

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT  
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकर अपील सं./ITA No.73/SRT/2023

(Assessment Year: 2014-15)

(Physical Hearing)

Divyaben Prafulchand Parmar, 1-2, Harikrishna Niwas, B/h Braham Kumari Ashram, Bhatar Road, Surat – 395017.	Vs.	The ITO, Ward-1(3)(1), Surat.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ACBPP9559Q		
(Appellant)		(Respondent)

Appellant by	Shri Rajesh Upadhyay, AR
Respondent by	Shri Vinod Kumar, Sr. DR
Date of Hearing	07/07/2023
Date of Pronouncement	27/07/2023

**आदेश / ORDER**

**PER DR. A. L. SAINI, AM:**

Captioned appeals filed by the assessee, pertaining to the Assessment Year (AY) 2014-15, is directed against the order passed by the Learned Commissioner of Income Tax (Appeals), [in short “the Ld. CIT(A)”], National Faceless Appeal Centre (in short ‘the NFAC’), Delhi, which in turn arises out of an assessment order passed by Assessing Officer u/s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”), dated 28.12.2016.

2. The grounds of appeal raised by the assessee are as follows:

“1. Ld. CIT(A), NFAC has erred in law and on fact to confirm assessing officer’s addition being LTCG on shares of Sunrise Asian Ltd u/s 68 for Rs.49,01,840/- ignoring the fact and law that the assessee has duly discharged her burden in terms of section 68 of the I.T. Act.

2. Ld. CIT(A), NFAC has erred in law and on fact to confirm assessing officer’s addition of Rs.98,037/- u/s 69 of the Act without there being any

*proof of payment of commission @ 2% of LTCG made by the assessee as per para 15 of assessment order.*

*3. Ld. CIT(A), NFAC has erred in law and on fact to confirm assessing officer's action of charging Income tax @ 30% u/s 115BBE of the Act."*

3. The appeal filed by the assessee for Assessment Year 2014-15, is barred by limitation by 137 days. The assessee has moved a petition requesting the Bench to condone the delay. The contents of the petition for condonation of delay are reproduced below:

*"1- That appeal order of NFAC, Delhi is dated 19.07.2022 has been communicated through portal under the tab 'For Your Information'. It is deemed to be served on 19.07.2022. Appeal is filed with the registry, ITAT, Surat on 02.02.2023. Thus it is filed after -197- days from the date of order of 1<sup>st</sup> appellate authority. Limitation period provided under the act, for filing of 2<sup>nd</sup> appeal is -60- days. Therefore, the appeal is late by -137- days.*

*2- NFAC has served appeal order on portal electronically. I am a house hold lady do not have any computer system, internet facility etc. Shri Pradip Gohil is providing services as my Tax consultant. He is filing my ITR and looking after my income tax matters. It was also not in his knowledge that CIT(A) order was served on portal in my case on 19.07.2022.*

*3- Another income tax proceeding, namely i.e. reassessment proceeding for A.Y. 2016-17 is also going on, at present, in my case. A SMS was received somewhere in January 2023, from the department that notice/letter/communication have been served on portal which requires e-compliance from my side. At that time, my consultant has looked in to the portal under my ID and Password. At that time, it came to his notice that the appeal order of Ld. CIT(A) was available on portal for A.Y. 2014-15.*

*4- At that time, he has discussed my matter pertaining to filing of appeal before of Honorable ITAT Surat with Shri Rajesh M. Upadhyay. He directed me to make payment of appeal fees of Rs.10,000/-. He has prepared, appeal memo, grounds, condonation petition, affidavit etc. in connection with filing of 2<sup>nd</sup> appeal.*

*5- That the delay in filing the appeal for-137-days is neither willful nor deliberate but due to the newly introduced system of service of orders electronically through portal. I am not well equipped and up-dated with the new system. I have fully co-operated in assessment proceedings as well as appellate proceedings. Neither assessment order nor CIT(A) order is ex parte. I was totally unaware about electronically service of appeal order. Otherwise appeal can be filed in time. I have not been benefited in any way by filling of late appeal. On the contrary, I am carrying out huge burden of*

*tax, interest, Penalty etc. on my shoulders. I humbly submit that the impugned order is high pitched order and is also arbitrary.”*

4. Apart from this, Id Counsel also submitted that entire delay has resulted due to mistake of assessee`s Tax Consultant, Shri Pradip Gohil, who has not checked the order of Id CIT(A) in the e-portal of Income Tax Department and has not advised the assessee from time to time.

5. On the other hand, Learned Senior Departmental Representative (Ld. Sr. DR) for the Revenue submitted that such huge delay should not be condoned merely because there was a mistake on the part of the Tax Consultant of the assessee.

6. We have heard both the parties on this preliminary issue. We note that main reason of delay in filing the appeal was due to negligent approach of the assessee`s Tax Consultant/Advocate. We note that assessee should not be penalized because of the mistake of assessee`s Tax Consultant/advocate. Reliance in this regard, is placed on the decision of I.T.A.T., 'C' Bench, Kolkata in the case of M/s. Garg Bros. Pvt. Ltd. & Others vs. DCIT [ITA Nos.2519 to 2521/Kol/2017, order dated 18.04.2018, wherein under similar set of facts and reasons, the Hon'ble Tribunal was pleased to condone the delay of 211 days by holding as under:

*"3. We have heard both the parties on this preliminary issue. Having regard to the reasons given in the application for condonation of delay, we are of the considered opinion that assessee was under a bona fide belief that the impugned order of Pr. CIT was not appealable before this Tribunal since they were not advised by their Tax Consultants about this legal right. Later on, when a Senior Lawyer advised them to file an appeal, the assessees immediately took steps to file the appeals. Therefore. the delay caused. we note. was because of the wrong advice of the Tax Professional for which*

*assessee cannot be penalized. For the ends of justice, we condone the delay and admit the appeal for hearing.*

7. We are of the view that provisions of law have to be adhered strictly and that one cannot be allowed to act in leisure and make a mockery of enacted law, because law and provisions are laid down to benefit both sides of litigation. Be that as it may, we have to do justice and the Hon'ble Supreme Court in the case of Collector, Land Acquisition vs Mst. Katiji and others, reported in 167 ITR 471, (1988 SC 897) (7) has observed as follows:

*“4. When substantial justice and technical considerations are pitted against each, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.”*

8. When we weigh these aspects then the side of justice becomes heavier and casts a duty on us to deliver justice. The reasons given in the affidavit for condonation of delay were convincing and these reasons would constitute reasonable and sufficient cause for the delay in filing this appeal. We, therefore, condone the delay in filing appeal and admit the appeal for hearing.

9. Succinctly, the factual panorama of the case is that assessee before us is an Individual and filed her return of income on 04.03.2015, declaring total income of Rs.4,22,502/-. The assessee's case was selected for scrutiny through CASS and notice u/s 143(2) of the Act was issued on 18.09.2015 and the same was duly served upon the assessee on 24.09.2015. Subsequently, notice u/s 142(1) of the I.T. Act alongwith questionnaire dated 13.06.2016 were issued to the assessee and served upon the assessee. In response to the notices issued u/s 143(2) and 142(1) of the Income Tax Act, 1961, the assessee attended from time to time and furnished the details before the

Assessing Officer. During the year under consideration, the assessee has shown income from business as well as income from other sources. The assessee has also shown Long Term Capital Gain of Rs.45,01,840/- in her return of income, which was claimed as exempt u/s 10(38) of the Act. On the perusal of the details filed by the assessee, it was noted that LTCG of Rs.45,01,840/-, so claimed, includes sale transactions effected during the year on the Scrip named “Sunrise Asian Ltd.”

10. The Assessing Officer observed that as per the details available on record, the assessee has sold 10,000 shares of the “Sunrise Asian Ltd” during the year under consideration, on total sale prices of Rs.49,01,840/- which has resulted in total earning of Rs.45,01,840/- in F.Y. 2013-14. During the course of assessment proceeding, information u/s 133(6) of the Act was called for from Bombay Stock Exchange and the details of sale of Sunrise Asian Ltd have been received by the assessing officer. The details of the sale of the script during the year are stated by the assessing officer on page No.5 and 6 of the assessment order. Ongoing through the purchase details of these shares, it was observed by the assessing officer that the Assessee had purchased shares of M/s Conart Trade's Ltd on 21.08.2011, directly from the company. Since the Assessee has purchased share of M/s Conart Trader's Ltd and sold shares of Sunrise Asian Ltd., therefore, the Assessee was asked to clarify the matter. The Assessee has replied to the Assessing Officer that the company Conart Trades Ltd was later amalgamated with Sunrise Asian Ltd. vide order of Hon'ble Bombay High Court dated 24.01.2013.

11. On perusal of the submission made by the assessee, it was observed by the Assessing Officer that the assessee purchased share of M/s Conart Traders Ltd on 21.08.2011, physically materialized on 06.03.2014. The Assessing Officer has received information, through proper channel from the Directorate of Investigation, Kolkata vide their letter F.No.75A/2015-16/257-273 dated 27.04.2015. While going through the facts reported by the Investigation Wing, it revealed that the Investigation Wing of Kolkata had conducted inquiries and unearthed some big syndicates involved in providing accommodation entry of Long Term Capital Gain. They have also carried out number of search and surveys in the office premises of more than 32 Share broking entities, which accepted that they were actively involved in the bogus LTCS/STCL Scam. The Assessing Officer also discussed in the assessment order the features of penny stocks. The Assessing Officer also observed that assessee is one such beneficiary who has allegedly taken the entry of LTCG. The Assessing Officer has issued a show cause notice to the assessee to explain the transaction.

12. In response to the show cause notice, the assessee submitted its reply to the assessing officer, vide assessee`s reply dated 16.12.2016. However, the assessing officer rejected the contention of the assessee and held that financials of the companies do not justify such phenomenal rise or fall in the market price. The same are evident from the charge given above. On perusal of bank account and contract note of sale of share, it is revealed that the assessee has shown credit of Rs.49,01,840/- in his bank account as sale proceeds of shares “Sunrise Asian Ltd.” It is evident from the investigation that the actual source of this credit is the unaccounted cash of the assessee, therefore assessing officer made addition under section 68 of the Act.

13. Further, a sum of Rs.98,037/- being commission paid @ 2% of the LTCG was also added by the assessing officer, as unexplained expenditure under section 69 of the Act.

14. The Assessing Officer also held that tax on the above unaccounted income of Rs.49,99,877/- (Rs.49,01,840 + Rs.98,037) should be calculated @ 30% as per the mandate of section 115BBE, of the Income Tax Act, 1961.

15. Aggrieved by the above additions, the assessee carried the matter in appeal before Id CIT(A), who has confirmed the action of the assessing officer. Aggrieved by the order of the Ld. CIT(A), the assessee is in further appeal before us.

16. Shri Rajesh Upadhyay, Learned Counsel for the assessee argued that during the assessment stage, the assessee submitted the following documents and evidences to prove its claim, which are reproduced below:

- (i) Ledger account of Conart Trader, Debit note for purchase of shares, share certificate and assessee's SBI Passbook for FY.2011-12 (vide PB.11 to 18)
- (ii) Income Tax Return, Computation and Financial statements for AY.2012-13 (vide PB. 19 to 23)
- (iii) Income Tax Return (ITR), Computation, Financial statements for AY.2013-14 (vide PB. 24 to 30)
- (iv) ITR, Computation and Financial statements for AY.2014-15 (vide PB.31 to 35)

- (v) Copy of ledger account of Nirmal Bang Securities Pvt. Ltd. with their contra account and Demat account (vide PB. 36 to 40)
- (vi) Contact notes issued by SEBI register, broker Nirmal Bang Securities Pvt. Ltd. w.r.t. sale of shares in BSE with payment of STT (vide PB. 41 to 47)
- (vii) Appellant's SBI Bank account passbook for FY.2013-14 (vide PB. 48 to 50)
- (viii) Copy of NSDL statement of holding as on 31.03.2013 & 31.03.2014 (vide PB.51 to 52)
- (ix) Copy of written submission before CIT(A) (vide PB.53 to 56)
- (x) Copy of Assessing Officer (assessing officer) notices and assessee's reply thereto (vide PB. 57 to 76)
- (xi) Evidence for Amalgamation 3 companies by Hon'ble Bombay High Court order (vide PB.77 to 107)
- (xii) Sunrise Asian Ltd. Price data downloaded from Money Control (vide PB.109 to 114)

17. Therefore, Ld. Counsel submits that assessee has submitted enough documents and evidences to prove its claim. On appeal, by the assessee, before the Ld. CIT(A), the Ld. CIT(A) has not examined the issue and passed the order in brief without any analysis of the above documents and evidences. The Assessing Officer has used report of Directorate of Investigation, which is not applicable to the assessee, moreover, such report has not been provided to the assessee. The assessing officer also used the statement of Shri Anju Agarwal, which

is not relevant to the assessee, moreover, opportunity to confront and cross examine, with such person has not been provided to the assessee. The Ld. Counsel also submitted that license was not cancelled of the stock exchange broker, through whom the transactions were conducted. There is no evidence before the assessing officer that the assessee has received the cash back against such transaction. The transaction is supported by the Ledger account of Conart Trader, Debit note, share certificate and moreover, the transaction was conducted through banking channel and STT was paid. Therefore, Id Counsel contended that addition made by the Assessing Officer may be deleted.

