finance Ltd. and has been held to be eligible for exemption u/s.10(38) of the Act. In the said decision, there was another issue also considered insofar as in the course of survey the assessee therein had surrendered the claim of deduction u/s.10(38) of the Act and the coordinate bench had held that the retraction from the surrender was permissible. When the revenue filed appeal against the said decision of the coordinate bench of the Tribunal before the Hon'ble Jurisdictional High Court of Orissa, the question was raised as to *whether after making certain statements in the survey the Assessee not claiming exemption under Section 10(38) of the income Tax Act, 1961 at the stage of the assessment proceedings, could the Assessee turn around and make such claim of wanting to cross-examine persons make adverse statements against the Assessee at the stage of the appeal before the ITAT?* The revenue did not challenge the factual finding of the

coordinate bench of the Tribunal in the case of Deepansu Mohapatra (supra) in regard to the claim of deduction/s.10(38) of the Act. By not challenging the merits of the addition, the revenue has accepted the decision of the coordinate bench of the Tribunal in the case of Deepansu Mohapatra & Others (supra). In these circumstances, the decision of the coordinate bench of the Tribunal on merits in the case of Deepansu Mohapatra (supra) have become final and binding on a Single Member Bench of the Tribunal as the said decision has been rendered by a Division Bench of this Tribunal. In view of the above, respectfully following the decision of the coordinate bench of the Tribunal in the case of Deepansu Mohapatra (supra), which has also been affirmed by the Hon'ble Jurisdictional High Court of Orissa in the appeal filed by the revenue, the addition as made by the AO and as confirmed by the CIT(A) in respect of the claim of exemption u/s.10(38) of the Act in respect of sale of shares of M/s Kailash Auto, stands deleted.

9. In the result, appeal of the assessee allowed.

Order dictated and pronounced in the open court on 04/05/2023.

**Sd/-**

(जार्ज माथन)

**(GEORGE MATHAN)**

**न्यायिक सदस्य / JUDICIAL MEMBER**

**कटक** Cuttack; दिनांक Dated 04/05/2023

*Prakash Kumar Mishra, Sr.P.S.*

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

1. अपीलार्थी / The Appellant-  
Rashi Agrawal,  
C/o: Ramesh Enterprises,  
At-Naya Sarak, PO: Chandni Chowk  
Cuttack-753002
2. प्रत्यर्थी / The Respondent-  
ITO, Ward-1(1), Cuttack
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR,  
ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Assistant Registrar)

आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack