

| आयकर अपीलीय अधिकरण न्यायपीठ, कोलकाता |
IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, KOLKATA

BEFORE SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER
&
SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER

I.T.A. No. 763/Kol/2022
Assessment Year: 2013-14

Nalanda Builders Pvt. Ltd. 5, Sree Charan Sarani Bally Howrah - 711201 (West Bengal) [PAN : AABCN7736Q]	Vs	DCIT, Central Circle-2(1), Kolkata
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Soumitra Choudhury, A/R
Revenue by :	Shri P.P. Barman, Addl. CIT, Sr. D/R

सुनवाई की तारीख/Date of Hearing : 30/11/2023
घोषणा की तारीख /Date of Pronouncement: 11/01/2024

आदेश/ORDER

PER SHRI RAJESH KUMAR, ACCOUNTANT MEMBER :

The present appeal is directed at the instance of the assessee against the order of the National Faceless Appeal Centre, Delhi, [hereinafter the "Id. CIT(A)"] dt. 23/11/2022, passed u/s 250 of the Income Tax Act, 1961 ("the Act") for the Assessment Year 2013-14.

2. The issues raised in Ground Nos. 2 to 4 is against the confirmation of addition as made by the Assessing Officer on account of difference between the value taken by the assessee and the fair market value (FMV) u/s 50C of the Act.

3. The facts in brief are that during the year, the assessee sold two flats for an aggregate consideration of Rs.3,00,00,000/- and accordingly addition of Rs.3,26,37,314/- was made to the income of the assessee. In

the appellate proceedings the Id. CIT(A) upheld the order of the Assessing Officer on this issue by confirming the additions.

4. After hearing rival contentions, we find that the value adopted by the assessee and FMV of the flats u/s 50C is within the range of $\pm 10\%$ and, therefore, the provision of Section 56(2)(x) of the Act are not applicable which provides that where the market value of the property is more than the sale consideration received by the assessee then the difference between the two shall be considered. The case of the assessee finds support from the decisions of the coordinate benches in the *Sandeep Patil ITA No.924/Bang/2020*, *John Flower Inida Ltd. ITA No.7545/Mum/2014* and *Dulari Devi Hetampuriah ITA No. 1290/Kol/2018*. Hence Ground Nos. 2 to 4 are allowed.

5. The second issues raised in Ground Nos. 5 to 9 is against the confirmation of addition of Rs. 3,19,65,849/- has made by the Assessing Officer by disallowing the short term capital loss on sale of equity shares.

6. The facts in brief are that the Assessing Officer upon perusal of the computation of income observed that during the year, the assessee has incurred loss of Rs.3,19,65,849/- and the said loss was adjusted against the long term capital gain on sale of properties. The Assessing Officer observed that the loss has been incurred on the sale of shares of M/s. Tuni Textiles Ltd. & M/s. Blue Circle Services Ltd. The Assessing Officer also noted that similar transactions were made in the group company, namely, M/s. Namokar Builder Pvt. Ltd. and accordingly, the Assessing Officer came to the conclusion that the said loss is an

accommodation loss and was on pre-determined transactions intended to incur loss. Thereafter the Assessing Officer discussed the history of *modus-operandi* on the stock market by noting that there was a huge scam in the share market wherein prices of the shares were artificially manipulated and rigged in order to yield benefit to the beneficiaries in the form of long term capital gain/short term capital gain/loss. The Assessing Officer also noted that regarding 84 scrips which were identified as penny stocks and the stocks involved in the assessee's case were included in that list. Thereafter the Assessing Officer issued notices u/s 133(6) of the Act to M/s. Tuni Textiles Ltd. as well as M/s. Blue Circle Services Ltd. and after analyzing the particulars, observed that the said companies did not have the required financial strength. The Assessing Officer also issued notice u/s 131 of the Act to M/s. Trans Scan Securities Pvt. Ltd., the broker of the assessee and statement of Mr. Shanti Kumar Patni, one of the director of M/S Trans Scan Securities Pvt. Ltd was recorded, in which the broker admitted to have manipulated the shares prices. Pertinent to state that the assessee had furnished all the information before the Assessing Officer in respect of share transactions executed during the year, namely, name & address of the brokers, bills & vouchers, contract notes, bank statements and copy of d-mat account. The Assessing Officer, after relying on various decisions including the decisions *Commissioner Of Income-Tax, vs Durga Prasad More 1971 82 ITR 540 SC* and in the case of *Sumati Dayal vs. CIT (1995) 214 ITR 801(SC)*, treated the loss on sale of shares as bogus and

disallowed the same and consequently no set off was allowed in the assessment framed u/s 143(3) of the Act dated 10.11.2015.

7. In the appellate proceedings, the ld. CIT(A) confirmed the order of the Assessing Officer by following the decision of the Hon'ble Jurisdictional High Court in the case of *PCIT vs. Swati Bajaj & Ors.* [2022] 139 taxmann.com 352 (Calcutta) and various other decisions by recording a finding that the assessee has incurred bogus short term capital loss which was bogus and was rightly disallowed by the AO. Accordingly the ld. CIT(A) confirmed the order of the Assessing Officer.

8. The ld. A/R, submitted that in compliance to the questionnaires/directions in terms of order sheet notings by the Assessing Officer, the assessee filed all the evidences comprising contract notes, bills/vouchers, sales bills, copies of bank statements, D-mat a/c and broker bills raised in respect of purchase and sale of shares before the Assessing Officer. However, the assessing officer instead of carrying out an independent verification into these transactions entered into by the assessee during the year, the Assessing Officer has simply relied on the investigation Wing's report as well as on the SEBI investigation in which the SEBI has prepared a list of 84 shares in which manipulations and rigging were stated to have happened on the stock exchange platform. The ld. A/R argued that though these above securities traded by the assessee have been treated as appearing in the list published by SEBI, however, that list is published by the SEBI cannot be sacrosanct since the transactions in the instant case have been

done on a recognised stock exchange platform besides making and receiving the payments through proper banking channels. The Id. A/R reiterated that the contract notes, bills, D-mat a/c and vouchers etc. were duly produced before the Assessing Officer. The Id. A/R further stated that the Assessing Officer has not issued notices u/s 133(6) of the Act nor any summons u/s 131 of the Act to any of the parties to corroborate the allegation as made in the assessment order or to disbelieve the evidences and merely relied on the report of the investigation wing and SEBI. The Id. A/R submitted that though the possibility and chances are there that unscrupulous elements may have indulged in taking undue advantages of the systemic loopholes but the same cannot be applied as a straight-jacket formula in all the cases who have done share trading through stock exchange platform unless any substantive evidences/materials are brought by the Assessing Officer on record qua the brokers and entry operators to the effect they were actually indulged in the rigging and manipulation. The Id. AR also submitted that assessee has not been issued any notice either by the SEBI or by the investigation Wing of the Deptt. in respect of these irregularities as alleged by the assessing officer. The Id AR also submitted that the statements of brokers and various other persons such as entry operators were also recorded by the investigation wing which were never supplied to the assessee nor any cross examination was allowed. The Id AR therefore prayed that the materials collected at the back of the assessee can not be used against the assessee to make addition as the same is in violation of principles of natural justice and

has to be deleted. In defense of his arguments the ld AR relied on the decision of Andaman Timber Industries CCE(2015)281 CTR 241(SC) The ld AR argued that the assessment by the Assessing Officer is purely based on conjectures and surmises sans any enquiry/investigation or substantive evidences and, therefore, cannot be sustained on this count alone.

