

**IN THE INCOME TAX APPELLATE TRIBUNAL, "SMC" BENCH
MUMBAI**

**BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER
ITA No. 344/MUM/2023
(A.Y.2010-11)**

Sunita Shyam Malpani, 701,Plot No.117, KaranApartment, LokhandwalaComplex, Andheri (W), Mumbai-400053.	Vs.	ITO 25(1)(3), Room No.703, KautilyaBhavan, Bandra BKC, Mumbai-400051.
स्थायी लेखा सं./जीआइआर सं.PAN/GIR No.ACPPM8552J		
(अपीलार्थी/ Applicant)		(प्रत्यर्थी/ Respondent)

Applicant by	Mr.Ajay Singh.AR
Respondent by	Mr.RajendraChandekar.DR

सुनवाई की तारीख/Date of Hearing	02.05.2023
घोषणा की तारीख/Date of Pronouncement	24.07 .2023

ORDER

PER PAVAN KUMAR GADALE, JM:

The assessee has filed the appeal against the order of Commissioner of Income Tax appeals (CIT(A)) NFAC passed u/s. 250 of the Income Tax Act.

2. The assessee has raised the following grounds of appeal:

1. *On the facts and circumstances of the case and in law, the learned Commisioner Of Income Tax - Appeals (hereinafter referred as "Ld. CIT(A)") has erred in confirming the re-opening of the assessment by issuing notice U/s 148*

of Income Tax Act, 1961. The Assessment was reopened by giving the reason that the appellant allegedly indulge in penny stock manipulation and has made manipulative transaction in penny stock. capital gain. The assessment U/s 143 (3) r.w.s. 147 of the Income tax Act, 1961 was completed merely on the basis of change of opinion. In view of the above, the said order passed should be squashed as the reopening of the assessment is not justified and bad in law. and necessary direction should be given in this regard.

2. On the facts and circumstances of the case and in law, it is submitted that appellant had made application for directions u/s. 144A of the Income Tax Act, 1961 before Learned Joint Commissioner of Income Tax (herein after referred as "Ld. JCIT") Range 25(1) (Mumbai) to issue direction to the learned assessing officer. However the JCIT did not issue direction to the learned assessing officer and merely stated to verify details and complete assessment proceedings on merit considering the submission made by the assessee. The Ld. JCIT has despite of request of the appellant no clear directions where given to Ld AO. It is submitted that the direction given by Ld JCIT was ambiguous and which defeated the very purpose of the section 144A of the Income Tax Act, 1961. It is submitted that the very purpose of the section 144A is the Ld. JCIT has to give his judgement/ direction on a issue before him and the Ld. AO is bound to implement such judgement direction. Therefore it is submitted that no proper judgement/ direction given by the JCIT and therefore the order of the Ld. AO confirmed by the Ld. CIT(A) is null and void.

3. On the facts and circumstances of the case and in R law, the Ld. CIT(A) has erred in confirming the addition of sale value of shares of Rs.14,61,081/- treating it as sale of alleged penny stocks and invoked section 68 of the Income Tax Act, 1961 by treating the sale proceeds as unexplained cash credit and alleging the sale proceeds are received back by the appellant. The Ld. CIT(A) had failed to consider the merit of the submissions made by the Appellant during the

course of CIT(A) proceedings. It is submitted that addition u/s 68 of the Income Tax Act, 1961 confirmed by the Ld. CIT(A) is on the basis assumptions, presumption, conjecture and surmises without understanding the facts of the case. It is therefore prayed to your honour that such additions confirmed by the Ld. CIT(A) should be deleted.

4. On the facts and circumstances of the case and in F law, the Ld. CIT(A) has erred in confirming the addition on account of unexplained Expenditure u/s 69C of the Income Tax Act, 1961 of Rs.36,527/- being 2.5% of sale value of Rs. 14,61,081/-. The Ld CIT(A) erred in confirming that alleged commission in cash paid was by appellant to the broker / exit providers for arranging the alleged manipulative sale transaction on which your appellant had claimed long term capital gain. It is submitted that addition u/s 69C of the Income Tax Act, 1961 confirmed by the Ld. CIT(A) is on the basis assumptions, presumption, conjectures and surmises and without understanding the facts of the case and without giving any opportunity of being heard in this matter. It is therefore prayed to your honour to delete such arbitrary additions confirmed by the Ld. CIT(A).

5. Your appellant craves to add, alter, or amend any of the grounds of appeal on or before the date of hearing of appeal.

