

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

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

आयकर अपील सं./ITA No. 77 & 64/JP/2023
निर्धारण वर्ष / Assessment Years : 2014-15 & 15-16.

Smt. Kanta Agarwal, B-1, Nulite Colony, Tonk Road, Jaipur.	बनाम Vs.	The Income Tax Officer, Ward 6(5)/The DCIT Circle-6, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. AAMPA 9615 K		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Sarwan Kumar Gupta, Advocate.

राजस्व की ओर से / Revenue by : Smt. Monisha Choudhary (JCIT)

सुनवाई की तारीख / Date of Hearing : 19/07/2023
उदघोषणा की तारीख / Date of Pronouncement: 5/10/2023

आदेश / ORDER

PER: SANDEEP GOSAIN, J.M.

These two appeals by the assessee are directed against two separate orders dated 10.02.2023 and 12.10.2022 of Id. CIT (A), National Faceless Appeal Centre (NFAC), Delhi passed under section 250 of the Income Tax Act, 1961 for the assessment years 2014-15 & 15-16 respectively. The assessee has raised the following grounds :-

ITA NO. 77/JP/2023

A.Y. 2014-15.

1. Under the facts and circumstances of the case the Id. NFAC was not justified in confirming the addition as made Id. AO of Rs. 21,39,336/- on account of alleged unexplained credit under section 68 for alleging Bogus

Exemption claimed u/s 10(38) of the Act, during the year without evidence and without considering the materials and explanations available on record in their true perspective and sense.

2. Under the facts and circumstances of the case the Id. NFAC was not justified in confirming the addition as made by AO of Rs. 1,28,360/- on account of commission u/s 69C without appreciating the facts available on records and without considering them in their true perspective and sense therefore complete addition should be deleted.
3. The Id. NFAC has grossly erred in confirming the addition as made by Id. AO on the basis of statement recorded of the persons which are not concern with the company which shares have been traded though the concerns persons list have been provided by the assessee.
4. The Id. NFAC has grossly erred in confirming the addition made by Id. AO for Rs. 83,493/- under section 14A of IT Act, 1961 without appreciating that the assessee did not claim any expenses out of such exempted income that is why no expenditure should have been disallowed on account of this exempted income.
5. The Id. NFAC has grossly erred in confirming the addition on account of bogus long term capital gain u/s 10(38) and commission u/s 69C without having any corroborative material on record against the complete valid chain of documents as submitted by the assessee.
6. The Id. NFAC has grossly erred in confirming the addition as made by Id. AO by denying opportunity of cross examination of the persons (witness) on which recorded statements are the basis of addition though the Apex courts verdict in ANDAMAN TIMBER strongly recommended such opportunity of cross examination.
7. The Id. NFAC has grossly erred in confirming the action of the Id. AO of making the addition of Long Term Capital Gain as unexplained income u/s 68 and commission u/s 69C despite off the assessee has followed complete procedure as described u/s 10(38) of the Act.
8. The Id. NFAC has grossly erred in confirming the action of Id. AO for charging interest u/s 134A, B and C of the Act.
9. The appellant reserved her right to add, amend or alter the grounds of appeal on or before the date of appeal hearing.

ITA NO. 64/JP/2023 A.Y. 2015-16 :A.Y. 2015-16.

1. Under the facts and circumstances of the case the Id. NFAC was not justified in confirming the addition as made Id. AO of Rs. 9,68,549/- on account of alleged unexplained credit under section 68 for alleging Bogus Exemption claimed u/s 10(38) of the Act, during the year without evidence and without considering the materials and explanations available on record in their true perspective and sense.
2. Under the facts and circumstances of the case the Id. NFAC was not justified in confirming the addition as made by AO of Rs. 72,238/- on account of commission u/s 69C without appreciating the facts available on records and without considering them in their true perspective and sense therefore complete addition should be deleted.
3. The Id. NFAC has grossly erred in confirming the addition as made by Id. AO on the basis of statement recorded of the persons which are not concern with the company which shares have been traded though the concerns persons list have been provided by the assessee.
4. The Id. NFAC has grossly erred in confirming the addition on account of bogus long term capital gain u/s 10(38) and commission u/s 69C without having any corroborative material on record against the complete valid chain of documents as submitted by the assessee.
5. The Id. NFAC has grossly erred in confirming the addition as made by Id. AO by denying opportunity of cross examination of the persons (witness) on which recorded statements are the basis of addition though the Apex courts verdict in ANDAMAN TIMBER strongly recommended such opportunity of cross examination.
6. The Id. NFAC has grossly erred in confirming the action of the Id. AO of making the addition of Long Term Capital Gain as unexplained income u/s 68 and commission u/s 69C despite off the assessee has followed complete procedure as described u/s 10(38) of the Act.
7. The Id. NFAC has grossly erred in confirming the action of Id. AO for charging interest u/s 134A, B and C of the Act.
8. The appellant reserved her right to add, amend or alter the grounds of appeal on or before the date of appeal hearing.

Since common grounds are involved in both these appeals, therefore, these appeals are being disposed off by this combined order for the sake of convenience. I first take up appeal in ITA No. 77/JP/2023 for the assessment year 2014-15 and the decision arrived at will be applicable to other appeal also i.e. ITA NO. 64/JP/2023.

ITA NO. 77/JP/2023 A.Y. 2014-15 :

2. The brief facts of the case are that the assessee is an Individual and derives income from business, house property, capital gains and other sources. She e-filed her return of income on 27.09.2014 for the assessment year 2014-15 declaring total income of Rs. 5,04,310/- claiming exempt Long Term Capital Gain of Rs. 21,39,336/- under section 10(38) of the Income Tax Act, 1961. The case of the assessee was selected for scrutiny under CASS and accordingly, notice under section 143(2) of the IT Act, 1961 was issued on 18.09.2015 and the same was duly served on the assessee. The assessee was further issued notice under section 142(1) along with questionnaire on 20.06.2016. In compliance to the said notice, the assessee furnished relevant details/documents produced and justification obtained on the trading results, income shown and expenses/exemptions claimed were put to test check and placed on record and the case was discussed with the Id. A/R. Later on, information was received from Directorate of Investigation that an organized racket of generating bogus entries of LTCG in penny stocks has been unearthed as a result of detailed investigations. Statements of certain individuals relating to such bogus entry providers/beneficiaries were recorded during action under section 133A of the IT Act. It has been manifestly accepted by them that such penny stock companies are the conduit for converting untaxed money brought on record by paying no taxes

in the garb of exempted income. The investigation finally identified 84 such penny stock companies which were involved in the pool of the entry providers' syndicate. M/s. Unno Industries Limited is found to be one of such penny stock companies in which the assessee has made transactions. SEBI had issued certain directives regarding activities of some scrips. Thereafter, the BSE on the instance of the SEBI, vide its order dated 04.05.2015 has suspended trading in several scrips including Unno Industries Limited with a finding that price in these scrips are rigged. As a result of such investigations and search/survey the beneficiaries of such bogus LTCG were identified. The assessee appellant is also one of the beneficiary and as per details furnished by the assessee, it is noticed that she claimed exemption under section 10(38) of the IT Act, 1961 from bogus scrip transactions during the year as under :-

Name of company	Sale price (in Rs.)	Purchase price (in Rs.)	Transfer expenses	Exempt income claimed u/s 10(38) (In Rs.)
M/s. Unno Industries Ltd.	22,58,954/-	1,19,618/-	Claimed Nil	21,39,336/-
			Total :	21,39,336/-

During the course of assessment proceedings, the assessee explained that the assessee has purchased 80 Equity shares of M/s Pinnacle Vintrade Pvt Ltd. for a consideration of Rs.1,00,000/- on 18/10/2011, thereafter on 23/03/2012 Pinnacle Vintrade Pvt Ltd. allotted Bonus Shares in the ratio of 90:1 due to which the assessee got 7200 Bonus shares from the company resulting total 7280 shares. Later on Pinnacle Vintrade got amalgamated with UNNO Industries Ltd. under the order of Bombay High court therefore each equity share of Pinnacle Vintrade face value of

Rs. 10/- each received on share of UNNO Industries Ltd. face value of Rs. 10/-, hence assessee got 7280 shares of UNNO industries Ltd. That on 28/03/2013 each share of UNNO Industries got splitted into 10 Equity share of Rs. 1/- each thus the assessee got 72800 shares of Rs. 1/- each in lieu of his holding 7280 shares of Rs. 10/- each. Finally the assessee sold out 72800 Equity shares of UNNO Industries Ltd. for a consideration of Rs.22,64,080/- on 16/05/2013 and declared LTCG of Rs. 21,39,336/- and claimed exemption u/s 10(38) of the IT Act.