9. The ld. A/R submitted that the issue involved is squarely covered in favour of the assessee by the decision of the Co-ordinate Bench of the Tribunal in the case of *Gateway Financial Services Ltd. vs. ACIT in ITA No. 982/Kol/2018; Assessment Year 2014-15, order dt. 14/07/2023* and *Raigarh Jute & Textile Mills Pvt. Ltd. in ITA No. 2286/Kol/2019; Assessment Year 2014-15, order dt. 27/06/2023*, wherein the decision of the Hon'ble Jurisdictional High Court in the case of *PCIT vs. Swati Bajaj & Ors. [2022] 139 taxmann.com 352 (Calcutta)*, has been distinguished to be not applicable to the facts of those cases. The ld AR submitted that since the issue involved in the present appeal is similar to ones as decided by the Tribunal in the above appeals, the loss on sale of shares/F&O segment needs to be allowed to the assessee as claimed by following the said decisions. Besides, the ld. A/R also relied on the following decisions:

- 1) *Pr CIT vs. Smt. Renu Aggarwal* reported in 456 ITR 249 (SC)
- 2) *PCIT vs. Indravadan Jain [2023] 156 taxmann.com 605 (Bombay)*
- 3) *PCIT vs. Dipansu Mahapatra [2023] 149 taxmann.com 99 (Orissa)*
- 4) *ITO Vs. Smt. Bimla Devoi Singhania ITA Nos. 212 & 213/CKT/2019*

9.1. The ld. A/R submitted that in all these judicial precedents, transactions were done by the assessee on recognised stock exchange platforms and earnings profits/sustaining losses were accepted by the above judicial forums on the ground that the assessee has discharged its onus by filing all the evidences before the Assessing Officer and the Assessing Officer has only made a generalized observation in the assessment order without carrying out any specific enquiry and without bringing on record any cogent material in the absence of which no addition can be made. The ld. A/R submitted that assessee has not been named by persons whose statements were recorded by the investigation wing or by the stock exchange and the statements of those persons were relied which are totally unconnected with the assessee. The ld. A/R submitted that though the names of the shares traded by the assessee appeared in the list of 84 companies published by the SEBI, however, this fact by itself could not make the transactions carried out by the assessee on the recognized exchange platform as fictitious and bogus in a generalized manner without establishing the specific complicity of the assessee.

9.2. The ld. A/R further stated that where two constructions/interpretation of law are possible on any issue, the one which is favourable to the assessee has to be followed as held by the

Hon'ble Supreme Court in the case of *CIT v. Vegetable Products Ltd.* [1973] 88 ITR 192.

10. The ld. A/R also argued that the assessee has furnished all the documents and evidences before the Assessing Officer however he has hopelessly failed to conduct any enquiry on the basis of these evidences. The ld. A/R argued that the assessee has discharged its onus by filing the evidences qua the transactions entered into by it, the burden shifts to the revenue to prove otherwise. The ld. A/R, therefore, submitted that any addition made in that scenario has be deleted. The ld. AR relied on the following decisions of the Hon'ble Apex Court and various Hon'ble High Courts, namely, *CIT vs. Orissa Corporation Ltd.* (1986) 159 ITR 78 (SC); *ITO vs. Cygnus Developers (I) (P.) Ltd.* [IT Appeal No. 282 (Kol) of 2012, dated 2-3-2016] & *CIT vs. Gagandeep Infrastructure P. Ltd.* (2017) 394 ITR 680 (Bom), to buttress his arguments on the issue that where an assessee has filed the evidences before the Assessing Officer concerning the transactions, and the Assessing Officer has not carried out any further investigation or any enquiry into the issue and has not disbelieved those evidences either and in that scenario the additions made by the Assessing Officer could not be sustained. Though the ld. A/R relied on the above decisions but he submitted that these decisions were rendered in the matters relating to Section 68 of the Act in respect of share application & share premium/unsecured loans but the same hold good in the present case also as the assessee has filed all the evidences before the AO proving the genuineness of the transactions. Further, the ld. Assessing Officer has not carried out an investigation and merely relied upon the report of the investigation Wing and SEBI

on this issue. The Id. A/R argued that under these circumstances, the order passed by the Assessing Officer, is bad in law.

11. The Id. D/R, on the other hand, opposed the arguments advanced by the Id. A/R on the ground that the issue is covered against the assessee by the decision of the Hon'ble Jurisdictional High Court in the case of *PCIT vs. Swati Bajaj & Ors. (supra)*. The Id. D/R submitted that a very massive racket was busted by the investigation agencies which was a part of organised rigging in order to yield undue benefits to the beneficiaries by various unscrupulous entry providers and stock brokers whereby the prices of penny stocks were rigged on the stock exchange platform. The Id. D/R submitted that the transactions done by the assessee are nothing but bogus accommodation entries and, therefore, loss sustained by the assessee during the year from share trading was rightly disallowed by the Assessing Officer. The Id. D/R, therefore, prayed that the appeal of the assessee may kindly be dismissed by upholding the orders of the authorities below.

12. We have heard rival contentions and perused the material placed before including the various decisions cited by either sides before us. Undisputedly, the assessee has dealt in two stocks which appeared in the list of penny stocks published by SEBI. It is also true that the investigation wing of the department has unearthed a large scale manipulations on the stock exchange platform by the entry providers in connivance with the stock brokers which was carried out on the stock exchange platform by taking advantage of the loopholes in the system. However, keeping in view the facts and circumstances of the case, we

observe that the assessee has filed the copies of contract notes, bills/vouchers, evidences of payments and copies of D-MAT Accounts before the Assessing Officer. We also note that the Assessing Officer, instead of carrying out investigations/enquiries into these evidences either by issuing notice under section 133(6) of the Act to the purchaser/sellers or stock exchange or brokers, has merely relied on the investigation wing/SEBI reports. We find no whisper in the assessment order disbelieving the evidences filed by the assessee or rejecting the same and the Assessing Officer has merely proceeded on an assumption that the transactions entered into by the assessee during the year, which have resulted into the loss amounting to Rs.3,19,65849/-, are bogus and fictitious intended to evade the legitimate taxes due to the assessee.