18. Shri Rajesh Upadhyay, also stated that addition so made by the Assessing Officer should not be sustained under section 115BBE of the Act, because the addition made by the Assessing Officer is not the subject matter of Section 68 of the Act. Therefore, the rate prescribed under section 115BBE of the Act, is not applicable to the assessee under consideration. The assessee's matter is relating to Section 45 of the Income Tax Act (Capital Gain), therefore addition should have been made by the assessing officer under the head capital gain and not u/s 68 of the Act and therefore the provisions of section 115BBE is not applicable to the assessee. Apart from this, the Ld. Counsel relied on several judgments including the judgment of the jurisdictional High Court of Gujarat in the case of Nishant Kantilal Patel, Tax appeal No.296/2021, dated 07.01.2022 and stated that the addition made by the Assessing Officer should be deleted.

19. On the other hand, Ld. Sr. DR for the Revenue submitted that assessee has not proved the genuineness of the transaction, just to submit that the transaction was done through banking channel is not

sufficient. The assessee submitted debit note, ledger account and other evidences such as STT was paid on the transaction, these evidences and documents do not show that the transaction is genuine. The Ld. Sr. DR for the Revenue also relied on the judgment of Hon'ble Calcutta High Court in the case of PCIT vs Swati Bajaj (2022) 139 taxmann.com 352 (Calcutta) and stated that assessee has not proved the genuineness of the transaction and therefore addition made by the Assessing Officer should be sustained.

20. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the ld. CIT(A) and other material brought on record. We note that during the assessment proceedings, the assessee submitted before the assessing officer, Ledger account of Conart Trader, Debit note for purchase of shares, share certificates, Bank statement of assessee, Income Tax Return (ITR), Computation of total income, Financial statements for AY.2014-15, Copy of ledger account of Nirmal Bang Securities Pvt. Ltd. with their contra account and Demat account, Contact notes issued by SEBI register broker Nirmal Bang Securities Pvt. Ltd. w.r.t. sale of shares in BSE with payment of STT, Copy of NSDL statement of holding as on 31.03.2013 & 31.03.2014, Evidence for Amalgamation of companies by Hon'ble Bombay High Court order, and Sunrise Asian Ltd- Price data downloaded from Money Control. The assessing officer did not find any error and mistake in these documents and evidences. That is, the Assessing Officer did not find any defect in these documents and evidences except to say that these documents and evidences are not acceptable. We note that Assessing Officer has not

refuted or discredited these evidences and documents. The Assessing Officer does not mention why he is not accepting these evidences. On the contrary, the Assessing Officer has just brushed aside these evidences without even a word on why they are not acceptable. It is a well settled Law that when an assessee has all the possible evidence in support of its claim, they cannot be brushed aside based on surmises.

21. We note that assessee is an individual and filed her return of income (ROI) for assessment year (A.Y) 2014-15 on 04.03.2015, showing total income of Rs.4,22,502/-. In the said return of income (ROI), the long term capital gain (LTCG) on sale of shares at Rs.45,01,840/- was also shown. The assessee has claimed exemption u/s 10(38) of the Act, as LTCG was on listed equity shares and STT has been paid by assessee. The entire transaction was through banking channel. However, Assessing Officer made addition of Rs.49,01,840/- u/s 68 and addition of Rs.98,037/- was made u/s 69 of the Act, holding that transaction entered into by the assessee is in the nature of sham transactions, which is being done by assessee, in order to rout its own money to give it a color of genuine transaction. However, we note that there is no evidence before the Assessing Officer to the effect that the assessee has received the cash back against such transaction.

22. We note that during the assessment stage, the assessee has provided complete detail of the company. It was submitted that the company's share were listed on BSE and NSE stock exchange. The assessee has also submitted past history and business of the company, market cap and other financial data of the company. The shareholding pattern of the company and management particular, directors, administrators and auditors, were also proved. A price moment chart between April, 2012 to March, 2015 was also supplied. It was

submitted that during the given period, high price of “Sunrise Asian Ltd” (in brief “SAL”) was Rs.605.50 and low price was Rs.548.50 per share. Further, a list of the company who has given handsome return in the span of one year or less is also supplied to the Assessing Officer. These companies are in existence but not much popular due to its fundamentals, financial and corporate news. The assessee has argued that share market activities are risky business and many persons are losing their money and capital in the market due to its volatile nature. Therefore, only because of sharp moment in prices of shares, transaction in share cannot be held bogus. It was submitted that she being a genuine investor, has invested in the share of Conart Trader’s Ltd, and hold it for several months, say two and half years, being satisfied with the profit, share were sold through SEBI registered broker, in online platform of BSE. She has paid STT and sales proceeds were received directly in her bank account by RTGS and NEFT. Therefore, her case is not a case of accommodation entries, hence Id Counsel for the assessee prays the Bench that addition of Rs.45,01,840/- u/s 68 and addition of Rs.90,037/- u/s 69 of the Act may be deleted.

23. We also note that Assessing Officer has not followed the principle of natural justice, while making the addition in the hands of the assessee. In show cause notice, there was a proposal for addition of Rs.45,01,840/- being bogus LTCG on shares of Sunrise Asian Ltd., as well as commission expenses of Rs.90,037/- (being 2% of Rs.45,01,840/-) for bogus LTCG. However, in assessment order addition was made u/s 68 and u/s 69 of the Act, respectively. Further there was no show cause for charging of tax at 30% as per the mandate of section 115BBE of the Act. Thus, Assessing Officer has violated

principal of natural justice. In this regard, Id Counsel relied on the decision of ITAT Ahmedabad in the case of ITO vs. Mohammed Arif Ibrahimhai Shaikh in ITA No.1115/AHD/2019 dated 30.05.2022; wherein it has been held as under:

*“During the course of assessment, assessing officer issued notice proposing addition of INR 1.25 cores u/s 40A(3), whereas, in the assessment order assessing officer has made addition of INR 4.365 crores. That the show-cause issued by the Ld. assessing officer through proposing disallowance of Rs.1.24 crores, the addition was ultimately made to the tune of Rs.4.265 crores violating of the principle of natural justice.”*

In this regard, Ld Counsel also relied on the judgment of Hon`ble Supreme Court in the case of Uma Nath Pandey Vs. State of UP, AIR 2009 SC 2375, wherein it was observed, as follows:

*“8. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice.....”*

24. We note that while passing the assessment order, Assessing Officer has relied on certain additional documents, which are neither disclosed before the assessee nor supplied copy of such document to the assessee during assessment proceeding. These documents are listed as under:

Sr.No.	Additional documents relied on by the assessing officer	Assessment order	
		Page no	Para No.
i	Information collected u/s 133(6) from BSE	2 & 3	4
ii	Reports of Directorate of Investigation of Kolkata vide their letter No.75A/2015-16/257-273 dated	3	5

	27.04.2015		
iii	A statement Shri Anuj Agrawal u/s 131 during survey dated 30.03.2015	6 to 14	9.1

The Id Counsel stated that addition made on the basis of above documents is liable to be deleted in view of the decision of Hon'ble Supreme Court in Andaman Timber Industries Ltd. (Civil Appeal No.4228 of 2006) and the decision of Kishanchand Chellaram vs. CIT (125 ITR 713).