2.1 The A.O. noted that the assessee appellant had claimed exempt income on Long Term Capital Gain of Rs. 21,39,336/- on sale of shares of Unno Industries Ltd. It was also detected that M/s. Unno Industries Ltd. is a penny stock listed company with a very small capital base but its market capitalization is many times of its capital base. In the statement recorded by the Investigation Wing, Shri Sanjay Vora, Regional Director of M/s. Anand Rathi Shares & Stock Brokers Ltd. and Shri Deepak Patwari, Entry Operators/Syndicates of the share broking companies admitted about complete procedure of pre-arranged LTCG entries and their involvement through brokerage companies. In reply to Q. No. 60, Shri Sanjay Vora confirmed about involvement of Penny Stock company i.e. M/s. Unno Industries in such arrangement. Shri Deepak Patwari in his statement u/s 131 dated 22.07.2013 has accepted in the answer to question no. 10 that Scripts of different companies which are listed in BSE have been purchased through brokers by the instruction of financier to whom he manages the fund. Accordingly, a show cause notice was issued to the assessee vide letter dated 04.11.2016 asking the assessee to furnish explanation on or before 21.11.2016 failing which it was proposed that the whole would be treated as an

attempt to introduce undisclosed income and LTCG amounting to Rs. 21,39,336/- was proposed to be added on account of undisclosed income. The assessee vide reply dated 28.11.2016 submitted that since purchase was made through payment by account payee cheques and shares were allotted to her by the renowned broker at BSE, it was a genuine transaction. Secondly, sale was made online after paying STT at the prevalent market rates, therefore sale transactions were also genuine. The AO considered the above submissions of the assessee but did not accept the contentions of the assessee. The AO concluded that the alleged LTCG shown by the appellant on account of sale/purchase of shares of Unno Industries Ltd. is a bogus transaction and it actually represents unaccounted money routed back to appellant in the garb of LTCG. Regarding commission @ 6%, the assessee has denied having paid any commission. However, the AO on the basis of statements recorded under section 132(4) of the Act, of syndicate members of bogus entry providers which include promoters/Directors of penny stock companies, share brokers etc. observed that it is beyond doubt the entry operators charged commission for providing bogus entry of LTCG. Accordingly, the AO held that the assessee paid commission @ 6% in cash in lieu of bogus LTCG entry shown from artificial trading in penny stock bogus i.e. Unno Industries Ltd. Thus, the AO added Rs. 21,39,336/- to total income of assessee under section 68 of the Act and commission paid @ 6% to the tune of Rs. 1,28,360/- was added total income of the assessee under section 69C of the Act and simultaneously disallowed Rs. 83,493/- under section 14A. Thus the AO completed the assessment at the total income of Rs. 28,55,499/-. Aggrieved by the order of AO, the assessee preferred appeal before the Id. CIT(A). The Id. CIT (A) after detailed discussion and considering various judicial pronouncements, sustained

the additions of Rs. 21,39,336/- under section 68 on account of sale of shares claiming exempt LTCG under section 10(38), Rs. 1,28,360/- under section 69C on account of commission and Rs. 83,493/- under section 14A.

3. Now the assessee is in appeal before us.

Ground No. 1 to 7 relate to addition made under section 68 on account of sale of shares claiming exempt LTCG under section 10(38), addition made on account of alleged commission u/s 69C and addition made under section 14A of the Act.

4. Before us, the Id. A/R for the assessee submitted as under :

“ (i) Assessee is a regular investor in shares;

The assessee is regularly dealing in Shares as investments in support of it copy of ITR, computation of last 3 Years (including instant year) are being filed and enclosed herewith marked as **Annexure 1**

The instant transaction of Capital Gain as under questioned is sufficiently backed by complete supporting documents which established the genuineness and correctness of the Transaction.

The details of Demat account held by the assessee during F.Y 2010-11 TO 2013-14 is as under:

Demat Account No.	Depository Participant	Type	Holding Statement as on 31-03-2014	Date Opening of A/C
120690000002560	MOTISONS SHARES PVT LTD (12069000)	SOLE	Enclosed	01/04/2011

- (ii) Thus from the above it is clear the assessee having demat a/c since 2011. During the course of assessment proceedings we have provided the Details of Brokers along with the address and registration no. which is as under:

(a) MOTISONS SHARES PVT LTD-(From 2011-Continue Till this A.Y) DP of Central Depository Services (I) Ltd. (Member of Bombay Stock Exchange Ltd.)

Address- Motisons Tower, 5th Floor, SB-110, Lal Kothi, Tonk Road, Jaipur.

SEBI Registration No : INB 231298135

- (iii) The assessee had filed the consolidated details of all unique ISIN equity/shares bought or sold during the F.Y 2013-14 in the required format to the AO. There apart all the contract notes i.e sales and purchases bills related to the above mentioned transactions of shares has also been filed. Thus it cannot be said that the assessee has made investment for earning abnormal high bogus profit in short period.

1. Investment has not been made in Alleged Penny Stock: The Id. AO has treated the Unno Industries Ltd as Penny stock Company, which is wrong as per following details. Because the Assessee has firstly invested an amount of Rs. 1,00,000/- in the 80 Equity shares of M/s Pinnacle Vintrade Pvt Ltd. which were purchased on dated 18/10/2011 from a broker M/s Uniglory Developers Pvt Ltd. the payment for this purchase has been shown as paid by NEFT on 26/03/2012 through OBC Bank, before that on 23/03/2012 the assessee received Bonus Shares in the ratio of 1:90 therefore she hold 7280 Shares as on that date. Later on 18/01/2013 the Pinnacale Vintrade Pvt Ltd. has been Amalgamated into UNNO Industries Ltd. thereafter on dated 12/02/2013 the shares of Amalgamated Company (Unno Industries Ltd.) has been split off in the ratio 1:10 thus now the assessee was holding 72800 equity shares of this company. Which were dematerialized and showing in Dmat account on 20/04/2013. Finally

Traded as on 16/05/2013 through stock exchange to earn a good amount of profit for Rs. 21,39,336/- after a gap of 1 and a Half Year around.

Thus the assessee has originally made investment in M/s Pinnacle Vintrade Pvt Ltd., which is nowhere found Penny Stock thereafter converted in to Unno Industries Ltd. under the order of Honorable Bombay High court, and it was not in the control of the assessee on conversion which has been done under the instruction of High court and the evidence has been filed which has not been disputed by the Id. AO. Thus the allegation and provision as applied by the Id. AO is not applicable in the case of assessee.

2. INVESTMENT WAS MADE OUT OF OWN FUNDS; The Id. AO nowhere disputed the source of funds, as assessee has invested from its own funds, payment to share broker for the above transaction is disclosed as per the bank account of Party enclosed herewith **(PB -6-8)**.

3. TRANSACTION EVIDENCED WITH COMPLETE CHAIN OF DOCUMENTS;

(i) That the contract note for sales of shares of Unno Industries Ltd. (Converted from Pinnacle Vintrade Pvt Ltd) are being enclosed herewith**(PB-1)**.

(ii) Ledger of Broker through Shares of Unno Industries Ltd. have sold out is being enclosed herewith **(PB-2)**

(iii) Copy of relevant part of Bank statement where sales of Unno Industries Equity Shares have been deposited is being enclosed here with **(3A-3E)**

(iv) That Demat statement to prove inward and Delivery of shares is being enclosed herewith **(PB -12)**.

(v) The investment in the said shares has been done by the assessee as per the information disclosed in the newspapers / Internet at that time and as per own will.

(vi) That copy of contract note of share purchased is enclosed herewith **(PB-4-5)**.

(vii) Similarly relevant part of Bank statement for showing the payment made for purchase of shares of Pinnacle Vintrade Pvt Ltd. and receipt thereof are being enclosed **(PB-6-8)**

(viii) Confirmation from Uniglory Developers Pvt Ltd in support of above purchase is being attached **(PB-6)**

(ix) Letter issued by Registrar (Purva Sharegistry (India) Pvt Ltd.) intimated to Assesse about allotment of Bonus Shares is being attached **(PB-9)**

(x) Letter issued by Unno Industries Ltd. to the assessee intimating about approval of Amalgamation/Arrangement scheme and ratio of shares to be allotted in new company enclosed **(PB-10)**

(xi) Letter issued by Purva Sharegistry (India) Pvt Ltd. for intimation about allotment of Shares of Unno Industries to be allotted to the assessee after Amalgamation/Arrangement, enclosed **(PB-11)**

(xii) If the assessee gets good amount of profit on such sale it means not that same is bogus unless not proved. The assessee placed the purchase order with broker verbally as general trend in this market. The amount was received through cheque which was verifiable from Copy of Bank Statement and ledger a/c of Broker enclosed herewith for the relevant period **(PB-3A-3E)**.