3. The Brief facts of the case that, the assessee is a individual and derives income from salary, income from business, income from capital gains and income from other sources. The assessee has filed the return of income for AY 2010-11 on 13th July, 2010 disclosing a total income of Rs.1,78,172/- and the assessee has claimed exemption of Long term capital gains (LTCG) on sale of shares of M/s Nouvea Multi media Company Ltd u/s 10(38) of the Act of Rs.11,55,200/-. Whereas the Assessing Officer (A.O)

has received the information that the assessee was involved in the penny stock share transactions in the F.Y.2009-10 of trade value of Rs.14,61,081/-. The Assessing Officer has reasons to believe that the income has escaped the assessee and after recording the reasons for reopening has issued notice u/s. 148 of the Act. Subsequently, notice u/sec 143(2) and U/sec 142(1) of the Act were issued. The assessee has filed a letter dated 25.04.2016 to treat the return of income filed on 30-07-2010 as due compliance to notice. And the assessee has filed the objections against the reasons for reopening and were rejected. Further the Ld.AR of the assessee appeared from time to time and furnished the details. The A.O. found that the assessee has earned LTCG on sale of shares of M/S Nouveau Multimedia Limited and claimed exempt u/s 10(38) of the Act. Whereas the assessee has purchased 21,000 shares at Rs.10/- each paid up for 2,10,000/- on 10.02.1994 and 79,000 shares in January 1996 and out of the above shares, the assessee has sold 30,000 shares in December 2019 & January 2010 for Rs.14,61,081/- in F.Y.2009-10 through SEBI registered BSE brokers M/s Sykes &Ray Equities(I) Ltd.

4. The AO has dealt on the allotment /purchase letters, sales contract notes, bank statements and Demat Account Statement in respect of shares purchase and sale transactions and also relied on the various facts of shares price trends, modus operandi and the report of the kolkata investigation wing and has doubted the earning of Long Term Capital Gains (LTCG). The A.O finds that

there is a no correlation of the share price rise and the financial statements of the company. Finally the A.O was not satisfied with the explanations and material information and observed that the transactions are not genuine and made addition as unexplained cash credit u/s 68 of the Act of Rs.14,61,081/- and estimated commission expenditure @2.5% of trade value U/sec69C of the Act which works out to Rs.36,527/ and assessed the total income of Rs.16,75,780/- and passed the order U/sec143(3) r.w.147 of the Act dated 30-12-2016.

5. Aggrieved by the order, the assessee has filed an appeal before the CIT(A). The CIT(A) considered the grounds of appeal, submissions of the assessee and findings of the AO but has confirmed the action of the AO and dismissed the assessee appeal. Aggrieved by the CIT(A)order, the assessee has filed an appeal before the Hon'ble Tribunal.

6. At the time of hearing, the Ld. AR submitted that the CIT(A) has erred in sustaining the validity of reassessment proceedings and additions under section 68 & 69C of the Act overlooking the facts and submissions that the purchase & sale of shares are through banking channel and are genuine and the assessee has substantiated with various details with the both the authorities. Further, there is no scope for the AO to make the additions based on the surmises and conjectures as the assessee has filed the documentary material evidence in support of the claim. The Ld. AR explained the basis and reasons for purchase of

the shares credited to the demat account and holding from F.Y 95-96 to F,Y 2009-2010 and still the assessee holding the remaining shares and receiving the dividend income. The Ld. AR mentioned that no independent enquiry was conducted by the revenue. The Ld.AR substantiated the submissions with the fact sheet, paper book and judicial decisions and prayed for allowing the appeal. Contra, the Ld.DR submitted that the share transactions are not genuine and are doubted and the Ld.DR supported the order of the CIT(A).

7. Heard the rival submissions and perused the material on record. The Ld,AR envisaged that the CIT(A) has erred in dismissing the grounds of appeal pertaining to validity of re assessment and additions u/sec 68 & 69C of the Act. The Ld.AR submitted that the assessee has furnished the information with evidences of the allotment letters, purchase price, financial statements, and summary of shares sold in F.Y 2009-10, Ledger account, copies of bank statements, copy of contract notes for sale of impugned shares, demat account statement, copy of physical shares certificates evidencing the shares in the name of assessee etc.The assessee has purchased 21,000 shares at Rs.10/- each paid up for 2,10,000/- on 10.02.1994 and 79,000 shares in January 1996 and out of the above shares, the assessee has sold 30,000 shares in December 2019 & January 2010 for Rs.14,61,081/- in F.Y.2009-10 through SEBI registered BSE brokers M/s Sykes &Ray Equities(I) Ltd. The Ld.AR

demonstrated the evidence in support of sale of shares with the sale cum contract notes of the SEBI registered stock broker and settlement account placed at page 44 to 47 of the paper book and demat statement reflecting the shares at page 48 to 58. The Ld.AR referred to allotment advice dated 12.02.1994, 10-2-1994 and 5.2.1996 supporting the purchase of shares in F.Y 1993-94 & F.Y 1995-96 at page 79 & Page83 of the paper book. The contentions are that the assessee has filed the documentary evidence to justify the genuineness of the purchase and sales and the long term capital gains as the assessee has sold the shares on the recognized stock exchange where the STT has been paid in respect of listed shares and the shares are held for more 12 months. The Ld.AR demonstrated the allotment letter, bank statement, physical shares certificates, demat account for shares credit and period of holding. Further, the assessee is a regular investor in shares & securities in the stock market for more than 20 years. The assessee has substantiated the facts before the lower authorities and AO has not conducted any independent investigation and made additions on presumptions and conjectures. The Ld.AR relied on the judicial decisions of Honble High Court and Honble Tribunal in support of submissions. Further, the facts and circumstances of the present case are similar and identical and pertains to A.Y.2010-11 in respect of sale of Shares of M/s Nouveau Multi Media Ltd dealt by the Honble Tribunal Jaipur Bench in the case Shri. Manohar Lal Chugh

Vs. ITO Ward 6(1) in ITA No. 312/JP/2021 AY 2010-11 dated 31.08.2022 has granted relief observing at Page 19 Para 6 to 7 of the order read as under:

6. We have heard the rival contentions, perused the material available on record and gone through the orders of the lower authorities. The AO has doubted the transactions of purchase and sale of shares by the assessee of M/s. Nouvea Multi Media Ltd. on the basis of information received from the Directorate of Investigation that an organized racket of generating bogus entries of LTCG in penny stock has been unearthed as a result of investigation carried out through-out the country, wherein certain persons were found indulged in providing accommodation entries, inter-alia bogus Long Term Capital Gains which is claimed as exempt under section 10(38) of the IT Act by the beneficiaries in order to facilitate the beneficiaries to convert their black money into white without paying Income-tax. The AO has narrated the modus operandi of various entry providers which is a general statement so far as the indulgence of certain persons in providing the accommodation entry of bogus long term capital gains as well as other transactions. However, in the said narration of modus operandi there is nothing against the particular transaction of purchase and sale of shares by the assessee. The AO has specifically mentioned that during the course of enquiry in certain cases it has come to light that large scale manipulation has been done in the market price of shares of certain companies listed on Stock Exchange by a group of persons working as a syndicate for the purpose of providing entry of tax exempt bogus long term capital gains to large number of beneficiaries in lieu of unaccounted cash. These observations of the AO in the assessment order cannot constitute any tangible material or evidence to show that the transaction of the assessee is bogus being an accommodation entry. The AO in the show cause notice though referred the statements of Directors/entry operators, who have operated as entry providers/brokers, however, neither any documentary reference is made in the show cause notice or any such reference is made in the finding of the AO while holding the transaction as bogus by availing the accommodation entry of long term capital gain. The AO has either discussed the modus operandi of entry providers or the judgments on the issue but has not made any reference of any material or documentary evidence which reveals that the assessee has indulged in availing the accommodation entry of bogus long term capital gain. There is no dispute that once the assessee has claimed the long term capital gain from purchase and sale of shares which is exempt under section 10(38) of the