25. We note that assessee has received sale proceeds by electronic mode of payment system, that is, RTGS and NEFT, UTIB, directly in her SBI account, as follows:

Date	Mode	Amount (Rs)	Paper book page
25.02.2014	RTGS	14,50,756.68	-49
05.03.2014	RTGS	32,27,539.63	-49
11.03.2014	NEFT	1,95,711.34	-49
Total		48,74,007.65	

With respect to BSE date produced by the assessing officer on page 2 and 3 of assessment order; it was submitted that the assessee has furnished copy of purchase bill. The Payment of purchase of 10,000 shares of Conart Traders Ltd., was made by cheque that can be seen from her SBI passbook. It is also appearing in her balance-sheet as on 31.03.2012 and 31.03.2013. Assessment for assessment year (A.Y) 2013-14 was made by Assessing Officer u/s 143(3) of the Act. The purchase of shares of Conart Traders Ltd., is accepted by Assessing Officer. The said company was amalgamated with Sun Rise Asian Ltd, (in brief 'SAL') by virtue of order of Hon'ble Bombay High Court. The assessee has produced numerous data and details of 'SAL' which was the basis of her decision to make the investment. All time high share price was Rs.605.50 as on 31.03.2015 and from the month of Jan 2013

to July 2015, the price range was continuously shown to be in the range of Rs.360-600 per share and the trading volumes were shown to be in the range of 5 lacs to 25 lacs share per month. The price range stated by the Assessing Officer at para 4 of his order is between Rs.486/- to 492/- during the period February-2014 to June-2014. The assessee has sold shares of SAL at average rate of Rs.487.40 during the month of February- March 2014, which itself is an evidence of genuineness of transactions. Therefore, the allegations of rigging or manipulation of shares were refuted by the assessee.

26. We note that Assessing Officer heavily relied upon the findings of Investigation Wing without carrying out any independent investigation of his own. Nothing was brought on record which would establish that the assessee was beneficiary of alleged accommodation entries provided by the so-called Shri Anuj Agrawal. No corroborative evidences to support the findings of Assessing Officer were brought on record. No nexus was established. Further, no contrary and conclusive evidences were brought on record to dispute the documentary evidences furnished by assessee. The enquiries were conducted by the DCIT at Kolkata and the statements were recorded at the back of the assessee. The assessee was deprived off to cross examine the witnesses. The documentary evidences submitted by the assessee were neither proved contrary nor proved fabricated. Assuming that the brokers may have done some manipulation but the assessee cannot be held liable for the act of the brokers when the entire transactions have been done through banking channels duly recorded in the Demat accounts with a Government depository and traded on the stock exchange. The Sale transactions took place through recognized stock exchange and statutory Securities Transaction Tax (STT) as well as

Services Tax was paid on sale transactions. In the online platform, the identity of the seller as well as purchaser would not be known. The shares were delivered in demat form through clearing mechanism of the stock exchange. Therefore unless any link is established, the assessee could not be held to be part of the group indulging into rigging shares prices of the scrip. The sale proceeds were realised through banking channels *i.e.*, RTGS./NEFT. There was no evidence of any cash exchange. The findings as well as conclusion of Assessing Officer were based on mere suspicion, and surmises as against settled proposition of law that suspicion howsoever strong could not partake the character of legal evidence. The entire case of Assessing Officer was based on mere presumption that the assessee ploughed back her own unaccounted money in the form of bogus LTCG. The presumption needs to be corroborated by some evidence to establish the same. It is trite law that presumption, however, strong, cannot be a substitute, nor can it take place of evidence. For the said proposition, reliance is placed on Hon'ble Supreme Court decision, in the case of Omar Salav Mohamed Sait reported in (1989) 37 ITR 151 (SC) *wherein* it was held that no addition can be made on the basis of surmises, suspicion and conjectures.

27. We note that Assessing Officer has relied on the report of Investigation Wing Kolkata dated 27.04.2015. At the outset, these could not be relied on for the simple reason that the assessee has never taken any accommodation entry from any broker, she has supplied complete details of 'SAL' as well as the SEBI registered broker, Nirmal Bang Sec. Pvt. Ltd., through whom she has done sale transaction of shares by paying STT. The Assessing Officer has not made any inquiries with the share broker of the assessee. The

Assessing Officer does not have any evidence to show that cash payment of Rs.49,01,840/- was made by the assessee to any broker or any entry provider. In absence of such evidence, genuine transactions recorded in on BSE as well as in SBI bank account of the assessee cannot be held as accommodation entry. We note that the SEBI suspended only trading of 26 scrip out of the said 58 scrip and only 11 scrip prices were found rigged. The “Sunrise Asian Ltd” (Scrip Code 506615) was not included in these scrips whose shares assessee had purchased on 21.08.2011. We also note that in this case, the assessee, being an investor, has held shares for 2½ years and after holding shares for long period, the assessee sold the said shares. The assessee submitted Share holding pattern of ‘SAL’ which is as under:

Category	No. of shares	%age
Promoters	8,447,558	18.50%
General public	16,385,687	35.88%
Others	16,685,906	34.35%
Financial Institutions	5,143,909	11.26%

The Id Counsel submits that the shares of “Sunrise Asian Ltd.”, were being held buy Canara Bank, New Delhi, 6% of SAL shares during September 2015 and 11.26% shares of SAL, during March 2016 and June 2016 respectively. Thus, the sale transaction of ‘SAL’ shares cannot be doubted as bogus and denying the exemption u/s 10(38) of the Act. The Id Counsel also submitted the judgments of various Coordinate Benches of ITAT, wherein addition made by the assessing officer U/s 68, in respect of sale of shares of “Sunrise Asian Ltd” were deleted:

- 1) ITO vs. Devyani Dharmendra Shah [ITA No.576/Ahd/2020] (Ahd Trib.)
- 2) Sita Devi Agarwal Vs. ITO [ITA No.56/JP/2020] (Jaipur Trib.)