By perusing aforementioned chain of documents of alleged transaction it has been established that such transaction have come across almost more than 10-15 persons, each and every persons has separate

address and identity, some of them are body corporate and some of them are Banking Institutions therefore it is hardly impossible to manage such transaction by managing each and every person including Honorable Bombay High court through whose orders Amalgamation process have been completed. It is also notable that each and every part of transaction has been accepted by the Ld. AO during the course of assessment proceedings and no disputes have been raised except some presumptions/assumption. Presumption cannot take the place of tangible material as placed on record.

(xiii) In the assessee's case also, no direct evidence is brought on record by the lower authorities to hold that assessee introduced his own unaccounted money by way of bogus LTCG. The report / statement relied by the Id. AO cannot provide any evidence against the assessee to hold that he is a beneficiary to the modus operandi adopted by different entities / brokers / entry providers. Therefore, in view of the above judgment of Special Bench, the various judgments relied upon by the lower authorities are irrelevant in as much as the said judgments are based on conclusions drawn on the basis of circumstantial evidences only without any material evidence on record.

(xiv) It is submitted that the assessee has furnished all the evidences in support of its claim that he earned LTCG on transaction of his investment in shares. The purchase of shares has been accepted by the AO in the year of its acquisition and thereafter, until the same were sold. As we have already stated that the assessee is regularly investing in shares as can be seen from the various shares appearing in his balance sheet and in the Demat account. The off-market transaction for purchase of shares is not illegal. The transactions were all through account payee cheque and the same is reflected in the Demat account. The sale of shares suffered STT, brokerages, etc. In these circumstances, it cannot be held that the transaction is bogus.

Reliance in this connection is placed on the following decisions:

- (a) The Honorable Supreme Court in the matter of Principal Commissioner of Income-tax -1 v. **Parasben kasturchand Kochar reported at (2021)** 130 Taxmann.com177(SC) has confirmed the order of Honorable Gujrat HC where it has held;

"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 appellant after earning of the long term capital gain.

10. Learned A.R. contention is that no statement of the Investigation Wing was given to the assessee which has any reference against the assessee.

11. In support of its contention, learned A.R. also cited an order of Coordinate Bench in ITA No. 62/Ahd/2018 in the matter of *Mohan Polyfab (P.) Ltd. v. ITO* wherein ITAT has held that A.O. should have granted an opportunity to cross examine the person on whose statement notice was issued to the assessee for bogus long term capital gain. But in this case, neither statement was supplying to the assessee nor cross examination was allowed by the learned A.O. Therefore, in our considered opinion, assessee has discharged his onus and no addition can be sustained in the hands of the assessee."

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.”

Here also the same position and directly applicable on the present case.

(b) CIT vs. Smt. Pooja Agrawal DBIT Appeal No. 385/2011 dated 11.09.2017 (Raj)(HC);

In this decision, the Hon'ble High Court approved the following finding of the ITAT reproduced at Para 12 of the order:

“Contention of the AR is considered. One of the main reasons for not accepting the genuineness of the transactions declared by the appellant that at the time of survey the appellant in his statement denied having made any transactions in shares. However, subsequently the facts came on record that the appellant had transacted not only in the shares which are disputed but shares of various other companies like Satyam Computers, HCL, IPCL, BPCL and Tata Tea etc. Regarding the transactions in question various details like copy of contract note regarding purchase and sale of shares of Limtex and Konark Commerce & Ind. Ltd., assessee's account with P.K. Agarwal & co. share broker, company's master details from registrar of companies, Kolkata were filed. Copy of depository a/c or demat account with Alankrit Assignment Ltd., a subsidiary of NSDL was also filed which shows that the transactions were made through demat a/c. When the relevant documents are available the fact of transactions entered into cannot be denied simply on the ground that in his statement the appellant denied having made any transactions in shares. The payments and receipts

are made through a/c payee cheques and the transactions are routed through Kolkata Stock Exchange. There is no evidence that the cash has gone back in appellants's account. Prima facie the transaction which are supported by documents appear to be genuine transactions. The AO has discussed modus operandi in some sham transactions which were detected in the search case of B.C. Purohit Group. The AO has also stated in the assessment order itself while discussing the modus operandi that accommodation entries of long term capital gain were purchased as long term capital gain either was exempted from tax or was taxable at a lower rate. As the appellant's case is of short term capital gain, it does not exactly fall under that category of accommodation transactions. Further as per the report of DCIT, Central Circle-3 Sh. P.K. Agarwal was found to be an entry provider as stated by Sh. Pawan Purohit of B.C. Purihit and Co. group. The AR made submission before the AO that the fact was not correct as in the statement of Sh. Pawan Purohit there is no mention of Sh. P. K. Agarwal. It was also submitted that there was no mention of Sh. P. K. Agarwal in the order of Settlement Commission in the case of Sh. Sushil Kumar Purohit. Copy of the order of settlement commission was submitted. The AO has failed to counter the objections raised by the appellant during the assessment proceedings. Simply mentioning that these findings are in the appraisal report and appraisal report is made by the Investing Wing after considering all the material facts available on record does not help much. The AO has failed to prove through any independent inquiry or relying on some material that the transactions made by the appellant through share broker P.K. Agarwal were non-genuine or there was any adverse mention about the transaction in question in statement of Sh. Pawan Purohi. Simply because in the sham transactions bank a/c were opened with HDFC bank and the appellant has also received short term capital gain in his account with HDFC bank does not establish that the transaction made by the appellant were non genuine. Considering all these facts the share transactions made through Shri P.K. Agarwal cannot be held as non-genuine. Consequently denying the claim of short term capital gain made by the appellant before the AO is not approved. The AO is therefore, directed to accept claim of short term capital gain as shown by the appellant."

- (c) **Recently the Honorable ITAT, Jaipur Bench in the case of Manohar lal Chug in ITA No. 312/JP/2021 Dated;31/08/2022** has deleted the additions under the

same facts and circumstances by following the many decisions as described in this submission namely, CIT vs. Pooja Agarwal (supra) as well as in case of PCIT vs. Pramod Jain & Others (supra) (copy enclosed),

(d) Recently the Honorable ITAT Jaipur Bench has observed in the matter of Shri Pramod Jain Vs. DCIT, Jaipur in ITA 368 & 372/JP/2017 as follows;

“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 ITA No. 368 & 372/JP/2017 Shri Pramod Jain Vs. DCIT, Jaipur. 31 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.”

(e) In the case of CIT V. Rungta Properties Private Limited [ITA No. 105 of 2016] (Cal HC) – In this case the Hon'ble Calcutta High Court affirmed the decision of this tribunal, herein, the tribunal allowed the appeal of the assessee where the Id AO did not accept the explanation of the assessee in respect of his transactions in alleged penny stocks. The Tribunal found that the Id AO disallowed the loss on trading of penny stock on the basis of some information received by him. However, it was also found that the Id. AO did not doubt the genuineness of the documents submitted by the assessee. The Tribunal held that the Id AO's conclusions are merely based on the information received by him. The appeal filed by the revenue was dismissed.

- 4. Shares held more than 1 and half year:** The allegation of the Id. AO that the shares have been held for short period, in this type of transaction it is absolutely wrong as the impugned shares were purchased on dated 18/10/2011 in the name of Pinnacle Vintrade Pvt Ltd which were stuck in the process of Amalgamation/Arrangement with Unno Industries Ltd therefore dematerialized on 20/04/2013. Further there is no specific reason for delay in dematerialization. However shares are sold for Rs. 22,66,217/- on 20/05/2013. .
- 5.** Before the assessing officer assessee has filed a detailed reply with various evidences and material as attached as **annexure A**. However the Ld. AO has not rebutted all this reply and evidences with the help of any contrary evidences or material.
- 6. AO alleged without bringing any corroborative/tangible material in his support:** The Id. AO has made the addition u/s 68. In this regard we would like to submit that the assessee has claimed an amount of Rs. 21,39,336/- as Long Term Capital Gain on sale of Shares of Unno Industries Ltd. which is exempted u/s 10 (38), the transaction entered by the assessee in terms of Purchase and Sales of Shares of Pinnacle Vintrade Pvt Ltd are not bogus. Allegation not proved with the help of any documentary evidence, since the genuineness of the same can be verified with all the required enclosures which are enclosed herewith. Therefore said amount cannot be added back u/s 68 and 69C to the returned income. As we have already mention that the assessee is investing in shares on regular basis, as an evidential proof, ITR of last 3 Assessment Years along with the transaction statement has already been enclosed which further proved the authenticity of the transaction. Assessee has undertaken/followed these transactions with proper procedure and has proper records/documents of Purchase, holding and sale of such Shares. Assessee has also maintained proper accounts with the Broker. Accordingly exemption claimed under the said section cannot be denied.