Act, the primary onus is on the assessee to substantiate his claim by producing the supporting evidence. We find that the assessee is a regular investor in shares. We also find that in the case in hand the assessee purchased 20,000 equity shares of M/s. Nouvea Multi Media Ltd. through Mawerick Share Broker Pvt Ltd. who is registered in BSE for a sum of Rs. 6,33,124/- which includes STT, Stamp Duty etc. vide Bill No. 546 dated 09.01.2008 and 0036 dated 15.01.2008. The shares were deposited in DMAT A/c with M/s. Alankit Assignment Ltd., Jaipur and the quantities of 20000 shares were credited on 24.01.2008. M/s. Nouvea Multi Media Ltd. was listed in stock exchange and the shares were purchased at the rates prevailing on the date of purchase in BSE. The assessee received 40000 Right Shares issued by the company later on. We find that the assessee has duly reflected all these shares in the Books of accounts as an Investment and on sale of shares, the assessee has claimed exempt LTCG in the return of income for the assessment year 2010-11. Thus it is clear that 20,000 shares acquired by the assessee on 15.01.2008 in Demat format as it is evident from the Demat Account and reflected in the Books of account for the year under consideration. We further note that the assessee produced the copy of purchase bills of these shares along with the bank statement showing the purchase consideration paid by the assessee through cheque along with copy of Transaction statement/Demat account, Contract note issued by the broker, copy of ledger account. The shares acquired by the assessee are duly reflected in the Demat account of the assessee. Once the shares are dematerialized and credited in the Demat account of the assessee, the holding of the shares by the assessee cannot be disputed. It is also not in dispute that assessee sold 20,000 shares held in the Demat account of the assessee during the year under appeal for a consideration of Rs. 20,03,929/- which was credited in Bank on 22.03.2010. The AO has treated the transaction of sale of 20,000 shares as bogus being accommodation entry but has not doubted the holding of the shares by the assessee to the tune of 20,000 shares in the Demat account of the assessee. Once the assessee has produced all the supporting evidences which include purchase bill, bank statement showing the payment of purchase consideration, Demat account, holding of shares in the Demat account, sale of the shares through Stock Exchange which are also reflected in the Demat account of the assessee and receipt of the sale consideration in the bank account of the assessee as it is evident from the bank account, statement of the assessee, then in the absence of any contrary material or evidence brought on record by the AO, the transaction of purchase and sale of the shares in question cannot be held as bogus merely on the basis of the investigation carried out by the Department in some other cases where some persons were found indulged in

providing accommodation entry. The AO in the entire assessment order has not made reference to single documentary evidence which can be said to be an incriminating material against the assessee to show that the assessee has availed accommodation entry of bogus Long Term Capital Gain. Therefore, the mere suspicion cannot be a ground for treating the transaction as bogus in the absence of any evidence or material on record by the AO. In the case in hand the assessee produced all the relevant documentary evidence to establish the genuineness of the transaction. Even if the AO doubted the transaction, then to establish that the transaction is bogus, the AO is required to produce the contrary material evidence so that the evidence produced by the assessee can be controverted. In the absence of such contrary material or evidence brought on record by the AO and the evidence produced by the assessee is otherwise independently verifiable being the documents in the shape of bank statement, Demat account, books of account and bills for which the assessee has no control or say, therefore, the said evidence cannot be manipulated by the assessee. Once the evidence produced by the assessee is not prepared or beyond the scope of any manipulation by the assessee, then the assessee has discharged his onus to prove the transaction of purchase and sale of shares and consequential capital gain. The Ld. A/R has filed all the possible documentary evidence relating to purchase and sale of the stock on which the LTCG was earned. All the details are filed in assessee's Paper Book and the same were filed before the Ld. AO.

The details filed are as under: S.No. Particulars Paper Book Page No. 1. Copy of Contract note of the Broker through whom the shares were sold. 102 2. Copy of Ledger Account maintained by him with the Broker 103-105 3. Copy of transaction statement with Prabhat Financial Services Ltd. 106 4. Copy of Bank statement of the assessee 107-109 In short, after the AO confronted the appellant with circumstantial evidences the Ld. A/R filed all possible documentary evidences in his possession. It is clear that AO has based his addition u/s 68 of the Act on the basis of statement of the entry operator and information received from the Investigation Wing of the Department. However in the statement of entry operator no question was ever put to the entry operator regarding transaction through the companies, through which alleged cash of appellant was routed. On one hand the AO has oral statements/oral evidences in the form of statement of entry operator (never confronted to the appellant); the appellant has rebutted these oral evidences by filing documentary evidences listed above. It is a settled law that documentary evidences will always carry more weight than the oral statements. After the oral statements were available to the AO, the appellant proved the oral statements to be incorrect by filing

documentary evidences. Thereafter the AO did not prove the documentary evidence to be untrue/ bogus/ non genuine. The AO never confronted the documentary evidence to the person whose oral statement was recorded & relied upon. Therefore the oral statement loses their evidentiary value in light of the documentary evidences placed by appellant. Even the oral statement is general and does not pin point or mention appellant name anywhere. Neither does it mention anywhere that cash from appellant was received & it was same cash which was routed back to the appellant through bank account. Considering the above documentary evidences, it clearly out weights the oral evidences relied upon.