- 3) Ashok Agarwal vs. ACIT [ITA No.124/JP/2020] (Jaipur Trib.)
- 4) ITO vs. Liberal Realtor LLP [ITA No.449-450/Mum/2021] (Mumbai Trib.)
- 5) Shri Shripal Rai Lodha vs. DCIT [ITA No.619/Mum/2020] (Mumbai Trib.)
- 6) Narayan Ramchandra Rathi vs. ITO [ITA No.4811/Mum/2018] (Mumbai Trib.)
- 7) Arun S. Tripathi vs. PCIT [IA No.2560/Mum/2018] (Mumbai Trib.)
- 8) Anraj H.Shah (HUF) vs. ITO [ITA No.4514/Mum/2018] (Mumbai Trib.)
- 9) Anjana Sandeep Rathi vs. ACIT [ITA No.4369/Mum/2018] (Mumbai Trib.)
- 10) Dipesh Ramesh Vardhan vs. DCIT [ITA No.7648/Mum/2019] (Mumbai Trib.)
- 11) Kumari Ayush Nyati vs. ITO [ITA No.203/Ind/2019] (Indore Trib.)
- 12) Smt. Manorama Devi Sharma vs. ITO [ITA No.39/Ind/2019] (Indore Trib.)
- 13) Shri Shiv Narayan Sharma vs. ACIT [ITA No.889/Ind/2018] (Indore Trib.)

28. We note that Hon`ble Jurisdictional High Court of Gujarat in the case of Jagat Pravinbhai Sarabhai, [2022] 142 taxmann.com 247, held that where Assessing Officer noted that assessee had indulged in scrip of shell company and had claimed long term capital gain on sale of shares and made addition under section 68 holding that entire transaction was bogus and in the nature of penny stock, however, since genuineness of investment in shares by assessee was substantiated by him by

producing copy of transaction statement and shares were retained for long time and were sold after such long time, hence investment was not bogus therefore it cannot be treated that investment was made in penny stock. The findings of the Hon`ble Court is reproduced below:

*"2. As submitted by learned senior advocate Mr. M.R. Bhatt for M.R.Bhatt and Co., the appellant revenue proposes the following substantial questions of law, which according to the submission requires examination.*

*"Whether on the facts and circumstances of the case and in law, the decision of Appellate Tribunal is ex facie perverse because the Appellate tribunal deleted the addition of Rs. 2,10,474/- made on account of bogus long term capital gain, without appreciating the entire gamut of fact that the assessee transacted in penny stock namely M/s. Devika Proteins Ltd. thus earning bogus Long term Capital Gain and claiming it to be exempt under section 10(38) of the Income-tax Act?"*

*3. The assessee filed the return of income for the assessment year 2011-12 on 29-3-2012 declaring his total income Rs. 3,11,490/-. Subsequently the assessment was reopened as information was received that assessee has indulged into script of shell company and had claimed long term capital gain on sale of shares of Devika Proteins Limited to the tune of Rs. 2,10,474/- and that the amount was claimed as exemption under section 10(38) of the Income-tax Act, 1961 (hereafter referred to as 'the Act')*

*3.1 The Assessing Officer made addition of the said amount. The entire transaction was treated as bogus and in the nature of penny stock. By adding Rs. 2,10,474/- under section 68 of the Act, total income was assessed at Rs. 5,21,964/-.*

*3.2 In appeal by the assessee before the Commissioner of Income-tax (Appeals), the issue was re-examined. According to the appellate authority the appellant assessee had furnished evidence to show that the shares were brought as genuine investment which was long back in the year 2000-01. As the shares were in the nature of old investment, they could not be treated as penny stock by any stretch of imagination.*

*4. The Income-tax Appellate Tribunal further examined the question in appeal preferred by the revenue and confirmed the view of the appellate authority noticing that the shares were purchased in the year 2001 and they were sold after long time in the year 2010-11.*

*5. The genuineness of investment in the shares by the assessee was substantiated by him by producing copy of transaction statement for the period from 1-6-2001 to 1-10-2010. The investment was made in the year 2000-01. The shares were retained for more than ten years and were sold after such long time. These circumstances suggested that the investment was not bogus or investment made in penny stock. The shares were purchased in order to invest and not for the purpose of earning exempted income by frequent trading in short span.*

6. *The finding recorded by the appellate authority and confirmed by the appellate tribunal is based on material before them. They are in the realm of findings of fact. No error could be noticed in the findings and conclusion that the investment was longstanding and genuine and was not penny stock on the basis of which the capital gain was wrongly claimed.*

6.1 *On the facts of case, no question of law much less substantial question of law arises.*

7. *Resultantly, appeal is dismissed”.*

29. We note that findings of the Hon`ble Jurisdictional High Court of Gujarat in the case of Jagat Pravinbhai Sarabhai(supra) is squarely applicable to the assessee`s facts under consideration. The genuineness of investment in the shares by the assessee was substantiated by him by producing contract note, Transaction was through recognised Broker, transaction was done through banking channel on which STT was paid. The shares were held by assessee, as an Investor for a period of two and half years, which is also a long period. These circumstances suggest that the investment was not bogus.

30. The Hon`ble Gujarat High Court in the case of NISHANT KANTILAL PATEL TAX APPEAL NO. 296 of 2021 held as follows:

*“15. Allegedly, the scrip being Global Securities Ltd. was one of the Penny Stock Companies utilized by M/s.Anand Rathi Shares and Stock Brokers Ltd. for providing bogus accommodation entries. This had been accepted in the statement recorded under Section 131 of the Act of Shri Sanjay Vora, the assessee had claimed the LTCG amounting to Rs.20,76,924/- arising out of sale of shares of Global Securities Ltd. The Assessing Officer on getting this information has issued the notice by recording the reasons that this claim of LTCG on sale of shares of Global Securities Ltd. was the prearranged mechanism of claiming bogus LTCG. On getting this information, it was deduced that the Global Securities Ltd has been involved in circular trading and sale and purchase of the scrip to convert unaccounted money of several beneficiaries into accounted one by following the said modus operandi.*

*16.The Assessing Officer to form the opinion there shall need to be some link with the material and as discussed above, the same is missing, the challenge needs to fail. Though no rigid format is a must to express application of mind or for formation of belief that income chargeable to tax has escaped assessment and yet,*

*when reliance on the information is mechanical without reassessment for the verification, independent opinion needs to be held to be absent.*