7. Directly covered matter : It is submitted that the above matter is now directly covered by the decision of this Honable Bench in the case of assessee's group cases namely Shri Prabha Agarwal V/s ACIT Circle 6, Jaipur in ITA No. 163-164/JPR/2021 dated 11.10.2022. Wherein under the same facts and circumstances the Honable Bench has deleted the entire addition by holding as under vide para 6 to 6.4 at pages 34 to page 46 :-

"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. Unno Industries 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 80 equity shares of M/s. Pinnacle Vintrade Pvt. Ltd. through Uniglory Developers Pvt. Ltd. for a consideration of Rs. 1,00,000/- on 18.10.2011. Later on after receiving Bonus shares in the ratio of 90:1 (7280) and having amalgamation into Unno Industries Ltd. under the order of Hon'ble Bombay High Court, and splitting into 1:10 (72800) sold out for a consideration of Rs. 22,66,217/- in the month of May, 2013. The assessee was maintaining Demat Account No. 1206900000002594 with Motisons Shares Pvt. Ltd. and Demat Account No. 1201060500390497 with Anand Rathi Share And

Stock Brokers Ltd. The shares were credited in DP Account of assessee appellant as maintained with her Share Broker named Motisons Shares Pvt. Ltd. and Anand Rathi Share and Stock Brokers Ltd. respectively A copy of DP Account statement of assessee appellant maintained by her Broker is placed on record as Annexure-16. M/s. Unno Industries Ltd. was listed in stock exchange and the shares were purchased at the rates prevailing on the date of purchase in BSE. 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 2014-15. Thus it is clear that 72800 shares acquired by the assessee on 12.02.2013 after amalgamation with M/s. Unno Industries Ltd. and credited in DP Account of the assessee maintained with her broker M/s. Motisons Shares Pvt. Ltd. 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 DP account of the assessee. Once the shares are dematerialized and credited in the DP account of the assessee, the holding of the shares by the assessee cannot be disputed. It is also not in dispute that assessee sold 72800 shares held in the DP account of the assessee during the year under appeal for a consideration of Rs. 22,68,488/-. The AO has treated the transaction of sale of 72800 shares as bogus being accommodation entry but has not doubted the holding of the shares by the assessee to the tune of 72800 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.	1-2
2.	Copy of Financial Ledger Account maintained by him with the Broker	3
3.	Copy of purchases bill dated 18.10.2011 of Uniglory Developers Pvt. Ltd.	8
4.	Copy of Bank Statement of the assessee	4-7
5.	Copy of Bank Statement/receipt/confirmation of account (OBC)	9-12
6.	Intimation of declaration of Bonus Shares	13
7.	Intimation of Shares allotment of Unno Industries Limited	14-15
8.	Copy of DP Account statement as maintained by Broker	16

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 losses 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 weight 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 reliable to some incriminating material or the statement must be made reliable 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 cross examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross examination and made the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000 , order dated 17.2.2005 was passed remitting the case back 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. Nirmlala Sundaram, we are of the opinion that this one incident of donation through bank accounts at the direction of one of the employee of the Company does not implicate that the entire premium collected all throughout the country and deposited in Benami bank accounts actually belongs to the assessee company or the assessee-company had direct control on these bank accounts. Ultimately, the entire case of the revenue hinges upon the presumption that assessee is bound to have some large share in so called secret money in the form of premium and its circulation. However, this presumption or suspicion how strong it may appear to be true, but needs to be corroborated by some evidence to establish a link that GTC actually had some kind of a share in such secret money. It is quite a trite law that suspicion howsoever strong may be but cannot be the basis of addition except for some material evidence on record. The theory of 'preponderance of probability' is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee."

Therefore, in the absence of any contrary material or evidence brought on record by the AO, the transaction of purchase and sale of the shares in question cannot be held as bogus merely on the basis of Report of the Investigation Wing of the

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

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

"In view of the above facts and circumstances of the case, we are of the considered opinion that the addition made by the AO is based on mere suspicion and surmises without any cogent material to show that the assessee has brought back his unaccounted income in the shape of long term capital gain. On the other hand, the assessee has brought all the relevant material to substantiate its claim that transactions of the purchase and sale of shares are genuine. Even otherwise the holding of the shares by the assessee at the time of allotment subsequent to the amalgamation/ merger is not in doubt, therefore, the transaction cannot be held as bogus. Accordingly we delete the addition made by the AO on this account."

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

6.4. Thus in view of the above discussion and taking into consideration various documentary evidences produced by the

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

- 8.** The Honble Raj. High Court in the case of **CIT V/s Smt. Sumitra Devi 268 CTR 351(Raj.)2014** in the same facts and circumstances has held that Cash Credit—Share transaction—Assessee had shown LTCG from the sale of shares and same was claimed as exempt u/s 10(38)—AO observed that companies, whose shares were allegedly dealt with, were not very well known and it was entirely unlikely that there was a huge rise in prices of their shares in a very short span of time—AO treated huge rise in price as manipulation by stock broker and made additions in income of assessee towards transactions of purchase and sale of shares and undisclosed commission paid in cash—CIT(A) observed that shares were sold by assessee for consideration through named stock broker and appellant furnished all the evidence to establish genuineness of transactions—That AO failed to bring any evidence in rebuttal nor was it proved that documents produced by Assessee were false, fabricated or fictitious—ITAT upheld Order of CIT(A) that AO proceeded only on presumptions and was not justified in making additions under Section 68 of the Act—Held, findings of AO were based on presumptions rather than on cogent proof—CIT(A) and ITAT found that AO failed to show material documents placed on record by Assessee were false, fabricated or fictitious—Appellate authorities rightly observed that transaction could not be rejected altogether on basis of facts noticed by AO, particularly in absence of any cogent evidence to contrary—Finding recorded by appellate authorities, after thorough consideration of material on record, that transaction of purchase and sale of shares could not be treated as non-genuine was justified—No substantial question of law worth consideration in present case—Addition under Section 68 of the Act was not sustainable after due appreciation of evidence on record, on relevant considerations, and on sound reasoning—Finding of Appellate Authorities did not suffer from any perversity—No substantial question of law was involved in Appeal—Assessee's appeal dismissed.

Thus on the perusal of the order of the Id. AO it is submitted that findings of the AO are based on presumption and suspicion alone. The various documentary evidences as mentioned in the facts of the case have neither been found to be false nor fabricated. The purchase of shares has been accepted by the lower authorities. The alleged discrepancies pointed out by the Id. AO are incorrect and without confronting the assessee, otherwise the same would have been clarified then and there. The discrepancies pointed out by the Id. AO are only for namesake.

- 9.** Further regarding allegation of the price inflation it is submitted that it is not in the hands of the assessee there are so many others shares of company where the price hike in very short span of time, in support of this we are enclosing historical data of one share where the price has increased from Rs. 4.31 to Rs. 122.88 in one year(in 2021), why this shares has not been held as penny stock till date and there may be so many other companies in this type of shares. Copy of the details of this share is enclosed and marked As **Annexure-2**
- 10.** It is submitted that there is no allegation by Shri Sanjay Vora and Deepak Patwari that assessee ever approached him for any bogus LTCCG. Therefore, lower authorities are not justified on drawing adverse inference against the assessee on the basis of the price of stock quoted in the stock exchange / financial statements of these companies. The transaction of sale of shares was online trading system through the broker from whom assessee received the sale consideration. The seller and buyer cannot know the names of each other. In such situation, it cannot be presumed that there could be any transfer of cash between buyers and sellers to convert the unaccounted money of the beneficiaries as presumed by the AO. The transaction of sale of shares M/s Unno Industries Ltd is through Motisons Pvt Ltd who is the Member of BSEL Ltd. The Id. AO have not conducted any inquiry from the stock exchange and broker to ascertain as to whether the transaction of sale of shares by the assessee is genuine or

not. Therefore, in the absence of any material to show that cash was transferred against the long term capital gain earned by the assessee, the same cannot be alleged to be bogus.