6.1. It is settled position of law that addition cannot be made simply on the basis of statement alone. The same has to be substantiated and corroborated either by enquiries or by linking it with tangible material/ evidence. It is a settled law that statement, that too of 3rd person, alone cannot be treated as incriminating material for the purposes of making addition for assessment completed u/s 143(3). It has been held in many judgments that mere statement u/s 132(4) or u/s 131 is not sufficient to make an addition. A statement made must be relatable to some incriminating material or the statement must be made relatable to material by subsequent inquiry/investigations.

Hon'ble High Court of Rajasthan in the case of Mantri Share Brokers PL (96 taxmann.com 279) have held as under: Section 69B of the Income-tax Act, 1961 - Undisclosed investments (Burden of proof) - Whether where except statement of director of assessee-company offering additional income during survey in his premises, there was no other material either in form of cash, bullion, jewellery or document or in any other form to conclude that statement made was supported by some documentary evidence, said sum could not be added in hands of assessee as undisclosed investments - Held, yes Paras 10-11] [In favour of assessee]

Further, Hon'ble Delhi High Court in case of Harjeev Agarwal (2016) 70 taxmann.com 95 (Delhi) held thus: "...A plain reading of Section 132 (4) of the Act indicates that the authorized officer is empowered to examine on oath any person who is found in possession or control of any books of accounts, documents, money, bullion, jewellery or any other valuable article or thing. The explanation to Section 132 (4), which was inserted by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1st April, 1989, further clarifies that a person may be examined not only in respect of the books of accounts or other documents found as a result of search but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Act. However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books

of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB (1) read with Section 158B (b) of the Act, it is at once clear that a statement recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during search. The statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to for an assessment to be based on the statement recorded...."

The Hon'ble High Court in the above case has also observed that statements recorded under Section 132 (4) of the Act do not by themselves constitute incriminating material.

6.2. Further, the Ld. A/R has also taken a legal plea that no cross examination of the person, whose statement was relied upon, was granted despite specific request made to the AO. The aspect of not granting cross examination has specifically been answered by the Hon'ble ITAT Jaipur in the case of Shri Pramod Jain & Others in ITA Nos. 368 to 372/JP/2017 dated 31.01.2018. The relevant extract on the issue at page 24 to 28 are as under: "As regard the non grant of opportunity to cross examine, the Hon'ble Supreme Court in case of Andaman Timber Industries vs. CCE (supra) while dealing with the issue has held in para 5 to 8 as under:- "5. We have heard Mr.KavinGulati, learned senior counsel appearing for the assessee, and Mr. K. Radhakrishnana, learned senior counsel who appeared for the revenue. 6.According to us, not allowing the assessee to cross-examine the witness by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner as based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating

Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he as specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which could not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was no for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealer and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross —examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of crossexamination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the crossexamination and made the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000 , order dated 17.2.2005 was passed remitting the case back the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions. 8. 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." Therefore, the statement of witness cannot be sole basis of the assessment without given an opportunity of cross examination and consequently it is a serious flaw which renders the order a nullity. The Mumbai Special of the Tribunal in case of GTC Industries vs. ACIT (supra) had the occasion to consider the addition made by the AO on the basis of suspicion and surmises and observed in para 46 as under:-

"46. In situations like this case, one may fall into realm of 'preponderance of probability' where there are many probable factors, some in favour of the assessee and some may go against the assessee. But the probable factors have to be weighed on material facts so collected. Here in this case the material facts strongly indicate a probability that the

wholesale buyers had collected the premium money for spending it on advertisement and other expense and it was their liability as per their mutual understanding with the assessee. Another very strong probable factor is that the entire scheme of 'twin branding' and collection of premium was so designed that assessee-company need not incur advertisement expenses and the responsibility for sales promotion and advertisement lies wholly upon wholesale buyers who will borne out these expenses from alleged collection of premium. The probable factors could have gone against the assessee only if there would have been some evidence found from several searches either conducted by DRI or by the department that Assessee-company was beneficiary of any such accounts. At least something would have been unearthed from such global level investigation by two Central Government authorities. In case of certain donations given to a Church, originating through these benami bank accounts on the behest of one of the employees of the assessee company, does not implicate that GTC as a corporate entity was having the control of these bank accounts completely. Without going into the authenticity and veracity of the statements of the witnesses Smt. NirmlalaSundaram, we are of the opinion that this one incident of donation through bank accounts at the direction of one of the employee of the Company does not implicate that the entire premium collected all throughout the country and deposited in Benami bank accounts actually belongs to the assessee company or the assessee-company had direct control on these bank accounts. Ultimately, the entire case of the revenue hinges upon the presumption that assessee is bound to have some large share in so-called secret money in the form of premium and its circulation. However, this presumption or suspicion how strong it may appear to be true, but needs to be corroborated by some evidence to establish a link that GTC actually had some kind of a share in such secret money. It is quite a trite law that suspicion howsoever strong may be but cannot be the basis of addition except for some material evidence on record. The theory of 'preponderance of probability' is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee." Therefore, in the absence of any contrary material or evidence brought on record by the AO, the transaction of purchase and sale of the shares in question cannot be held as bogus merely on the basis of Report of the Investigation Wing of the Department in

some other cases where some persons were found indulged in providing accommodation entry, and further it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain.