*17. Resultantly, this appeal fails and dismissed accordingly.”*

31. Hon`ble Delhi High Court in the case of Principal Commissioner Of Income vs Smt. Bindu Garg, ITA No.125.2020, order dated 15 January, 2021, held as follows:

*“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 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 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."*

32. We note that Jurisdictional Coordinate Bench of ITAT Ahmedabad in the case of M/s. Ice Worth Reality LL P, vide ITA Nos. 565 & 566/Ahd/2020, for Assessment Years 2012-13 & 2015-16, order dated 13-03-2023, deleted the addition made by the assessing officer

in respect of “SAL” shares. Findings of the Coordinate Bench are reproduced below:

*“7. We have given our thoughtful consideration and perused the materials available on record. It is seen from the Paper Book filed by the assessee, the assessee produced before the Assessing Officer the documentary evidences in respect of purchase of shares namely copy of allotment letter from Conart Traders Ltd., Ledger account of Conart Traders Ltd. and share certificate of SAL dated 24/05/2013, Copy of Audit Report for the Assessment Year 2013- 14 showing investment in shares of Conart Traders Ltd and bank statement reflecting payments made for purchase of SAL shares [at Page No. 333 to 364 of the Paper Book]. Similarly, the assessee also filed documentary evidences submitted before the Assessing Officer in respect of SAL of shares by producing the copy of the ledger account of the four share brokers, copy of the bank statement reflecting the amount received on sale of shares after making Securities Transaction Tax [at page no. 65 to 113 of the Paper Book]. The assessee also produced contract notes/bills issued by approved share brokers in respect of sale of shares [at Page nos. 114 to 216 of the Paper Book]. Thus the genuineness of investment in the shares of the assessee was substantiated by producing the above details by the assessee. Therefore the investment cannot be doubted as bogus investments made in penny stock.*

*7.1. In order to prove the purchase of shares, the assessee filed copy of the allotment letter, ledger account of Conart Tarders Ltd. physical share certificate, copy of the bank statement reflecting payments made for purchase of SAL shares. Similarly, for Sale of shares, the sale were being routed through demat account. Copy of the ledger account of four share brokers through whom sales were made. Copy of the bank statement reflecting the sale consideration received after STT. Thus the Assessing Officer has no evidence that the purchase of sale of shares are done through cash and the entire transaction to be bogus.*

*7.2. We further see from records that the present sale of Sunrise Asian Ltd shares by the assessee is relating to 12,15,840 shares only, as against 39,61,270 shares held by the assessee. After the above sales, still the assessee is retaining 27,45,430 shares of SAL, thus the Ld AO is not justified that the sale of SAL Shares at such high prices in nothing but a Penny stock. If the assessee would have indulged the sale of SAL shares as a Penny stock, then it would not have retained 27,45,430 shares which is more than 2/3rd of its holding of the SAL shares. Thus the findings of the Ld AO are found to be baseless with cogent materials on record, therefore the same is not sustainable in law.*

*7.3. This view of ours is supported by the Jurisdictional High Court in the case of PCIT Vs. Muktaben Nishantbhai Patel (cited supra) held as follows:*

*In order to prove the Sale of shares of Sun & Shine Worldwide Ltd., assessee filed the following documents before the assessing officer, viz:*

*Ledger Account of Tradebulls Securities Pvt. Ltd, Contract Notes of Tradebulls Securities Pvt Ltd and Bank Statement. In order to prove purchases of shares, assessee filed the following documents, viz: Contra confirmation of broker M/s. Corporate Commodity Broker Private Ltd, Share Certificate, Share Transfer Form, Debit Note and Cash Receipt. The payments were received through account payee cheque and transaction was done through recognized stock exchange. The inflow of shares is reflected by way of physical share certificate and demat account. The shares were transferred through demat account. There is no evidence that the cash was recycled back to the assessee. The assessing officer*

has failed to bring any cogent evidence on record to show that these documents and evidences filed by the assessee are false.

The assessee merely acted on the basis of such market information and happened to get phenomenal gain. It could have been otherwise as well. The rags to riches story in the stock market are galore. It has been submitted that the alleged, circumstantial evidence and material has led the Assessing Officer to believe that the real is not the apparent. In the absence of any link between the assessee and the alleged, admissions of the directors and brokers, human probability is being used as a vague and convenient medium for the department's conjectures. To draw an adverse inference without any admissible evidence on record, is bad in law.

In the light of the discussions that have preceded and for the reasons alluded we are of the view that the addition made by the assessing officer and confirmed by the Ld. CIT(A) needs to be deleted. Accordingly, we delete the additions made by assessing officer in case of Smt. Muktaben N. Patel and Shri Nishant K. Patel in the assessment year 2014-15."

7.4. Similarly, the Jurisdictional High Court in the case of PCIT Vs. Parasben Kasturchand Kochar (cited supra) held as follows:

".. 2. We take notice of the fact that the issue in the present appeal is whether the assessee earned long term capital gain through transactions with bogus companies. In this regard, the finding of fact recorded by the Tribunal in paras 9, 10 and 11 reads

thus:-

"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 Principal Commissioner of vs Para 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 Pvt. Ltd. Vs. 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."

3. Thus, the Tribunal has recorded the finding of fact that the assessee discharged his onus of establishing that the transactions were fair and transparent and further, all the relevant details with regard to such transactions were furnished before the Income Tax authorities and the Tribunal also took notice of the fact that some of the shares also remained in the account of the appellant.

4. We take notice of the fact that the assessee has a Demat Account maintained with the ICICI Securities Ltd. and has also furnished the details of such bank transactions with regard to the purchase of the shares. In the last, the Tribunal took notice of the fact that the statements recorded by the investigation wing of the Revenue with regard to the Tax entry provided were informed to the assessee despite giving him opportunity to meet such

*an allegation. In the overall view of the matter, we believe that the proposed question cannot be termed as a substantial question of law for the purpose of maintaining the appeal under Section 260-A of the Act, 1961.*

*5. In the result, this appeal fails and is hereby dismissed.*

*7.5. Further the Co-ordinate Bench of the Mumbai Tribunal in the case of DCIT vs. Shri Dilip B. Jiwrajka (cited supra) distinguished the Calcutta High Court judgment held as follows:*

*"... 51. Apart from the above, we have also taken suo-motto judicial notice of the judgment rendered by the Hon'ble Calcutta High Court in the case of Pr. CIT Vs Swati Bajaj (288 Taxman 403). Having carefully perused the same, it is noted that peculiar facts were involved before the Hon'ble Court wherein eighty-nine different appeals of different assessee's were disposed off by the Tribunal in a single consolidated order without taking cognizance of the specific facts involved in each case (appeals preferred by different assessee's). The relevant observations made by the Hon'ble High Court is as follows:*