13. We have also perused carefully the facts of the decisions passed by the Coordinate Benches in the case of *Gateway Financial Services Ltd. (supra)* and *Raigarh Jute & Textile Mills Pvt. Ltd. (supra)* and find that the facts of the assessee's case are substantially similar to that in the above cases as decided by the Coordinate Benches. We also note that the decision of the Hon'ble Jurisdictional High Court in the case *Swati Bajaj & Ors. (supra)*, relied upon by the Id. D/R, has been distinguished by the Coordinate Bench and held to be not applicable to the facts of those cases. For the sake of ready reference and convenience the relevant part of the order in the case of *Gateway Financial Services Ltd. (supra)* is expected below:-

"21. So far as the recent judgment of Hon'ble Jurisdictional High Court in the case of *Principal CIT Vs Swati Bajaj* reported in [2022] 446 ITR 56 (Cal)

is concerned, we observe that the Hon'ble High Court at Calcutta in the case of Principal CIT Vs Swati Bajaj [2022] 446 ITR 56 (Cal) at Page 142 of the judgment in the second last paragraph has observed that where a witness has given directly incriminating statement and the addition in the assessment is based solely and mainly on the basis of such statement, in that eventuality it is incumbent on the Assessing Officer to allow cross examination of the witness. Adverse evidence and material, relied upon in the order, to reach the finality should be disclosed to the assessee. In the case of the appellant the Assessing Officer has noted at Page-2 of the assessment order dated 18.12.2016 that employee of Gateway Financial Sri Ranjeet Kumar Gupta, Sri Kiranjeet Mahanta in their statement on oath dated 10.02.2015 accepted that they are appointed as director in different zama kharchi companies. Further the employee of Gateway Financial Sri Soumen Chowdhury in his statement on oath dated 10.02.2015 accepted that the said company is engaged in buying and selling of different shares including jamakharchi companies for providing accommodation entry in different forms such bogus long term capital gain/loss etc. He also explained the modus operandi of pre-arranged bogus LTCC transactions. The AO further observed that statement of Sri Amit Singh was recorded on oath on 22.12.2015 who in reply to Question No.5 accepted that he was working under the direction of Sri Bal Kishan Sikaria Director of Sikaria Share & Stock Broking Services Ltd. The AO further noted that statement of Sri Bal Kishan Sikaria was recorded on oath on 04.01.2016 who is a Director of Sikaria Share & Stock Broking Services Ltd which is the member of Calcutta Stock Exchange and 5 Other companies. Mr. Amit Singh of an employee of him, who in reply to Question No. 6 confirmed that he was indulging in providing accommodation entries to various parties and in reply to Question No. 12 he stated that he confirms that Sri Amit Singh was the Proprietor of M/s SS Enterprises which is controlled and managed by him have purchased 2,69,870 shares of Radford Global through Calcutta Stock Exchange which were sold by Pratik Agarwal Beneficiary Trust, Praveen Agarwal HUF, Pinky Agarwal and Nishit Agarwal Beneficiary Trust of approx. Rs.2,19,10,234/- through their seller-broker M/s. Gateway Financial Services Pvt. Ltd resulting in facilitation of pre-arranged accommodation entry of LTCC to them. This evidence was utilised by the Assessing Officer in treating their Long Term Capital Gains from transaction in shares of Radford Global Ltd as bogus and making addition u/s 68 of the Act.

22. Regarding the report of SEBI report dated 19.12.2014 we find that the said order was revoked by SEBI by the final order dated 20.09.2017 in SEBI/WTM/MPB/EFD-1-DRA-III/ 30 /2017 by observing as under:

“Considering the fact that there are no adverse findings against the aforementioned 82 entities with respect to their role in the manipulation of the scrip of Radford, I am of the considered view that the directions issued against them vide interim orders dated December 19, 2014 and November 9, 2015

which were confirmed vide Orders dated October 12, 2015, March 18, 2016 and August 26, 2016 are liable to be revoked.

In view of the foregoing, I, in exercise of the powers conferred upon me under Section 19 of the Securities and Exchange Board of India Act, 1992 read with Sections 11, 11(4) and 11B of the SEBI Act, hereby revoke the Confirmatory Orders dated October 12, 2015, March 18, 2016 and August 26, 2016 qua aforesaid 82 entities (paragraph 9 above) with immediate effect."

23. *It is well settled that while acting in their quasi-judicial capacity the income tax authorities have to adhere to the principles of natural justice and in the instant cases Assessing Officers of respective assessee(s) ought to have given opportunity to assessee(s) to cross examine these five persons whose statements were the basis of alleged additions.*

24. *Coordinate Bench Delhi in the case of Nokia India (P.) Ltd. vs. DCIT reported in [2015] 59 taxmann.com 212 (Delhi - Trib.) has held that "whether cross-examination is to be provided or not depends upon the facts of each case and there is no thumb rule or straight tight jacket formula for arriving at this conclusion. It all depends on facts of each case whether principles of natural justice have been complied with or not. If decision making authority has provided due opportunity to the person complaining of non-observance of principles of natural justice, then it is for the person so complaining to demonstrate the same and show the prejudice caused to him. Mere bald assertion of non-observance of the principles of natural justice is of no consequence.*

25. *Further, Supreme Court in the case of Andaman Timber Industries v. CCE reported in (2015) 281 CTR 241 (SC) has considered that "if there was no material with the Department on the basis of which it could justify its action, and if the statement of the two witnesses who were unknown to the appellant was the only basis of issuing the Show Cause Notice, right to cross examination has to be given and held that 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."*

26. *The Hon'ble Supreme Court of India in New India Assurance Company Ltd. v. Nusli Neville Wadia & Anr., AIR 2008 SC 876, while considering a case under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, held that though the statute may not provide for cross-examination, the same being a part of Principles of Natural Justice should be held to be an indefeasible right. It was held as follows:*

"If some facts are to be proved by the landlord, indisputably the occupant should get an opportunity to cross-examine. The witness who intends to prove the said fact has the right to cross-examine the witness. This may not be provided by under the statute, but it being a part of the principle of natural justice should be held to be indefeasible right"

27. In the case of *Rajiv Arora v. Union of India and Ors.* AIR 2009 SC 1100 Hon'ble Supreme Court observed that "effective cross-examination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Indian Evidence Act as also the principles of natural justice demand that the maker of the report should be examined, save and except in cases where the facts are admitted or the witnesses are not available for cross-examination or similar situation. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the Appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review."

28. The aforesaid decision makes it evident that, not only should the opportunity of cross-examination be made available, but it should be an effective cross examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice. Cross-examination is must where Assessing Officer relies upon only on the statement of the Third Party unconnected with the appellant

29. In the case of *Krishna Chand Chela Ram v. CIT* reported in (1980) 125 ITR 713 (SC) the Supreme Court has held that "cross-examination is must where Assessing Officer relies upon only on the statement of the Third Party unconnected with the appellant. Hon'ble Supreme Court has held that the letters, dated 14.02.1955 and 09.03.1959, did not constitute any material evidence which the Tribunal could legitimately taken into account for the purpose of arriving at the finding that the amount of Rs. 1,07,350 was remitted by the assessee from its Madras Office, and if these two letters were eliminated from consideration, there was no material evidence at all before the Tribunal which could support its finding. What the manager of the bank wrote in his letters could not possibly be based on his personal knowledge but was based on here say. The revenue authorities ought to have called upon the manager to produce the documents and papers on the basis of which he made the statement and confronted the assessee with those documents and papers."