6.3. The issue of penny stock and consequent additions made has elaborately dealt with by ITAT Jaipur Bench in the case of Pramod Jain & Others (supra) and relying on the decision of Hon'ble Rajasthan High Court in the case of CIT vs. Pooja Agarwal, 160 DTR 0198 (Raj.) deleted the addition by observing as under :- "In view of the above facts and circumstances of the case, we are of the considered opinion that the addition made by the AO is based on mere suspicion and surmises without any cogent material to show that the assessee has brought back his unaccounted income in the shape of long term capital gain. On the other hand, the assessee has brought all the relevant material to substantiate its claim that transactions of the purchase and sale of shares are genuine. Even otherwise the holding of the shares by the assessee at the time of allotment subsequent to the amalgamation/merger is not in doubt, therefore, the transaction cannot be held as bogus. Accordingly we delete the addition made by the AO on this account."

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

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

7. Ground No. 3 relates to commission paid for the accommodation entries is consequential to the issue involved in ground no. 2, therefore, when we have given a finding that the transaction of purchase and sale of shares and consequential Long Term Capital Gain cannot be treated as bogus, then the addition made by the AO on 31 ITA No. 312/JP/2021 Shri Manohar Lal Chugh, Jaipur. account of notional commission paid treating the same as undisclosed expenditure under section 69C will not be sustainable being consequential hence the same is deleted.

8. Similarly the Jurisdictional High Court of Bombay in the case of CIT Vs. Shyam R. Pawar, 54 taxmann.com 108 has observed as under:

Section 68 of the Income-tax Act, 1961 Cash credit (Share dealings) - Assessment years 2003-04 to 2006-07 Assessee declared capital gain on sale of shares of two companies. Assessing Officer, observing that transaction was done through brokers at Calcutta and performance of concerned companies was not such as would justify increase in share prices. held said transaction as bogus and having been done to convert unaccounted money of assessee to accounted income and, therefore, made addition under section 68 - On appeal, Tribunal deleted addition observing that DMAT account and contract note showed credit/details of share transactions; and that revenue had stopped inquiry at particular point and did not carry forward it to discharge basic onus Whether on facts, transactions in shares were rightly held to be genuine and addition made by Assessing Officer was rightly deleted Held, yes [Para 7] [In favour of assessee]

It was revealed during the course of inquiry by the Assessing Officer that the Calcutta Stock Exchange- words showed that the shares were purchased for code numbers S003 and R121 of STPL and RMPL pectively. Out of these two, only RMPL is listed in the appraisal report and it is stated to be involved in dus operandi It is on this material that the Assessing Offices holds that the transactions of sale and purchase of shares are doubtful and not genuine. In relation to assessee's role in all this, all that the Commissioner observed is that the assessee transacted through brokers at Calcutta, which itself raises doubt about the genuineness of the transactions and the financial result and performance of the company was not such as would justify the increase in the share prices. Therefore, he reached the conclusion that certain operators and brokers devised the scheme to convert the unaccounted money of the assessee to the accounted income and the assessee utilized the scheme Para 5]

The Tribunal 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. The Tribunal referred to the entire material and found that the investigation stopped at a particular point and was not cared forward by the revenue. A copy of the DMAT account, placed before the Tribunal showed the credit of share transaction. The contract notes in Form-A with two brokers were available which gave

details of the transactions. The contract note is a system generated and prescribed by the stock exchange. From this material, the Tribunal concluded that this was not mere accommodation of cash and enabling it to be converted into accounted or regular payment. The discrepancy pointed out by the Calcutta Stock Exchange regarding client code has been referred to. But the Tribunal concluded that same, by itself, is not enough to prove that the transactions in the impugned shares were bogus sham. The details received from stock exchange have been relied upon for the purposes of faulting the revenue in failing to discharge the basic onus. If the Tribunal proceeds on this line and concluded that inquiry was not carried forward and with a view to discharge the initial or basic onus, then such conclusion of the Tribunal cannot be termed as perverse. The conclusions as recorded in the Tribunal's order are not vitiated by any error of law apparent on the face of the record either.
[Para 6]