- 11.** It is submitted that all the observations, conclusions and findings of the lower authorities are based on suspicion, surmises and hearsay. It is trite law that suspicion however strong cannot partake the character of legal evidence (**Lalchand Bhagat Ambika Ram vs. CIT 37 ITR 288 – SC**). The suspicion of presumption however, strong it may appear to be to true needs to be corroborated by some evidence to establish a link that the assessee has brought back his unaccounted income in form of LTCG. In this connection reference can be made to the recent judgment of **Special Bench of Mumbai, ITAT in case of GTC Industries vs. ACIT 164 ITD 1 where in Para 46**, it is observed 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 expenses 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. Nirmala Sundaram, we are of the opinion that this one incident of donation through bank accounts at the direction of one of the employee of the Company does not implicate that the entire premium collected all throughout the country and deposited in Benami bank accounts actually belongs to the assessee company or the assessee company had direct control on these bank accounts. Ultimately, the entire case of the revenue hinges upon the presumption that assessee is bound to have some large share in so called secret money in the form of premium and its circulation. However, this presumption or suspicion how strong it may appear to be true, but needs to be corroborated by some evidence to establish a link that GTC actually had some kind of a share in such secret money. It is quite a trite law that suspicion how so ever strong may be but cannot be the basis of addition except for some material evidence on record. The theory of 'preponderance of probability' is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee."

12. In the case of Mahesh Kumar Baid vs. ACIT, in ITA No. 1236/Kol/2017 dated 18.08.2017 (Cal.)(Trib.)

The finding of Hon'ble ITAT in Para 6 is reproduced as under:

"We have heard both the rival submissions and perused the materials available on record. We find lot of force in the arguments of the Id AR that the Id AO was not justified in rejecting the claim of the assessee on the basis of theory of surrounding circumstances, human conduct, and preponderance of probability without bringing on record any special evidence against the assessee. We rely on the judgment of Special Bench of Mumbai Tribunal in the case of GTC Industries Ltd. (supra) for this proposition. The various facets of the arguments of the

Id AR supra, with regard to impleading the assessee for drawing adverse inferences which remain unproved based on the evidences available on record, are not reiterated for the sake of brevity. The principles laid down in the various case laws relied upon by the Id AR are also not reiterated for the sake of brevity. We find that the amalgamation of CPAL with KAFL has been approved by the order of Hon'ble High Court. The Id AO ought not to have questioned the validity of the amalgamation scheme approved by the Hon'ble High Court in May 2013 merely based on a statement given by a third party which has not been subject to cross-examination. Moreover, it is pertinent to note that the assessee and / or the stock broker Ashita Stock Broking Ltd name is neither mentioned in the said statement as a person who had allegedly dealt with suspicious transactions nor they had been the beneficiaries of the transactions of shares of KAFL. Hence we hold that there is absolutely no adverse material to implicate the assessee to the entire gamut of unwarranted allegations leveled by the Id AO against the assessee, which in our considered opinion, has no legs to stand in the eyes of the law.

The enquiry by the investigation Wing in connection with the alleged bogus transaction in shares also did not implicate the assessee and / or his broker. It is also a matter of record that the assessee has furnished all evidences in the form of bills, contract notes, demat statements and the bank accounts to prove the genuineness of the transactions relating to purchase and sale of shares resulting in LTCG. These evidences were neither found by the Id AO to be false or fabricated. The facts of the case and the evidences in support of the assessee's case clearly support the claim of the assessee that the transactions of the assessee were bonafide and therefore the Id AO was not justified in rejecting the assessee's claim of exemption u/s 10(38) of the Act. We also find that the various case laws of Hon'ble Jurisdictional High Court relied upon by the Id AR and findings given thereon would apply to the facts of the instant case. The Id DR was not able to furnish any contrary cases to this effect. Hence we hold that the Id AO was not justified in assessing the sale proceeds of shares of KAFL as undisclosed income of the assessee u/s 68 of the Act. We accordingly hold that the reframed question no. 1 raised hereinabove is decided in the negative and in favour of the assessee."

In this decision, Hon'ble ITAT has referred to various decisions at pages 17-19 of the order. Similar view has been taken by **ITAT Mumbai Bench in case of ACIT vs. M/s Krishna Sheet**

Processors Pvt. Ltd. in ITA No. 403/Mum/2015 dated 05.05.2017.

13. THEORY OF PRERPONDERANCE OF PROBABILITY IS NOT

APPLICABLE IN INSTANT CASE;

(i) Rejecting the theory of preponderance of probability in the instant case of Equity Shares the Honorable Delhi High court substantiated two important Judgments namely Suman Poddar Vs. ITO (2020)423 ITR 480(Delhi) and Sumati Dayal Vs. CIT (1995) 80 Taxmann 89/214ITR801 (SC) in the matter of PCIT-12 Vs. Smt. Krishna Devi Reported (2021)126 Taxmann. Com 80(Delhi) against the revenue and in the favor of Assesse and held;

"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 preplanned 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* case (*supra*) and *Sumati Dayal* case (*supra*) is of no assistance. Upon examining the judgment of *Suman Poddar* case (*supra*) at length, we find that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, *inter alia*, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. On such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the factual matrix at hand. Similarly, the case of *Sumati Dayal* (*supra*) too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue.

13. The learned ITAT, being the last fact-finding authority, on the basis of the evidence brought on record, has rightly come to the conclusion that the lower tax authorities are not able to sustain the addition without any cogent material on record. We thus find no perversity in the Impugned Order.

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

(ii) Recently **Kiran Kothari (HUF) V/s ITO Ward 35(3) in ITA No. 443/Kol/2017 dt. 15.11.2017** the Honble ITAT Kolkata Bench held that

“9. We have heard the rival submissions and perused the records. We note that in the present case, the appellant had purchased 13500 shares of M/s. Tuni Textile Mills Private Limited on 06.04.2011 from a stock broker in off-market transactions from M/s Badri Prasad & Sons, who was a member of Calcutta Stock

Exchange. These shares were held in the demat account of the assessee maintained with M/s CD Equisearch Pvt. Ltd , a member of Mumbai Stock Exchange and ultimately these shares were sold through M/s. CD Equisearch and on such sale, Security Transaction Tax was duly paid. Payments were duly received in the bank account of the assessee. We take note that the purchase of shares by off-market transactions for purchase of shares is not illegal as was held by the Coordinate Bench of this Tribunal in the case of Dolarrai Hemani vs ITO in ITA NO.19 /Kol /2014 dated 02.12.2016. The transactions were all through a registered broker (pages 18 and 19 of the paper book), backed by a contract note (page 22 of the paper book) and shares were credited in the demat accounts (page 25 of the paper book) and duly reflected in the books of account. In the light of these evidences on record we are of the opinion that the purchase of shares per-se cannot be held to be bad.

9.1. We note that there was a survey conducted u/s 133A of the Act by the Mumbai Investigation Wing against M/s. Tuni Textile Mills Pvt. Ltd on 02.06.2015 and in the survey a deposition was taken **on oath** wherein the Managing Director of the said company Shri N.P.Surekha was examined and he stated that 47 persons were allotted preference shares on 25.01.2010 and a sum of Rs.7.50 crores was raised by the company. He further submitted that this entire deal was done by one Shri Manish Baid and then these 47 investors used the shares allotted to them, sold the same at jacked up price and in the process they earned bogus long term capital gain from such transactions which was stage managed by Shri M.Baid. Based on this statement, the lower authorities concluded that the transactions of the assessee were also part of the bogus transactions and the same was accordingly held to be unexplained

cash credit u/s 68 of the Act. We do not subscribe to the said view taken by the authorities below for the reasons stated below:-