30. In the case of *Dhakeswari Cotton Mills Ltd. v. CIT* reported in (1954) 26 ITR 775 (SC) the Hon'ble Supreme Court has held that "the rule of law on this subject has been fairly and rightly stated by the Lahore High Court in the case of *Seth Gurmukh Singh* where it was stated that while proceeding under sub-section (3) of section 23, the Income-tax Officer, though not bound to rely on evidence produced by the assessee as he considers to be false, yet if he proposes to make an estimate in disregard of that evidence, he should in

fairness disclose to the assessee the material on which he is going to find that estimate; and that in case he proposes to use against the assessee the result of any private inquiries made by him, he must communicate to the assessee the substance of the information so proposed to be utilized to such an extent as to put the assessee in possession of full particulars of the case he is expected to meet and that he should further give him ample opportunity to meet it." It was held in that case that "In this case we are of the opinion that the Tribunal violated certain fundamental rules of justice in reaching its conclusions. Firstly, it did not disclose to the assessee what information had been supplied to it by the departmental representative. Next, it did not give any opportunity to the company to rebut the material furnished to it by him, and lastly, it declined to take all the material that the assessee wanted to produce in support of its case. The result is that the assessee had not had a fair hearing."

31. *In Suraj Mall Mohta and Co. v. A. V. Visvanatha Sastri reported in (1954) 26 ITR 1 (SC) the Supreme Court has held that "the assessment proceedings before the Income-tax Officer are judicial proceedings and all the incidents of such judicial proceedings have to be observed before any conclusion is arrived at. The assessee has a right to inspect the record and all relevant documents before he is called upon to lead evidence in rebuttal. This right has not been taken away by any express provision of the Income Tax Act."*

32. *In respect of the report of the Investigation Wing of the Department, the appellant pointed out the said report nowhere states the name of the appellant or the transaction of the appellant. The said investigation was carried out in case of any other person and not in case of the appellant. In the said investigation the transaction in question of the appellant was not commented upon by the Investigation Wing and therefore the said Investigation Wing report is not evidence to impeach the transaction of the appellant. We find that the Ld. Departmental Representative could not point out anything to show that the said Investigation report was relied upon by ld. AO in the order of assessment was related to the specific transaction of the appellant. In the circumstances, the said Investigation Report wherein some other persons were found to be involved in some manipulation does not establish that the appellant was also involved in any manipulation.*

33. *Recently, Hon'ble High Court of Orissa in the case of PCIT vs. Dipansu Mohapatra reported in [2023] 149 taxmann.com 99 (Orissa) adjudicating similar case of exemption claimed u/s 10(38) of the Act and the assessee was alleged to have taken accommodation entries from Kolkata based companies on the basis of the report of Investigation Wing of Income Tax Department. The relevant finding of the Hon'ble Court dealing with the issue of opportunity of cross-examination and principles of natural justice not given to the assessee held as follows:*

“6. Another ground on which the ITAT found fault with the additions made by the AO was that reliance was placed on statement of 'so called entry operator' to justify the additions under sections 68 and 69 of the IT Act. These statements were recorded on various dates in some other proceedings not connected with the Assessee. Further, the statements were recorded much before the date of the survey conducted on the Assessee. It was unable to be disputed by the Department that the Assessee did not have an opportunity to challenge such statements and further, no opportunity to cross-examine the so-called entry providers was given to the Assesseees.

7. Having heard learned Senior Standing Counsel for the Department (Appellant) and having perused the impugned orders of the AO, CIT(A) and the ITAT, the Court finds that both the grounds viz., the claim for benefit of section 10(38) of the Act and denial of an opportunity to cross examine the entry providers, turned on facts. The ITAT was justified in accepting the plea of the Assessee that the failure to adhere the principles of natural justice went to the root of the matter. Also, the CBDT circular that permitted to the Assessee to file revised returns if he omitted to make a claim was also not noticed by the AO.”

Therefore the Assessing Officer was bound to supply those statements and allow the cross examination of the maker of the statements to the assessee according to the judgement of the Hon'ble Calcutta High Court in Swati Bajaj (supra) case as well as in view of the judgments of Hon'ble Supreme Court in the case of Andaman Timber Industries Vs Commissioner of Central Excise reported in [2016] 38 GSTR 117 (SC), Principal Commissioner of Income Tax (Central) Vs Oriental Power Cables Ltd reported in [2022] 143 taxmann.com 371 (SC), Kishinchand Chellaram (AIR 1980 14 SC 2117) and the Hon'ble Calcutta High Court in the case of Eastern Commercial Enterprise (1994) (Cal) [210 ITR 103].”

34. In view of the above discussion, we notice that so far as the statement of Mr. Praveen Kumar Agarwal is concerned who is the director of one of the group companies namely M/s. Gateway Financial Services Ltd. already stands retracted by him by filing affidavit before the Investigation Wing of Income Tax Department and also as regards the submissions of ld. D/R that proceedings under other Acts were carried out in the case of Mr. Praveen Kumar Agarwal it was stated by ld. Counsel for the assessee as an officer of Court that as on date no proceedings are pending against Mr. Praveen Kumar Agarwal in regard to the alleged transactions before any authorities other than Income Tax Department. Even otherwise, we are not dealing with the case of Praveen Kumar Agarwal. So far as the statements of remaining persons which have been referred by ld. AOs in the assessment orders they have all either been taken during the course of search/survey in some other cases or during the course of any proceeding in the case of the company the shares of which have been traded by the assessee(s), however, there is no documentary evidence either placed by these persons during the course of recording the statement or at any other stage which could show that the assessee(s) were directly involved in the racket of providing accommodation entries or were aware of such

activities being carried out. The claim of the assessee has always been that as a prudent investor it had made the investments and some investments did not give any return rather gave losses and, in some cases, profits were earned. It was incumbent upon ld. AO to provide the assessee(s) a proper opportunity of cross-examination with all those persons who stated to be either involved in accommodation entries or were having some connection with the alleged transactions. There was no opportunity with the assessee(s) to cross-examine those persons, that why they have referred these transactions as bogus or accommodation in nature. No such exercises have been carried out at any stage by the Revenue authority. Though the assessee has placed material on record to show that on merits also the case of the assessee is strong and the alleged transactions have been carried out through banking channel as well as through recognised stock exchange and demat accounts and also it has been claimed that in one case there is a loss and there is no addition u/s 68 of the Act but without going into the merits of the case even on legal ground itself, we, in view settled judicial procedure referred hereinabove, are inclined to hold that there is a violation of principles of natural justice as opportunity of cross-examination of all those persons whose statements though not directly referred to the alleged transactions but the statements having been used by ld. AO to make additions in the hands of the assessee(s) in appeal before us, was not provided to the assessee(s) even though requested during the course of hearing before the AO well as ld. CIT(A). Based on these facts, we find merit in the contention of the ld. Counsel for the assessee that principles of natural justice have been violated in the case of all the four assessees namely M/s. Gateway Financial Services Ltd., M/s. Nishit Agarwal Beneficiary Trust, Pinky Agarwal and Pratik Agarwal Beneficiary Trust.