9. Hon'ble Supreme Court in the case of Pr. CIT Vs. Parasben Kasturchand Kochar, 130 taxmann.com 177 (SC) has observed as under:

Section 10(38) of the Income-tax Act, 1961 Capital gains Income arising from transfer of long-term securities (Shares) Assessment year 2014-15 Assessee-individual engaged in business of trading in shares claimed long term capital gains arising out of sale of shares as exemption under section 10(38) - Assessing officer denied claim and made certain additions into assessee's income on grounds that said gains were earned through bogus penny stock transactions and companies to whom sold shares belonged were bogus in nature Tribunal observing that assessee by submitting records of purchase bills, sale bills, demat statement, etc., had discharged his onus of establishing said transactions to be fair and transparent, same not being earned from bogus companies was eligible for exemption under section 10(38) High court by impugned order held that no substantial question of law. arose from Tribunal's order - Whether SLP against said impugned order was to be dismissed -Held, yes (Para 2) (In favour of assessee)

10. Similarly Hon'ble High Court in the case of Pr. CIT Vs. Prem Pal Gandhi, (401 ITR 0253) (P & H) has observed as under:

Capital gain-Share transaction-Addition-Deletion thereof-During course of assessment proceedings u/s 153A, it was noticed by AO that assessee had shown long term capital gain on sale of shares of company-AO treated share transaction as non-genuine transaction and amount was shown as long term capital gain on share transaction was added to income of assessee-CIT(A) deleted addition-Tribunal upheld order passed by CIT(A) and dismissed appeal of revenue-Held, assessee sold shares through MTL shares and Stock Broker limited which was SEBI registered Stock Broker-Payment for sale of shares was received through banking channels-All documentary evidence being in favour of assessee, deletion of addition made by CIT(A) was upheld by Tribunal-All these documentary evidences in favour of assessee were rejected by AO merely on basis of some casual replies given by assessee to AO-Documentary evidences were in favour of assessee and CIT(A) had passed very reasoned and speaking order-Dividend amount was received with regard to holding of shares and said amount was disclosed by assessee in his return of income and exemption was claimed accordingly-Thus, addition being without any logical basis was deleted-Revenue's appeal dismissed.

Held:

The CIT(A) examined the matter and the comments of the Assessing Officer in the remand report. It has been recorded by the CIT(A) that the purchase of shares in the financial year 2006-07 for an amount of Rs. 11 lakhs had been physically transferred in favour of the assessee in the books of the company namely GeeFCee Finance Limited. Further, the said shares were dematerialized and credited in the assessee's account maintained with depository participant i.e. HDFC on 16.10.2006. The dividend amount of Rs. 1,50,000/- had been received with regard to aforementioned holding of shares on 23.10.2007. The said amount had been disclosed by the in his return of income and exemption was claimed accordingly. Thus, the addition being without any logical basis was directed to be deleted. (Para 4)

Assessee had sold shares through MTL shaes and Stock Brokers Limited as is noted by Assessing Officer in reply to question No.24 which is a SEBI registered Stock Broker. Furthermore the payment for sale of shares was received through Banking channels. All these documentary evidences in favour of the assessee were rejected by Assessing Offiver merely on the basis of some casual replies given

by assessee to the Assessing Officer. However, the fact remains that all the documentary evidences are in favour of assessee and learned CIT(A) has passed a very reasoned and speaking order and we do not find any infirmity in the same."

11. The Hon'ble High Court of Bombay in the case of CIT Vs. Smt. Jamnadevi Agrawal, 328 ITR 656 (Bom) has observed as under:

Income-Cash credit-Genuineness of share transactions-Assessee offered long- term capital gains arising from sale of shares-On the basis of material seized during the search in the case of various assessee who belong to H group, AO did not accept the capital gains and treated the entire sale proceeds of the shares as income from undisclosed sources under s. 68-Not justified-Fact that the assessee in the group have purchased and sold shares of the same companies through the same broker cannot be a ground to hold that the transactions are sham and bogus, especially when documentary evidence has been produced to establish the genuineness of the sale-Company has confirmed that it has handed over the shares purchased by the assessee-Similarly, the sale of shares to the respective buyers is also established by producing documentary evidence-Purchase and sale price of the shares declared by the assessee is in conformity with the market rates prevailing on the respective dates-Thus, the fact that some of the transactions were off-market transactions cannot be a ground to treat the transactions as sham transactions-Tribunal has arrived at a finding of fact that the transactions were genuine-Nothing has been brought on record to show that the findings recorded by the Tribunal are contrary to the documentary evidence-Also, no fault can be found with the finding recorded by the Tribunal that the cash credits in the buyers' bank accounts cannot be attributed to the assessee-Therefore, the decision of the Tribunal is based on findings of fact and no substantial question of law arises.