*"40. Before we examine the contentions, we are tempted to point out that the exercise done by the tribunal was a bit perfunctory. There is absolutely no discussion of the factual position in any of the 89 appeals, the exception is in paragraph 4 with regard to the certain facts of the assessee's case (SwatiBajaj). We are not very appreciative of the manner in which the bunch of appeals have been disposed of. The cardinal principles which courts and tribunal have followed consistently is that each assessment year is an individual unit and unless and until it is shown that there are distinguishing feature in a particular assessment year, the decision taken for the earlier years are to be followed to ensure consistency. While doing so the Courts/Tribunals are required to examine the facts and render a finding as to why the decision in the earlier assessment years should be adopted or not."*

*52. Apart from the above, the Hon'ble Court noted that the assessee had never mentioned before the AO that, he wanted the copy of investigation report or the statements of the brokers/entry operators and therefore the assessee's plea regarding non-availability of relevant material or denial of cross-examination claimed was rejected. The relevant observation of the Hon'ble High Court is as under:*

*"...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."*

*53. In the instant case, a specific request was made for a copy of investigation report as well as copies of statements recorded of different persons. The assessee is noted to have rebutted whatever details were provided by the AO and had sought cross-examination as well. Hence, the facts involved in the present case are noted to be distinguishable from the above case. Further, 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). In the instant case, direct irrefutable evidences were made available to the AO and, therefore, ignoring the direct evidences and jumping to circumstantial evidences is not justified even if one refers to the decision of Hon'ble Calcutta High Court. Moreover, as noted by us earlier, this issue at hand is squarely covered by the binding judgments of the Hon'ble jurisdictional High Court, in favour of the assessee, and, therefore following the judicial discipline, the order of the Ld. CIT(A) does not require any interference since we have the benefit of*

guidance on this subject by the Hon'ble jurisdictional High Court, which is binding upon us.

7.6. Similarly, the Co-ordinate Bench of this Tribunal in *ITO Vs. Devyani Dharmendra Shah* in ITA No.576/Ahd/2020 dated 15.06.2022 held as follows:

"... 7. We have heard the rival contentions and perused the material on record. The Assessing Officer has not doubted the purchase of shares were through banking channels. While making the additions, the ld. Assessing Officer has not brought any material how the assessee has brought its own unaccounted money for the acquisition of the shares specially when the purchase of shares was not doubted and shares have been sold on Stock Exchange. Further, the ld. Assessing Officer has not brought on record statement of any persons through whom assessee's own unaccounted money has been brought in. As stated above, the appellant has held the shares for over 3 years and it would be incorrect to treat sale of shares as bogus merely on the basis of suspicion and on account of fact that a substantial quantum of capital gains has been made by the assessee. In the present case, no material has been brought on record to suggest that purchase and sale of shares were bogus. The ld. Assessing Officer has not brought any material to support his finding that there has been collusion or connivance between the broker and the assessee for the introduction of his own unaccounted money. In the present case, despite the assessee's specific request, no opportunity of cross examination was provided to the assessee on the basis of whose statements reliance has been placed to hold that the sale of shares was sham / bogus. It would be useful at this stage to refer to some judgments which have dealt with the issue before us:

(i) In the case of *PCIT vs. Smt. Krishna Devi*, ITA No.125/2020, the Delhi High Court vide order dated January 27, 2021 held that the fact that there was an astounding 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 relevant extract of the judgment is reproduced for ready reference:

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.

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.

(ii) The Lucknow ITAT in the case of *Achal Gupta vs. ITO (ITAT Lucknow)* I.T.A. No.501/Lkw/2019 held that the documents demonstrates that the assessee had purchased shares through Brokers for which the payment was made through banking channels. The assessee had sold shares through an authorized stock broker and payment was received through banking channels after deduction of STT. The AO has not doubted any of the documents. The only objection raised is that the scrip from which the assessee had earned Long Term Capital Gain has been held by the Investigation Wing of the Revenue to be a paper entity and that this scrip was being used for creating artificial capital gain. The objection was not found to be acceptable.

(iii) *The Mumbai ITAT in the case of Dipesh Ramesh Vardhan vs. DCIT (ITAT Mumbai) I.T.A. No.7648/Mum/2019 held that the AO has not discharged the onus of controverting the documentary evidences furnished by the assessee and by bringing on record any cogent material to sustain the addition. The allegation of price rigging / manipulation has been levied without establishing the vital link between the assessee and other entities. The whole basis of making additions is third party statement and no opportunity of cross-examination has been provided to the assessee to confront the said party. As against this, the assessee's position that the transactions were genuine and duly supported by various documentary evidences, could not be disturbed by the revenue.*

(iv) *The Delhi ITAT in the case of Suresh Kumar Agarwal vs. ACIT, ITA No 8703/Del/2019 held that the assessee has produced contract notes, demat statements etc & discharged the onus of proving that he bought & sold the shares. The AO has only relied upon the report of the investigation wing alleging the transaction to be bogus. The ITAT held that the AO ought to have examined a number of issues (which are enumerated in the order) and shown that the transaction is bogus. The capital gains are genuine and exempt from tax.*

(v) *The Mumbai ITAT in the case of Vijayrattan Balkrishan Mittal vs. DCIT, ITA No.3311/Mum/2019 held that the fact that a scam has taken place in some penny stocks does not mean that all transactions in penny stocks can be regarded as bogus. In deciding whether the claim is genuine or not, the authorities have to be guided by the legal evidence and not on general observations based on statements, probabilities, human behavior, modus operandi etc. The AO has to show with evidence the chain of events and live link of the assessee's involvement in the scam including that he paid cash and in return received exempt LTCG gains.*

7.1 . *Notably in the case of Anjana Sandeep Rathi Vs ACIT (ITAT Mumbai) in ITA. No. 4369/MUM/2018, the ITAT Mumbai held that LTCG on sale of shares of M/s Sunrise Asian Limited was not bogus/ sham transaction. While adjudicating in favour of the assessee, observed as under:*

5. *We have heard the submissions made by rival sides and have perused the orders of authorities below. The assessee in appeal has assailed the findings of CIT (A) in disallowing benefit of section 10(38) of the Act on long term capital gain arising from sale of shares. The assessee during the relevant period had sold shares of M/s. Sunrise Asian Ltd. for a consideration of Rs.14,99,917/-. The authorities below held the sale transaction in aforementioned scripts as bogus and thus, made addition under section 68 of the Act. We find that similar disallowance was made in the case of Narayan R. Rathi (father-in-law of the present assessee/appellant) for the assessment year 2014-15. Narayan R. Rathi had also sold the shares of same company i.e. M/s. Sunrise Asian Ltd. The issue travelled to the Tribunal. The Co-ordinate Bench of the Tribunal in ITA No. 4811/Mum/2018 (supra) deleted the addition. The Tribunal while allowing the appeal of Narayan R. Rathi held that the principles of natural justice were violated, the benefit of cross examination was not afforded to the assessee, hence, the addition is unsustainable. The relevant extract of the finding of Tribunal are reproduced herein below:-*