35. In the preceding paragraphs, we have dealt with the legal issue regarding the matter that since the assessee has not been provided sufficient opportunity to cross examine those persons who were directly related to the assessee company i.e., Gateway Financial Services Ltd., and other assessee(s) even when their statements have been relied heavily by the Assessing Officers to deny the claim of short term capital loss /long-term capital gains as the case may be, we note that apart from placing reliance on the statements, the revenue authorities have also referred to the report of the investigation Wing which carried out search and survey in some other cases prior to the conclusion of assessment proceedings in the instant appeals and such investigation included the persons who have been alleged to be entry providers/operators, share brokers etc.

36. Now, before us in case of one of the assessee's, namely, Gateway Financial Services Ltd., the issue relates to bogus short-term capital loss from sale of equity shares of Blue Circle Services Ltd. and in the remaining three

cases the issue is regarding alleged bogus Long term capital gain from sale of scrip, namely, Radford Global Ltd..

37. Since the facts relating to claim of loss and gain are different, we will first take up the issue regarding alleged bogus short-term capital alleged by the AO in the case of Gateway Financial Services Ltd.. Though we have discussed the facts of this issue in detail in the preceding paragraphs and have also discussed the finding of the Hon'ble Jurisdictional High Court in the case of Swati Bajaj (supra), wherein also there was a reference to the report of the investigation Wing but in that case the issues were relating to long-term capital gains and additions were made u/s 68 of the Act. But in case of Gateway Financial Services Ltd., which is a share broking firm as well as trader in equity shares and being assessed to tax for past many years has dealt in the equity share, namely, Blue Circle Services Ltd.. Since the AO has only disallowed the claim of bogus loss, it in itself means, that the genuineness of purchases of equity shares of Blue Circle Services Ltd., has not been disputed by the revenue authorities. The assessee in this case has purchased 5232616 equity shares. The ld. AO has also referred to the equity shares price chart of Blue Circle Services Ltd., wherein there is a steep upward trend from 2011-12 onwards then a downward trend which goes up to the end of 2013 and again there is an increase in trend during 2013-14 but not to that extent of the past trend of steep increase. The claim of the assessee is that, looking at the trend of equity share, in the anticipation of earning good profits it made the investment in equity shares of Blue Circle Services Ltd., and there was some increase in the price but subsequently it started decreasing and since the assessee did not want to lose all its capital it sold the equity shares as and when it got the opportunity. Even though, the transactions have been carried out on the recognised stock exchange and well within the rules and regulations provided by the SEBI, we note that in all the alleged statements of the alleged third parties and the report of the investigation Wing there is specifically no indication that whether the assessee was directly involved with the promoters/directors of Blue Circle Services Ltd., for such a steep increase/decrease of the prices. It prima facie seems to be a case where the assessee has made an adventure in the business of trading in equity shares being in the business of share trading and investment and shares brokerage were given past many years. At this juncture when the purchase of equity shares has not been doubted by the revenue authorities, and the claim of the assessee is that it has entered into the purchase and sale transactions in the regular course of business and also considering the fact that it is not the case of earning long-term capital gains for claiming exemption u/s 10(38) of the Act, but is a case where the assessee has lost its capital by incurring huge loss. This Tribunal in the case of Raigarh Jute & Textile Mills Ltd. vs. ACIT in ITA No. 2286/Kol/2019; AY 2014-15; order dt. 27/06/2023, wherein the same

combination of Judicial and Accountant Member has dealt with the issue regarding the claim of short term capital loss/business loss from sale of equity shares which was alleged by the revenue authorities being arranged from penny stock companies has decided in favour of the assessee after dealing with the facts of the case, modus operandi of carrying out such transactions by the assessee and also dealing with the judgement of the Hon'ble jurisdictional High Court in the case of Principal CIT Vs Swati Bajaj 446 ITR 56 (Cal), and also examining that the facts of the case are different with that of Swati Bajaj (Supra) and the same being not applicable in the case and has held as follows:-

"9. We have considered the rival contentions and gone through the record. The Hon'ble Supreme Court in the case of NRA Steelin the case of "PCIT v/s NRA Iron & Steel (P) Ltd." reported in [2019] 103 taxmann.com 48(SC) has taken note of the observations made by the Supreme Court in the the land mark case of "Kale Khan Mohammed Hanif v. CIT"[1963] 50 ITR 1 (SC) and "Roshan Di Hatti v. CIT" [1977] 107 ITR 938 (SC) laying down the proposition that the onus of proving the source of a sum of money found to have been received by an assessee, is on the assessee. Once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness, then the AO must conduct an inquiry, and call for more details before invoking Section 68. If the Assessee is not able to provide a satisfactory explanation of the nature and source, of the investments made, it is open to the Revenue to hold that it is the income of the assessee, and there would be no further burden on the revenue to show that the income is from any particular source. Thereafter the hon'ble Supreme court summed up the principles, which emerged after deliberating upon various case laws, as under:

- i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.
- ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.
- iii. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.

"11. The principles which emerge where sums of money are credited as Share Capital/Premium are :

In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act."

9.1 The Hon'ble Supreme court, thus, has held that once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness of the subscribers, then the AO is duty bound conduct to conduct an independent enquiry to verify the same. Once the assessee having discharged initial burden upon him to furnish the evidences to prove the identity and creditworthiness of the share subscribers and genuineness of the transaction, the burden shifts upon the Assessing Officer to examine the evidences furnished and even make independent inquiries and thereafter to state that on what account he was not satisfied with the details and evidences furnished by the assessee and confronting with the same to the assessee.

9.2 The Hon'ble Calcutta High Court, however, in the case of PCIT vs. Swati Bajaj & Ors (supra) has observed that to prove the allegations a logical process of

reasoning from the totality of the attending facts and circumstances surrounding is to be adopted. That it is the duty of the Court to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded so as to reach a reasonable conclusion and the test would be what inferential process that a reasonable/prudent man would apply to arrive at a conclusion. Further proximity and time and prior meeting of minds is also a very important factor. A holistic approach is required to be made and the test of preponderance of probabilities has to be applied. The Hon'ble High Court observed that the assessee therein had failed to justify the rationale behind investment in the companies not having financial worth. They had failed to establish genuineness of steep rise in price of shares within a short period of time that too when general market trend was recessive. That the ld. Assessing Officer has pointed out that the assessee could not explain, why it invested in such script without knowing the financial performance of the company. That such cannot be case of intelligent investment or simple and straight case of tax planning to gain benefit of long term capital gains earnings @ 491% over period of 5 months which is beyond human probability and defies business logic of any business enterprises dealing with share transactions. Even brokers who coordinated transactions were also unknown to assessee. All these facts give credence to unreliability of entire transaction of shares giving rise to such capital gains ratio. That the Assessing officer was justified in making the additions on the basis of the material available on record, the surrounding circumstances, the human conduct and preponderance of probabilities.