We note that the assessee was not a part of 47 persons, who the managing director has named in the list of 47 persons and we also note that there is no material to remotely suggest that the assessee dealt with the said entry operator Shri Manish Baid, who is said to have stage managed and undertaken the entire transactions. We also find that the assessee has not dealt with any person or broker named in question no.28 of the statement which has been recorded **on oath** by the survey team and which has been reproduced by the Id. CIT(A) from pages 31 to 36 of the impugned order(Question no.28 finds place in page-35 of the impugned order). We therefore find merit in the submissions of the assessee that the statement recorded on oath during the survey cannot be the sole basis for adverse finding against the assessee. For this we rely on the decision of the Hon'ble Supreme Court in the case of CIT vs Khader Khan Son 352 ITR 480 (SC) wherein it has been held that section 133A (survey) does not empower any income tax authorities to examine any person on oath, hence any such statement lacks evidentiary value and any admission made during the survey cannot by itself be made the basis of addition. We therefore hold that the statement of Shri N.P.Surekha recorded on oath during the survey proceedings cannot be the sole basis to make the impugned addition. We note that the assessee had not purchased the shares by the *Preference Share Route* as stated by the party before the survey party. *The **allotment** made in **preference share** was on **25-01-2010**, whereas the assessee purchased the shares on **06-04-2011** through the broker.* (i.e after more than one year and three months) We find that the transactions of capital gains as claimed by the assessee was duly backed by relevant documentary evidences which include the following :-

- (i) The balance sheet of the assessee for the financial year 2011-12 wherein the investment made in these shares were duly recorded and reflected (page 16 of the paper book);
- ii) The bills of purchase of shares of M/s. Tuni Textile Mills Pvt. Ltd (page 18 of the paper book)
- iii) Copy of the demat statement maintained with M/s. CD Equi Search where the shares were held (page 24 of the paper book)
- iv) Copy of the contract notes issued by M/s. CD Equi Search Ltd, Member of Mumbai Stock Exchange having SEBI Registration No.INB010781133 and Code No.087 (page 19 to 22 of the paper book)
- v) The bank statement maintained by the assessee with Bank of Maharashtra reflecting the payment received for the sale of shares (page 23 of the paper book).

9.2. We find force in the contentions of the Id. AR that the AO and CIT(A) was not justified in rejecting the claim of the assessee on the basis of theory of surrounding circumstance, human conduct and preponderance of probability without bringing on record any relevant legally admissible evidence against the assessee. For the said proposition we rely on the judgment of the Special Bench of Mumbai Bench in the case of GTC Industries Ltd. (supra). The various facets of the contention of the AO, to rope in the assessee for drawing adverse inferences which remain unproved based on the evidence available on record are not reiterated for the sake of brevity. The principles laid down in various case laws relied upon by the Id. AR are also not reiterated for the sake of brevity. We further find that neither the reports relied on by the AO has not been brought on record nor is there any reference of finding of such

report to impute the assessee is there on record. The AO has merely carved out certain features/ modus operandi of companies indulging in practices not sanctioned by law and as mentioned in such report. However, we note that neither any investigation was carried out against the assessee nor against the brokers to whom the assessee dealt with the purchase and sale of shares in question. Thus the AO has failed to bring on record any material contained in the purported reports which are having so called adverse impact on the assessee. We further find that the company under scanner was having share Capital as on 31.03.2013 of Rs.13.18 crores and was having assets worth Rs.24.25 crores and a turnover of Rs.19.32 crores and profit of Rs.1.35 crores. Thus the allegation that these companies did not have financial credentials is not correct and so is perverse and therefore we do not subscribe to the said finding and necessarily negate the finding.

At the cost of repetition, we find that the transactions of sale of shares by the assessee was duly backed up by material/evidence including contract notes, demat statement, bank account reflecting transactions, the stock brokers have confirmed the transactions (pages 24-25 of the paper book), the shares having been sold on the online platform of the stock exchange and each trade of sale of shares were having unique trade number and trade time. It is not the case of the AO that the shares which were sold on the date mentioned in the contract note were not the traded price on that particular date. The AO doubted the transactions due to the high rise in the stock price and for that the assessee cannot be blamed unless there was any material/evidence to prove that the assessee or any one on his behalf has rigged the stock price. It should be noted that the Stock Exchange and SEBI are the statutory authorities appointed by the Govt. of India to ensure that there is no stock rigging or manipulation. The AO has not brought any

evidence on record to show that these agencies have alleged any stock manipulation against the assessee or the brokers or the company in question. In absence of any evidence to back the conclusion of AO/CIT(A), it cannot be said that merely because the stock price moved sharply, the assessee was to be blamed for bogus transactions. It is also pertinent to note that the assessee has purchased the stocks through registered brokers and thereafter the assessee has sold the shares through the registered share/stock brokers with Calcutta Stock Exchange, and both have confirmed the transactions and have issued valid contract notes as per law; and in similar case, the Hon'ble Calcutta High Court in the case of Principal CIT vs Rungta Properties in ITA No.105 of 2016 dated 08 May, 2017 wherein it was held that *"on the last point, the tribunal held that the AO had not brought relevant material to show that the transactions in shares of the company involved were false or fictitious. It is the finding of the AO that the scripts of this company was executed by a broker and the broker was suspended for some time. It is the assessee's contention that even though there are allegations against the broker, and for that reason the assessee cannot be held liable on this point, the tribunal held that –*

"As a matter of fact the AO doubted the integrity of the broker and the broker firm and also AO observed that the assessee's AO relied the loss of Rs.25,30,396/- only on the basis of information submitted by stock as fictitious. The AO has also not doubted the genuineness of the documents placed by the assessee on record. The AO's observation and conclusion are merely based on information. Therefore on such basis, no disallowance can be made and accordingly we find no infirmity in the order of the Id. CIT(A), who has rightly allowed the claim of the assessee. This ground no.1 of the revenue is dismissed."

We agree with the reasoning of the tribunal on this point also. We do not find any reason to interfere with the impugned order. The suggested question, in our opinion do not raise any substantial question of law."

9.3. In the light of the documents stated i.e. (i to v) in Page14 (supra) we find that there is absolutely no adverse material to implicate the assessee to the entire gamut of unfounded/unwarranted allegations levelled by the AO against the assessee, which in our considered opinion has no legs to stand and therefore has to fall. We take note that the Id. DR could not controvert the facts which are supported with material evidences furnished by the assessee which are on record and could only rely on the orders of the AO/CIT(A). We note that the allegations that the assessee/brokers got involved in price rigging/manipulation of shares must therefore consequently fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the transactions relevant to the purchase and sale of shares resulting in long term capital gain. Neither these evidences were found by the AO nor by the Id. CIT(A) to be false or fictitious or bogus. The facts of the case and the evidence in support of the evidence clearly support the claim of the assessee that the transactions of the assessee were genuine and the authorities below was not justified in rejecting the claim of the assessee exempted u/s 10(38) of the Act on the basis of suspicion, surmises and conjectures. It is to be kept in mind that suspicion how so ever strong, cannot partake the character of legal evidence. In the aforesaid facts and circumstance, for allowing the appeal we rely on the decision of the Hon'ble Calcutta High Court in the case of M/s. Alipine Investments in ITA No.620 of 2008 dated 26th August, 2008 wherein the High Court held as follows :

"It appears that there was loss and the whole transactions were supported by the contract notes, bills and were carried out through recognized stock broker of the Calcutta Stock Exchange and all the bills were received from the share broker through account payee which are also filed in accordance with the assessment. It appears from the facts and materials placed before the Tribunal and after examining the same, the tribunal allowed the appeal by the assessee. In doing so the tribunal held that the transactions cannot be brushed aside on suspicion and surmises. However it was held that the transactions of the shares are genuine. Therefore we do not find that there is any reason to hold that there is no substantial question of law held in this matter. Hence the appeal being ITA No.620 of 2008 is dismissed."

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

14. CROSS EXAMINATION WAS NOT PROVIDED;

It is submitted that the entire observation of the Id. AO is based on the report of Director of Income Investigation, and statement of Shri Sanjay Vora and Depak Patwari which are partly reproduced in the assessment order page 15 to 22 full copy of the same has not been provided to the assessee. Name of the assessee is neither appearing in the report of DIT (Inv.) nor in the statement of Sanjay Vora and Jai

Kishan Poddar. Further, the name of M/s Pinnacle Vintrade Pvt Ltd. is not mentioned as an alleged paper company in this report / statement. Shri Sanjay Vora and Depak Patwari were not allowed cross examination in spite of the specific request of the assessee through objection as filed of Reasons recorded, letter dated 28.11.2016 & 09.12.2016 vide page 63-67. Therefore, on the basis of such report / statement, the transaction of the assessee cannot be held non-genuine.