"11. *The authorities below have not doubted the documentary evidence produced by the assessee to prove the genuineness of the transaction of sale and purchase of the shares in question. Further, the authorities below have not pointed out any evidence on record to hold that the assessee has obtained bogus entries in connivance with entry operators and brokers etc., in order to claim bogus LTCG. As pointed out by the Ld. counsel, the assessee was not given an opportunity to cross examine the witnesses whose statements were relied upon and on the basis of their statements it was concluded that the transaction*

*in question was a part of penny stock scam. So, in view of the cases discussed in the foregoing paras, particularly the ratio laid down by the Hon'ble Supreme Court in the case of M/s Andaman Timber Industries (supra), we are of the considered view that the Ld. CIT (A) has wrongly confirmed the assessment order passed by the AO in violation of the principles of natural justice. Hence, the impugned order passed by the Ld CIT (A) suffers from legal infirmity. We, therefore, allow the sole ground of appeal of the assessee and set aside the impugned order passed by the Ld. CIT (A). Accordingly, we direct the AO to allow the claim of the assessee."*

*6. The ld. Departmental Representative has failed to controvert the findings of Tribunal in the case of Shri Narayan R. Rathi whose case is on the same pedestal with identical set of facts. In fact a perusal of the assessment order in the case of assessee reveal that the Assessing Officer in para 8.3 has observed that 3000 shares were jointly held by the assessee and Narayan Ramachandra Rathi. The facts of present case are similar to the facts of case in the case of Narayan R. Rathi decided by the Co-ordinate Bench. No distinction in facts has been brought to our knowledge by the Department. Thus, for the parity of reasons, addition made under section 68 of the Act deserves to be deleted. Further, the Assessing Officer is directed to allow the benefit of section 10(38) of the Act to the assessee.*

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

*7.2 In light of the above decisions, we are of the considered view that Ld. CIT(A) has not erred in law and in facts in allowing the assessee's appeal. "*

*8. It is appropriate to place on record the Hon'ble Supreme Court decisions in the case of Omar Salav Mohamed Sait reported in (1989) [37 ITR 151] (SC) where it is held that no addition can be made on the basis of surmises, suspicion and conjectures. In the case of CIT(Central), Kolkata vs. Daulat Ram Rawatmull reported in [87 ITR 349], the Hon'ble Apex Court held that, the onus to prove that the apparent is not the real is on the party who claims it to be so. The burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidences, which would directly prove the fact of bogusness or establish circumstance unerringly and reasonably raising an interference to that effect. The Hon'ble Supreme Court in the case of Umacharan Shah & Bros. Vs. CIT [37 ITR 271] held that suspicion however strong, cannot take the place of evidence.*

*8.1. Respectfully following the above judgments of the Jurisdictional High Court and that of the Co-ordinate Benches of the Tribunal, we have no hesitation in confirming the order passed by ld. CIT(A) and deleting the additions made by the Assessing Officer u/s. 68 and u/s. 69C of the Act. Thus the grounds raised by the Revenue are devoid of merits and the same are liable to be rejected."*

33. We note that Ld DR for the Revenue heavily relied on the Judgment of Hon`ble Calcutta High Court in the case of Swati Bajaj and others (supra), however, we are of the view that as per the judgment of Hon`ble High Court of Bombay in the case of Thana Electricity Supply Ltd (1994) 206 ITR 727 (Bom) wherein it was held that decision of a High Court will have the force of binding precedent only in the State or territories in which the Court has jurisdiction.

Hence we note that Judgment of Hon`ble Calcutta High Court in the case of Swati Bajaj and others(supra) should not be applicable to the assessee as it is outside the territorial jurisdiction of Gujarat. However, the Judgment of Hon`ble Jurisdictional High Court of Gujarat in the case of Jagat Pravinbhai Sarabhai and Nishant Kantilal Patel (supra) should be applicable to the assessee`s case, as these are the judgment of Jurisdictional High Court. Besides, the Jurisdictional Coordinate Bench of ITAT Ahmedabad in the case of M/s. Ice Worth Reality LLP, vide ITA Nos. 565 & 566/Ahd/2020, for Assessment Years 2012-13 & 2015-16, order dated 13-03-2023 (supra), deleted the addition made by the Assessing Officer in respect of Sunrise Asian Ltd (“SAL”) shares, which is the impugned shares before us. We note that Assessing Officer has not been able to point out any evidence whatsoever to allege that money changed hands between the assessee 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.

34. We note that addition under section 68 of the Act made merely on the basis of suspicion, presumptions and probability of preponderance without any direct evidence to prove the transactions as non-genuine or sham or demonstrating assessee's involvement in any kind of manipulation, cannot be made. Thus, the assessee has explained and submitted evidences to prove identity, nature and source of the cash credit on account of sale proceeds credited / received in the bank account of the assessee and also furnished all evidences comprising contract notes, brokers, banking details in support of the genuineness of the transactions. The shares are sold by assessee's broker on BSE platform hence source is BSE's clearing system. The

transactions on the BSE platform and settlement system who are responsible for the transactions of the demat account and prevailing price on public domain prove the genuineness of the transactions. Therefore, respectfully following the judgment of Hon`ble Jurisdictional High Court (supra) and Coordinate Bench of ITAT (supra), we deleted the addition Rs.49,01,840/-

35. Since we have deleted the main addition of Rs.49,01,840/-, therefore Ground No. 2 raised by the assessee for addition u/s 69C for Rs.98,038/-, w.r.t. notional commission expenses @ 2% of LTCG being unexplained expenditure, is consequential in nature and hence deleted.

36. Ground No.3 raised by the assessee relating to charging of income tax @ 30% u/s 115BBE of the Act, would not survive, as we have deleted the main addition, therefore it does not require adjudication.

37. In the result, appeal filed by the assessee is allowed.

Order is pronounced on 27/07/2023 in the open court.

Sd/-  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

सूरत /Surat

दिनांक/ Date: 27/07/2023

SAMANTA /DKP

**Copy of the Order forwarded to**

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

Sd/-  
**(Dr. A.L. SAINI)**  
**ACCOUNTANT MEMBER**

By Order

// True Copy //

Assistant Registrar/Sr. PS/PS  
ITAT, Surat