10. Now, we have to examine the contentions of the assessee in the light of the ratio of law laid down by the hon'ble Supreme Court in the case of "NRA steels" (Supra) and by the Calcutta High Court in the case of "Swati Bajaj" (supra).

10.1 The plea of the assessee in this case is that the assessee was bona fide purchaser of the shares in question. That the assessee had duly taken note of the financials and share price movement of the companies before purchasing the shares. The ld. counsel in this respect has referred to the financials of the said companies, the market trend and the reasons to exit as mentioned in the written submissions as reproduced above. firstly referred to the financial details and share price movement of Rutron International Ltd. It has been submitted that Rutron International Ltd. was a listed public company. The assessee company took note of the annual reports. The said company had reported total assets of 17.88 for F.Y 2012-13 and its turnover and proceeds had improved substantially from its previous years. Its income has also increased substantially. It reported net profit of Rs.0.50 Crores in FY 2012-13 as against Rs.0.11 Crores in FY 2011-12 implying an increment of 354.54%. The stock even started declaring dividends (Equity Dividend of Rs.0.18 Crores in FYE Mar'13 as against NIL in FYE Mar'12, Mar'11 and Mar'10 implying a trend reversal and a dividend payout of 36%). That having regard to these fundamentals of Rutron, the assessee company had purchased shares in a staggered manner in January 2014 in anticipation of trading profits. The purchase of the stock was motivated not only by the dividend but the anticipated price rise. However, since the stock of Rutron was in a sustained fall and therefore like any prudent trader, the company purchased the stock only when its price fell substantially. However, when it became apparently clear that the financials of Rutron were not indicative of future financial performance of the stock, the assessee company, being a prudent trader switched gears and immediately cut short its losses by exiting its position in Rutron. The ld. AR, therefore, has demonstrated that the investments in these shares were governed on commercial prudence.

10.2 The Ld. Counsel has further demonstrated that the Trades in Comfort Fincap Ltd. ('Comfort') shares, were also based on the company's own reading of the financial statements of the said company. That its stock parameters had improved from its previous reporting period. (Total Assets of Rs.25.23 Crores in FYE Mar'13 as against Rs.21.49 Crores in FYE Mar'12; Operating Profit of Rs.1.83 Crores in FYE Mar'13 as against Rs..86 Crore in FYE Mar'12; Reported Net Profit of Rs.0.99 Crore in FYE Mar'13 as against Rs.0.59 Crore in FYE Mar'12 implying an increment of 67.79%) and the stock even started declaring dividends whose trend showed a marked upward trajectory (Equity Dividend of Rs.0.54 Crores in FYE Mar'13 as against Rs.0.22 Crore in FYE Mar'12 and NIL in FYE Mar'11 and Mar'10 implying a trend reversal and a dividend payout of 59.60%). The purchase of the stock was timed in anticipation of the expected price action that usually follows in such stocks showing a reversal in dividend payout trend. That the shares of Comfort (still Comfort Fincap Ltd 535267) were purchased in a staggered manner in January 2014 in anticipation of trading profits and the same were sold, again in a staggered manner, in March 2014 when the trade went awry. The stock of Comfort was also in a steep fall when the company purchased it. However, the company purchased the stocks only when the price fall was sustained over a period of time. It is notable that the company did not enter/exit at the highest/lowest price and the trades in shares of Comfort were entered into on the basis of the trend visible in the then latest financials of the stock available publicly.

10.3 Regarding the third company, it has been demonstrated that Luminaire Technologies Ltd. ('Luminaire'), was a listed public company at the relevant time. That the shares of Luminaire were purchased in a staggered manner in January and February 2014 in anticipation of trading profits and the same were sold on the 5th of March 2014. The stock of Luminaire was also in a steep fall when the company purchased it. However, the company purchased the stocks only when the price fall was arrested and a trend reversal was visible. However, the favourable technical analysis of the stock, which prompted the company to purchase the stock, did not lead to the anticipated price rise owing to the weak market outlook regarding the stock. The company, having entered the trade to profit in the immediate short term, immediately chose to cut short its losses as the stock price deteriorated further.

10.4 Regarding the decision to trade in the stock of Unno Industries Ltd., the Ld. Counsel has explained that the same was based on the company's own reading of the financials of Unno, which was a listed public company at the relevant time. That the trade was undertaken based on the not only the fundamentals but also the technical aspects of the stock. The shares of Unno were purchased on 22nd January 2014 in anticipation of trading profits and the same were sold on 20th March 2014 when there was an indicator for a further decline in the prices of a stock. That the stock of Unno was in a steep fall and the company had purchased the stock only when its price fell substantially. That the company did not enter/exit at the highest/lowest price and the trades in Unno were entered into only after carefully considering both the technical and fundamental aspects of the stock. The trend visible in the then latest financials of the stock available publicly was upbeat. That Unno had reported Total Assets of Rs.42.55 Crores for FYE Mar'13 and its turnover and profit had remained stable over the years despite the falling prices in the market. Unno had a Turnover of Rs.0.65 Crore both in FYE Mar'13 and FYE Mar'12; Total Income of Rs.0.65 Crore in FYE Mar'13 as against Rs.0.67 Crore in FYE Mar'12; Reported Net Profit of Rs.0.07 Crore in both FYE Mar'13 and FYE Mar'12 implying a marked stability in financial performance in the recent years. However, the head and

shoulders pattern on the stock charts implied an oncoming decline in the stock prices, therefore, the assessee company immediately sold the stock to avoid further loss.

10.5 In case of Global Infratech & Finance Ltd. ('Global') shares, it has been explained that the trade was undertaken based on the parameters which clearly set out both the logic and rationale behind the trades. The stock of Global was also in a steep fall when the company purchased it. The shares of Global were purchased in a staggered manner in February 2014 in anticipation of trading profits and the same were sold, again in a staggered manner, in March 2014. However, the company purchased the stock only when the price fall was sustained over a period of time. That the stock parameters had improved from its previous reporting period (Total Assets of Rs.56.62 Crores in FYE Mar'13 as against Rs.20.90 Crores in FYE Mar'12; Operating Profit of Rs.1.49 Crores in FYE Mar'13 as against Rs.0.01 Crore in FYE Mar'12; Reported Net Profit of Rs.1.05 Crore in FYE Mar'13 as against Rs.0.08 Crore in FYE Mar'12 implying an increment of 1,212.50% and trend reversal). The company, being a prudent trader, did not only rely on the financials of Global to make its decisions in the market. It was also prone to keep tabs on the technical aspects of the stock to pre-empt market movements in it. Envisaging a further fall in the stock prices owing to its interpretation of the deteriorating technical parameters of Global even in the face of robust fundamentals, the company sought to exit its position in the stock completely for the time being.

10.6 It has been further explained that the SEBI has also investigated regarding the allegation of share trading in respect of two companies out of the above mentioned 5 companies. In the case of Rutron, only 14 persons were suspected to be involved in price rigging who were restrained from accessing the security market for a period of 6 months. Neither the assessee nor his share brokers were ever named for restrain from trading in the said scrip. Even, the company itself was not implicated of any wrong doing. Any other person, except the aforesaid 14 persons, was not restrained for trading in the shares in the said company. The second company investigated was Global Infratech & Finance Ltd, in respect of which, only 46 specific persons/entities were found guilty of price manipulation in shares of the said company after detailed investigation. That some of the entities had inter alia questioned the act of SEBI in not holding all persons/entities who had traded in the shares of Global Infratech and Finance Limited to be artificial or suspicious. However, the SEBI in their Order had specifically observed that only the promoters and/or their connected entities were found to be guilty of price manipulation and that the unrelated entities were not to be made party to these proceedings. It has been further submitted that in respect of other three companies, the SEBI did not choose to make any investigation and there is no action taken by the SEBI against the other three companies namely Comfort Fincap Ltd, Luminaire Technologies Ltd and Unno Industries Ltd. It has been submitted that no adverse orders ever have been passed by the SEBI regarding price manipulation in respect of aforesaid three companies. The Ld. Counsel, therefore has submitted that the facts of the case of the assessee, when considered in the light of the proposition of law laid down by the Hon'ble supreme Court in the case of NRA Steel (supra) and of the hon'ble Calcutta High Court in the case of Swati Bajaj (supra), the evidence furnished by the assessee, the surrounding circumstances would show that the assessee's decision to invest in those companies was based on business prudence and that there was no evidence, even circumstantial, that the assessee was involved in price rigging or otherwise instrumental to book bogus short term capital loss.

11. The Ld. Counsel has further submitted that the facts of the case of the assessee were quiet distinguishable from that of the cases of "Swati Bajaj & others" (supra). He has submitted that in most of the cases before the Hon'ble High Court, the purchases were off the Stock Exchange/private placements. That there were orders of SEBI suspending the scrip and/or wherein the concerned trader were found guilty of price manipulation. Further, that there were statements recorded from the brokers of the assessee, who had admitted to have indulged in price manipulation and therefore adverse view was taken. That in the specific facts before the hon'ble High Court, it was noted that the price of the scrips showed steep increase during recessive trends and therefore the movement in prices was held to be ingenuine. That the Hon'ble High Court had observed that the onus was on the assessee to establish that the price rise was genuine in light of the fundamentals of the scrip. However, in case of the assessee, the trades were made on the Stock Exchange. There was no adverse statement of assessee's broker. Moreover the Director of the assessee was examined and confronted with the allegations u/s 131 of the Act and he had specifically denied the same. That the assessee has sufficiently demonstrated that the financial results and the fundamentals of the scrips was mirrored in their price movements and therefore it was not a case that the movement in prices was not explained. Even as demonstrated above, in three (3) out of the five (5) scrips, there were no adverse orders of SEBI regarding any kind of price manipulation. Further in the remaining two scrips, the SEBI upon completion of investigation found specific entities/persons guilty of manipulation. The Ld. Counsel has further submitted that in the similar facts and circumstances, the coordinate benches of the Tribunal have opined in favour of the assessee therein.

12. We find force in the contentions raised by the ld. counsel for the assessee. Firstly, in this case, the assessee has not claimed long-term capital gains on account of unrealistic steep rise in the share prices of these scrips traded in as was in the case of PCIT vs. Swati Bajaj & Ors (supra). The Hon'ble High Court had held, under the circumstances, that the burden was upon the assessee to explain the business prudence of investment in these scrips of the companies having negligible financial worth and thereafter of steep rise in their share price resulting into huge capital gains within a short span of time. The case before us is of business loss in share trading. The assessee, as observed above, has duly explained the factors and considerations which prevailed for making decision by the assessee company of purchasing in the aforesaid five scrips, which included their financial worth, the market position, their income, dividends etc. Further, it was not a case that the shares shown to have been purchased off market/private and thereafter they were put into demat account after sufficient lapse of time from the alleged date of physical purchase and then sale of the same within a short span of time after they were accounted in the demat account, gaining high monetary capital gains. In the case of the assessee, the shares were traded on the stock exchange, the same were kept in the demat account of the assessee. There is no allegation of involvement of the assessee or even his share broker in any type of price rigging. There even does not seem any probability of meeting minds of the assessee and/or his share broker and the promoters of the companies. A very peculiar fact which is noted from the assessment order/investigation wing report is that in the list of the persons whose statement was allegedly recorded and who in their statement have admitted of price rigging, **the names of share brokers, entry operators and exit providers** have been mentioned. The facts on the file itself show that there was meeting of minds of the entry operators and the share brokers and exit providers. The price rigging was done

by giving benefit to various subscribers with connivance of share brokers and the motive was to convert their unaccounted money into tax exempt long-term capital gains and for that purpose, there were certain persons chosen as exit providers who would buy shares when the share prices would be at its peak and those exit providers thereafter would suffer losses on account of fall in the price of the shares. This specific fact on the file shows that the exit providers were already chosen to execute the plan. The motive was to give the benefit of bogus long-term capital gains to various beneficiaries and to make that plan foolproof, the exit providers were already chosen with a pre-determined planning as to at what stage the beneficiaries of bogus long-term capital gains would be given exit. That perhaps was not dependent upon chance exit providers willing to book bogus short-term capital loss. Neither the name of the assessee nor of his share broker is mentioned in the list of exit providers. The circumstances of this case do not suggest of unnatural and unrealistic human conduct. The Assessing Officer in this case has not pointed out any adverse evidence against the assessee. He has simply relied upon the investigation report which is a general investigation report. The Hon'ble Calcutta High Court in the case of PCIT vs. Swati Bajaj & Ors (supra) has considered the said report and analysed the same vis-a-vis circumstantial evidences like the negligible financial worth of the companies whose shares were traded in, the unrealistic steep hike in the share prices as against the recessive market trend and the failure of the assessee to explain the commercial prudence for making such huge investments. The additions thus have been made on the basis of circumstantial evidences and considering the preponderance of probabilities. Hon'ble Supreme Court in Padmasundara Rao v. State of T.N. 255 ITR 147 (SC) has held that circumstantial flexibility, e.g. one additional or different fact, may make a world of difference between conclusions in two cases:

"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington Vs. British Railways Board (1972) 2 WLR 537. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

The Hon'ble Karnataka High Court in the case of "Flipkart India (P.) Ltd. v/s Assistant Commissioner of Income-tax", [2017] 79 taxmann.com 159 (Karnataka) has observed that considering the fact that this blind appreciation of a precedent is a frequent occurrence, in catena of cases, the Hon'ble Supreme Court has clearly opined that a judgment should not be read as a provision of law. A judgment is confined to the facts and circumstances of its own case. It is only when the facts and circumstances in two cases are similar that the ratio of the former case becomes applicable to the latter case.

As discussed above, in the absence of any direct incriminating evidence against the assessee, the distinguishable and weak circumstantial evidence, in our view, do not suggest the preponderance of probability of the assessee being involved in price rigging of the scrips or being the predetermined and pre planned beneficiary of the devised scheme, therefore, the impugned additions are not warranted in this case, and the same are accordingly ordered to be deleted."

38. Respectfully following the above decision of this Tribunal in the case of Raigarh Jute & Textile Mills Ltd. vs. ACIT (supra), which is squarely applicable on the facts of the instant case of assessee i.e., M/s. Gateway Financial Services Ltd., we find that the alleged loss has been incurred by the

assessee in the regular course of its business. We also note that the statement of various persons recorded by the AO/investigation wing/search team in the course of other proceedings as well as the report of the Kolkata investigation wing, there is no reference to a direct evidence indicating that the transactions in question is in the nature of accommodation entry or for arranging bogus loss. Thus, the addition/disallowance made by the assessee is merely on the basis of preponderance of probabilities. Therefore, in the present case, when the statements and investigation report relied upon by the AO has not been given to the assessee for the purpose of cross-examination as well as rebuttal, we in view of the above decision are inclined to hold that the alleged loss being genuine loss from share trading incurred by the assessee in regular course of business, deserves to be allowed. Thus, impugned disallowance is uncalled for.

44. *Thus, to conclude we hold that firstly the principles of natural justice have been violated while carrying out the assessment proceedings in the case of the assessee(s) since no opportunity for cross-examination was provided for those persons whose statements have been relied upon by the assessing officer for making the alleged additions. Secondly, there is no direct evidence referred to by the assessing officer or in the report of the investigation Wing that the assessee(s) have made arrangements with the entry operators/company owners for carrying out the alleged transactions. Thirdly, additions made by the assessing officer are merely based on a theory called preponderance of probability that in same type of cases prices are rigged up and down by the entry operators in order to provide accommodation entry to various persons in the form of Long term capital gain and though, the assessing authority can apply preponderance of probabilities in some cases on account of surrounding circumstances but so far as the cases on hand are concerned, we notice that firstly some observations were made by the SEBI regarding some fishy transactions carried out in case of few companies. Based on such primary information, the income tax department has carried out extensive enquiries and search and surveys in the case of various entry operators and alleged companies and based on such statements, a theory was established regarding such accommodation/bogus entries in the form of capital gains. However, since in the case of the assessee, SEBI at a later stage has intensively carried out the investigation on the facts of the assessee(s) along with other persons as referred in the order of the SEBI (extracted supra), and after a detailed investigation and examination of records exonerated, the assessee(s) from the charges levelled in the show cause notice issued to them. Therefore, when the assessee(s) have been exonerated and the charges against them have been waived and the transactions of purchase and sale of equity shares carried out by them have been found to be genuine, the theory of preponderance of probabilities is ruled out in the case of the present assessee(s). Thus, when the transactions giving rise to the long term capital gain have been found to be*

genuine, and as per rules and regulation of SEBI, the finding of the ld. CIT(A) deserves to be set aside and the impugned additions in case of assessee(s) in appeal before us are uncalled for.

13.1. In the case of *Pr. CIT Vs. Renu Aggarwal (Supra)*, the Hon'ble Apex Court has dismissed the special leave petition filed by the revenue affirming the decision the Hon'ble High court of Allahabad in ITA No. 44 of 2022 which in turn has upheld the decision of the tribunal in *ITA No. 204/Lkw/2020 A.Y. 2014-15 & anothers*. The Hon'ble Apex Court, however, kept the legal issue open. We have perused the **decision of the tribunal wherein the following findings of fact were recorded:**

"The above findings recorded by ld. CIT(A) are quite exhaustive whereby he has discussed the basis on which the Assessing Officer had made the additions. While allowing relief to the assessee, the ld. CIT(A) has specifically held that there is no adverse comment in the form of general and specific statement by the Pr. Officer of stock exchange or by the company whose shares were involved in these transactions and he held that Assessing Officer only quoted facts pertaining to various completely unrelated persons whose statement were recorded and on the basis of unfounded presumptions. He further held that the name of the appellants were neither quoted by any of such persons nor any material relating to the assessee was found at any place where investigation was done by the investigation Wing. The ld. CIT(A) relying on various orders of Lucknow Benches and other Benches has allowed relief to the assessee by placing reliance on the evidences filed by the assessee before Assessing Officer. I do not find any adversity in the order of ld. CIT(A) specifically keeping in view the fact that Lucknow Benches in a number of cases after relying on the judgment of Hon'ble Delhi High Court in the case of Krishna Devi and others had allowed relief to various assessees."

13.2. The Hon'ble High Court, after taking into the concurrent findings of the first appellate authority and the tribunal, held that no substantial question of law is involved in the appeal of the revenue and

accordingly dismissed the appeal of the Revenue. In the present case before us also there is no adverse comment in the form of general and specific statement by Pr. Officer of the Stock Exchange or by the company whose shares were involved in the above said transactions. We note that the AO only referred to the report of the investigation wing which was based upon the statements of several persons who were wholly unrelated. The same is the position with regard to report of the SEBI. In the instant case also the name of the assessee was neither quoted by any of such persons nor any materials relating to the assessee was found at any place where investigation/searches were carried out by the Wing. Thus find the above decision squarely applies to the instant case.

13.3. We note that the Hon'ble High Court of Orissa in the case of *PCIT vs Dipansu Mohapatra(supra)*, has held that tribunal was justified in allowing assessee's claim u/s 10(38) of the Act where the assessee has filed the details of purchase and sales of shares alongwith contract notes for purchase and sale, D-mat A/C and bank statement and furthermore no incriminating materials were found against the assessee in the survey conducted in the premises of the assessee and therefore the AO could not deny the claim u/s 10(38) of the Act merely by relying on the statements of accommodation entry providers which were recorded much before the date of survey. In the present case before us the facts of the assessee are on better footing even as there is no survey on the assessee's premises and AO relied on the statements of entry providers which were recorded long ago. Besides there was no

incriminating materials against the assessee found even in the premises of entry operators/stock brokers. Therefore this case also squarely applies to the facts of the case.

14. In view of the above discussion and in the given facts and circumstances of case, we are inclined to hold that the Assessing Officer has failed to carry out any independent investigations/enquiries into the evidences filed by the assessee and has rejected the claim by the assessee *qua* loss from shares trading only on the basis of surmises and conjectures and relying on the statements of entry operators who never named the assessee and their statements were recorded long before . Therefore, we set aside the order of first appellate authority and direct the Assessing Officer to delete the allow the loss of Rs.3,19,65,849/- .The first issue raised by the assessee is allowed. The ground Nos. 5 to 9 are allowed.

15. In the result the appeal of the assessee is allowed.

Order pronounced in the Court on 11th January, 2024 at Kolkata.

Sd/-

(SONJOY SARMA)
JUDICIAL MEMBER

Sd/-

(RAJESH KUMAR)
ACCOUNTANT MEMBER

Kolkata, Dated 11/01/2024

**SC S.P.*

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

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाई/ Guard file.

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