(i) The Hon'ble Supreme Court in decision dated 02.09.2015 in case of Andaman Ttimber Industries vs. Commissioner of central excise (2015) 281 CTR 0241 (SC) : (2015) 127 DTR 0241 (SC) the honble Supreme Court held that denial of opportunity to the assessee to cross-examine the witnesses whose statements were made the sole basis of the assessment is a serious flaw rendering the order a nullity in as much as it amount to violation of principles of natural justice. *Principles of Natural justice—Cross examination of witness—Non-consideration of statements—Assessee was manufacturing ply-woods and related products in its factory—Some of those products were sold from factory premises only to certain buyers—However, major portion of products manufactured were sold to other dealers from their numerous depots situated at different places in country—Assessee filed its declaration u/s. 173C of Central Excise Rules showing price of goods at which they were sold ex-factory and delivery basis—Revenue found that there was lot of price difference between goods sold at ex-factory and delivery basis in comparison with goods which were sold to buyers from depots—Investigation was carried out and statements of two buyers were recorded, on basis of which Show Cause Notice was served upon Assessee—Adjudicating Authority passed order confirming demand in Show Cause Notice on ground that price at which goods were sold to customers from depots may not be basis for determining value for*

purpose of excise duty—Adjudicating Authority also took into consideration price list of Assessee maintained at its depots that was treated as price for purposes of levying excise duty—Assessee filed Appeal against order of Adjudicating Authority that was dismissed by CESTAT—Assessee submitted that it was not allowed to cross-examine dealers whose statements were relied upon by Adjudicating Authority in passing impugned orders—Held, not allowing Assessee to cross-examine witnesses by Adjudicating Authority though statements of those witnesses were made as basis of impugned order, amounted in serious flaw which make impugned order nullity as it amounted to violation of principles of natural justice—It was to be borne in mind that order of Commissioner was based upon statements given by two witnesses—Even when Assessee disputed correctness of statements and wanted to cross-examine witnesses, Adjudicating Authority did not grant opportunity to Assessee—In impugned order passed by Adjudicating Authority it was specifically mentioned that such opportunity was sought by Assessee, however, no such opportunity was granted—Assessee contested truthfulness of statements of two witnesses and wanted to discredit their testimony for which purpose opportunity of cross-examination was sought—It was not for Adjudicating Authority to presuppose as to what could be subject matter of cross-examination and deny prayer of Assessee—

(ii) The rejecting of Opportunity of cross examination of third party and any adverse action taken only on the basis of statement as recorded u/s 132(4) of the Act, cannot be sole basis of any addition it has been propounded in a landmark Judgment by the **Honorable Jurisdictional HC (Rajasthan) in the matter of PCIT, Jaipur-2, Jaipur Vs. Shri Sanjay Chhabra, ITA NO. 22/2021 (06/04/2022) has** held;

"The Tribunal by impugned order has categorically held that the material information received by the Assessing Officer from the investigation wing alongwith certain statements recorded by DBIT Investigation, Calcutta could not be taken into consideration as that material was not disclosed nor an opportunity was accorded for cross-examination of the Assessee. This finding recorded by the Tribunal cannot be said to be perverted or suffering from any patent illegality. Learned counsel for the Revenue could not satisfy us with reference to any judgment on this aspect that even without disclosing any material to the Assessee and without allowing him proper cross examination, such undisclosed and unverified material could be taken into consideration for the purposes of addition. The Tribunal's findings are based on material placed on record. The aspect of human probability, in the present case, only goes against the Revenue because in the present case, a raid was conducted and in that process, statement is said to have been recorded under Section 132(4) of the I.T. Act, which was, later on, retracted by the Assessee. In a situation like this, where the office premises are sealed for many days and during that period, a statement is said to have been recorded under Section 132 (4) of the I.T. Act, the Tribunal's view that only the basis of such retracted statement, addition could not be justified without any other material admissible in evidence, warrants no interference as it is not a substantial question of law.

In the case of Commissioner of Income Tax Versus Harjeev Aggarwal reported in (2016) 290 CTR (Del) 263 and Kailashben Manharlal Chokshi Versus Commissioner of Income Tax reported in (2010) 328 ITR 411 (Guj) various High Courts have held that addition based solely on statement later on retracted, without anything more, could not be justified in law. Thus, the view taken by the Tribunal cannot be faulted.

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

This Judgment has also been considered in Jai Singh Yadav vs DCIT, Central Circle-3, Jaipur ITA 168/JP/2022, dated; 15/06/2022.

(iii) Recently Hon'ble **Supreme Court in its order dated 21-08-2019 in the case of Odeon Builders Private Limited Vs. CIT-7, New Delhi (civil appeal no. 9604-9605/2019)** has held that no addition can be sustained if it is done purely on the basis of

information received from Investigation Wing without giving an opportunity of cross examination to the Assessee.

The keys observation by the Hon'ble Court reads as under:

"Thus, the entire disallowance in this case is based on third party information gathered by the Investigation Wing of the Department which have not been independently subjected to further verification by the AD who has not provided the copy of such statements to the appellant, thus denying opportunity of cross examination to the appellant, who has prima facie discharged the initial burden of substantiating the purchases through various documentation including purchase bills, transportation bills, confirmed copy of accounts and the fact of payment through cheques, & VAT Registration of the sellers & their Income Tax Return. In view of the above discussion in totality, the purchases made by the appellant from M/s Padmesh Realtors Pvt. Ltd. is found to be acceptable and the consequent disallowance resulting in addition to income made for Rs.19,39,60,8661, is directed to be deleted."

(iv)Cash credits –Accommodation entry – Without giving an opportunity of cross-examination merely on the basis of oral statement additions cannot be made [S.143(3)]

The oral statement of a third party recorded by search authorities which was never placed to be confronted by assessee and no documentary evidence was supplied to assessee, could not be considered in making addition under section 68 on account of alleged accommodation entries.

CIT v. A. L. Lalpuria Construction (P.) Ltd. (2013) 215 Taxman 12 (Mag.) (Raj.)(HC)

Prayer: Hence in view of above facts submissions and legal position of law, the addition may kindly be directed to be deleted. Thanking you."

5. On the other hand, the Id. D/R supported the orders of the lower authorities and submitted that the order of the Id. CIT (A) be upheld.

6. We have heard the rival contentions, perused the material available on record and gone through the orders of the lower authorities. At the very outset, we find that the present controversy in question raised by the assessee is directly covered by the decision of coordinate bench ITAT Jaipur in the case of assessee's group cases, namely, **Smt. Prabha Agarwal vs. ACIT, Circle-6, Jaipur in ITA No. 163-164/JPR/2021 dated 11.10.2022**, wherein under the same facts and circumstances, the coordinate bench has deleted the entire addition by holding in para 6 to 6.4 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. Unno Industries 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 80 equity shares of M/s. Pinnacle Vintrade Pvt. Ltd. through Uniglory Developers Pvt. Ltd. for a consideration of Rs. 1,00,000/- on 18.10.2011. Later on after receiving Bonus shares in the ratio of 90:1 (7280) and having amalgamation into Unno Industries Ltd. under the order of Hon'ble Bombay High Court, and splitting into 1:10 (72800) sold out for a consideration of Rs. 22,66,217/- in the month of May, 2013. The assessee was maintaining Demat Account No. 120690000002594 with Motisons Shares Pvt. Ltd. and Demat Account

No. 1201060500390497 with Anand Rathi Share And Stock Brokers Ltd. The shares were credited in DP Account of assessee appellant as maintained with her Share Broker named Motisons Shares Pvt. Ltd. and Anand Rathi Share and Stock Brokers Ltd. respectively A copy of DP Account statement of assessee appellant maintained by her Broker is placed on record as Annexure-16. M/s. Unno Industries Ltd. was listed in stock exchange and the shares were purchased at the rates prevailing on the date of purchase in BSE. 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 2014-15. Thus it is clear that 72800 shares acquired by the assessee on 12.02.2013 after amalgamation with M/s. Unno Industries Ltd. and credited in DP Account of the assessee maintained with her broker M/s. Motisons Shares Pvt. Ltd. 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 DP account of the assessee. Once the shares are dematerialized and credited in the DP account of the assessee, the holding of the shares by the assessee cannot be disputed. It is also not in dispute that assessee sold 72800 shares held in the DP account of the assessee during the year under appeal for a consideration of Rs. 22,68,488/-. The AO has treated the transaction of sale of 72800 shares as bogus being accommodation entry but has not doubted the holding of the shares by the assessee to the tune of 72800 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.	1-2
2.	Copy of Financial Ledger Account maintained by him with the Broker	3
3.	Copy of purchases bill dated 18.10.2011 of Uniglory Developers Pvt. Ltd.	8
4.	Copy of Bank Statement of the assessee	4-7
5.	Copy of Bank Statement/receipt/confirmation of account (OBC)	9-12
6.	Intimation of declaration of Bonus Shares	13
7.	Intimation of Shares allotment of Unno Industries Limited	14-15
8.	Copy of DP Account statement as maintained by Broker	16

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 outweighs 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 cross examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross examination and made the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000 , order dated 17.2.2005 was passed remitting the case back 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. Nirmlala Sundaram, we are of the opinion that this one incident of donation through bank accounts at the direction of one of the employee of the Company does not implicate that the entire premium collected all throughout the country and deposited in Benami bank accounts actually belongs to the assessee company or the assessee-company had direct control on these bank accounts. Ultimately, the entire case of the revenue hinges upon the presumption that assessee is bound to have some large share in so called secret money in the form of premium and its circulation. However, this presumption or suspicion how strong it may appear to be true, but needs to be corroborated by some evidence to establish a link that GTC actually had some kind of a share in such secret money. It is quite a trite law that suspicion howsoever strong may be but cannot be the basis of addition except for some material evidence on record. The theory of 'preponderance of probability' is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee."