The fact that the assessee in the group have purchased and sold shares of similar companies through the same broker cannot be a ground to hold that the transactions are sham and bogus, especially when documentary evidence was produced to establish the genuineness of the claim. From the documents produced, it is seen

that the shares in question were in fact purchased by the assesseees on the respective dates and the company has confirmed to have handed over the shares purchased by the assesseees. Similarly, the sale of the shares to the respective buyers is also established by producing documentary evidence. It is true that some of the transactions were off-market transactions. However, the purchase and sale price of the shares declared by the assesseees were in conformity with the market rates prevailing on the respective dates as is seen from the documents furnished by the assesseees. Therefore, the fact that some of the transactions were off-market transactions cannot be a ground to treat the transactions as sham transactions. The statement of the broker P that the transactions with the H Group were bogus has been demonstrated to be wrong by producing documentary evidence to the effect that the shares sold by the assesseees were in consonance with the market price. On perusal of those documentary evidence, the Tribunal has arrived at a finding of fact that the transactions were genuine. Nothing is brought on record to show that the findings recorded by the Tribunal are contrary to the documentary evidence on record. The Tribunal has further recorded a finding of fact that the cash credits in the bank accounts of some of the buyers of shares cannot be linked to the assesseees. Moreover, in the light of the documentary evidence adduced to show that the shares purchased and sold by the assesseees were in conformity with the market price, the Tribunal recorded a finding of fact that the cash credits in the buyers' bank accounts cannot be attributed to the assesseees. No fault can be found with the above finding recorded by the Tribunal. Therefore, the decision of the Tribunal is based on finding of facts. No substantial question of law arises from the order of the Tribunal.-Asstt. CIT vs. Kamal Kumar S. Agrawal (Indl.) & Ors. (2010) 41 DTR (Nag) (Trib) 105: (2010) 133 TT (Nag) 818 affirmed; Sumati Dayal vs. CIT (1995) 125 CTR (SC) 124: (1995) 80 Taxman 89 (SC) distinguished. (Paras 11 to 14 & 16)

Conclusion:

Assesseees having established the genuineness of purchase and sale of shares by producing documentary evidence and declaring the purchase and sale price of shares in conformity with the market rates prevailing on the respective dates, the finding of the Tribunal that the transactions were genuine is a finding of fact based on documentary evidence on record and, therefore, no substantial question of law arises from the order of the Tribunal deleting the addition under s. 68.

12. Considering the submissions and the information find that the assessee has furnished the financials, details of price trend of shares since 2005 to 2023 and the balance sheet of Nouveau Global Ventures Limited (earlier Known as M/s Nouveau Multi Media Ltd) as at 31 March 2022 to substantiate the listing/quote of shares, existence of the company and to prove the genuineness of share transactions of the assessee. The AO has doubted the purchase and sale of shares and observed that the price rise is not commensurate with the financials of the company. The assessee has substantiated with all details and information and the revenue could not make out a case that there is unaccounted money transactions took place in the hands of the assessee and the AO has relied on the investigation report and treated the long term capital gains on sale of shares as not genuine. Further the A.O. has not made any enquiry or independent investigation and relied on the statements. The fact remains that the assessee is a regular investor in shares and has submitted the requisite details in respect of purchase and sale of shares and were not disproved. The transaction of purchase and sale of shares is through banking channel. Further as discussed in the above paragraphs, the Honble Tribunal dealt on the same scrip of share and for the same assessment and has allowed the assessee appeal. Accordingly, considering facts, circumstances, ratio of judicial decisions, submissions, evidences and rely on the judicial precedents as discussed

above and set aside the order of the CIT(A) and direct the assessing officer to delete the additions and allow the grounds of appeal in favour of the assessee.

13. Since, the grounds of appeal on merits are decided in favour of the assessee, hence the grounds of appeal with respect to validity of reassessment proceedings raised by the assessee becomes academic and are left open.

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

Order pronounced in the open court on 24.07.2023.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated: 24/07/2023

Mrs. Urmila

Copy of the Order forwarded to:

1. The Appellant,
2. The Respondent
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,
(Dy./Asstt.Registrar)ITAT,
Mumbai