Therefore, in the absence of any contrary material or evidence brought on record by the AO, the transaction of purchase and sale of the

shares in question cannot be held as bogus merely on the basis of Report of the Investigation Wing of the Department in some other cases where some persons were found indulged in providing accommodation entry, and further it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain.

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

"In view of the above facts and circumstances of the case, we are of the considered opinion that the addition made by the AO is based on mere suspicion and surmises without any cogent material to show that the assessee has brought back his unaccounted income in the shape of long term capital gain. On the other hand, the assessee has brought all the relevant material to substantiate its claim that transactions of the purchase and sale of shares are genuine. Even otherwise the holding of the shares by the assessee at the time of allotment subsequent to the amalgamation/ merger is not in doubt, therefore, the transaction cannot be held as bogus. Accordingly we delete the addition made by the AO on this account."

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

6.4. Thus in view of the above discussion and taking into consideration various documentary evidences produced by the assessee in support of his claim and further relying upon various decisions of this Tribunal as well as the decision of Hon'ble Jurisdictional High Court including the decision in case of CIT vs. Pooja Agarwal (supra) as well as in case of PCIT vs. Pramod Jain & Others (supra), we allow the claim of

exemption under section 10(38) of the Act and accordingly delete the addition made by the AO. The order of Id. CIT (A) is set aside.”

Even otherwise on merits, the AO has doubted the transactions of purchase and sale of shares by the assessee of M/s. Unno Industries 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 80 equity shares of M/s. Pinnacle Vintrade Pvt. Ltd. through Uniglory Developers Pvt. Ltd. for a consideration of Rs. 1,00,000/- on 18.10.2011. Later on after receiving Bonus shares in the ratio of 90:1 (7280) and having amalgamation into Unno Industries Ltd. under the order of Hon'ble Bombay High Court, and splitting into 1:10 (72800) sold out for a consideration of Rs. 22,58,954/- in the month of May, 2013. The assessee was maintaining Demat Account No. 120690000002560 with Motisons Shares Pvt. Ltd. The shares were credited in DP Account of assessee appellant as maintained with her Share Broker named Motisons Shares Pvt. Ltd. A copy of DP Account statement of assessee appellant maintained by her Broker is placed on record at paper book page 12. M/s. Unno Industries Ltd. was listed in stock exchange and the shares were purchased at the rates prevailing on the date of purchase in BSE. 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 2014-15. Thus it is clear that 72800 shares acquired by the assessee on 12.02.2013 after amalgamation with M/s. Unno Industries Ltd. and credited in DP Account of the assessee maintained with her broker M/s. Motisons Shares Pvt. Ltd. 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 DP account of the assessee. Once the shares are dematerialized and credited in the DP account of the assessee, the holding of the shares by the assessee cannot be disputed. It is also not in dispute that assessee sold 72800 shares held in the DP account of the assessee during the year under appeal for a consideration of Rs. 22,58,954/-. The AO has treated the transaction of sale of 72800 shares as bogus being accommodation entry but has not doubted the holding of the shares by the assessee to the tune of 72800 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 by Broker through recognized stock exchange.	1
2.	Copy of Financial Ledger maintained by Broker	2
3.	Copy of Bank statement	3
4.	Copy of Purchase bill of shares	4-5
5.	Copy of Bank statement/receipt/confirmation of account	6-8
6.	Intimation of declaration of Bonus shares	9
7.	Intimation of approval of scheme	10
8.	Intimation of Shares allotment of UNNO INDUSTRIES LTD.	11
9.	Copy of DP Account statement as maintained by Broker	12
10.	Company Master Data of UNNO INDUSTRIES LTD as on 23/07/2021 on ROC portal	12A
11.	Copy of ITR acknowledgement, Computation, Balance Sheet and Profit of Loss Account of the assessee.	13-14

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 weight 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 cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and made the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000 , order dated 17.2.2005 was passed remitting the case back 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. Nirmlala Sundaram, we are of the opinion that this one incident of donation through bank accounts at the direction of one of the employee of the Company does not implicate that the entire premium collected all throughout the country and deposited in Benami bank accounts actually belongs to the assessee-company or the assessee-company had direct control on these bank accounts. Ultimately, the entire case of the revenue hinges upon the presumption that assessee is bound to have some large share in so-called secret money in the form of premium and its circulation. However, this presumption or suspicion how strong it may appear to be true, but needs to be corroborated by some evidence to establish a link that GTC actually had some kind of a share in such secret money. It is quite a trite law that suspicion howsoever strong may be but cannot be the basis of addition except for some material evidence on record. The theory of 'preponderance of probability' is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee."

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

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

"In view of the above facts and circumstances of the case, we are of the considered opinion that the addition made by the AO is based on mere suspicion and surmises without any cogent material to show that the assessee has brought back his unaccounted income in the shape of long term capital gain. On the other hand, the assessee has brought all the relevant material to substantiate its claim that transactions of the purchase and sale of shares are genuine. Even otherwise the holding of the shares by the assessee at the time of allotment subsequent to the amalgamation/ merger is not in doubt, therefore, the transaction cannot be held as bogus. Accordingly we delete the addition made by the AO on this account."

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

6.4. Thus in view of the above discussion and taking into consideration various documentary evidences produced by the assessee in support of his claim and further relying upon various decisions of this Tribunal as well as the decision of Hon'ble Jurisdictional High Court including the decision in case of CIT vs. Pooja Agarwal (supra) as well as in case of PCIT vs. Pramod Jain & Others (supra), I 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 relates to commission paid for the accommodation entries is consequential to the issue involved in ground no. 1, therefore, when I 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 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. Ground relates to addition made under section 14A of the IT Act, 1961.

The assessee has claimed that no administrative expenses have been incurred for earning the exempt income. She has referred to the expenses booked to the Profit & Loss account for both the years and submitted that no expenses have been incurred for earning the exempt income. There is no expenditure debited to profit and loss account which pertains to exempt income. The investment made in shares for which no administrative or other expenses are required to be incurred. She has further submitted that the investment in the shares were made in the earlier years and, therefore, even otherwise when no investment was made during the year under

consideration then no disallowance is called for in respect of the exempt income. On the other hand, the revenue authorities have not brought any material to controvert the submissions of the assessee. I am therefore of the view that the assessee deserves to succeed. Hence the disallowance made by the AO under section 14A is deleted.

ITA NO. 64/JP/2023 A.Y. 2015-16 :

9. The grounds raised by the assessee in ITA No. 64/JP/2023 for the assessment year 2015-16 are covered by the decision arrived at by me in ITA No. 77/JP/2023 for the assessment year 2014-15. Therefore, taking a consistent view, the order of the Id. CIT (A) is set aside. The appeal of the assessee is allowed.

10. In the result, appeals of the assessee are allowed.

Order pronounced in the open court on 5/10/2023.

Sd/-

(संदीप गोसाईं)

(SANDEEP GOSAIN)

न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 5/10/2023.

Das/

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

1. अपीलार्थी / The Appellant- Smt. Kanta Agarwal, Jaipur.
2. प्रत्यर्थी / The Respondent- The ITO, Ward 6(5)/DCIT Circle-6, Jaipur.
3. आयकर आयुक्त / CIT

4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 77 & 64/JP/2023}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar

