

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH' G': NEW DELHI
BEFORE,
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER
ITA No.9504/Del/2019
(ASSESSMENT YEAR 2015-16)**

Sachin Kanodia C/o. Kapil Goel, Adv. F- 26/124, Sector-7, Rohini, New Delhi PAN-BGJPK0712P	Vs.	Income Tax officer, Ward 42(2), New Delhi
(Appellant)		(Respondent)

Appellant by	None
Respondent by	Sh. Anuj Garg, Sr. DR

Date of Hearing	08/05/2024
Date of Pronouncement	10/05/2024

ORDER

PER YOGESH KUMAR U.S.JM:

This appeal is filed by the Assessee against the order of Commissioner of Income Tax (Appeals)-43, ["Ld. CIT(A)", for short], dated 31/10/2019 for the Assessment Year 2015-16.

2. The Grounds of Appeal are as under:-

"Jurisdictional Ground Notice u/s 143(2) is invalid

1. That order passed by Ld AO dated 28/12/2017 and further order passed by Id CIT A dated 31/10/2019 are bad in law in as much as mechanical notice u/s 143(2) on basis of CASS is not in accordance with jurisdictional conditions

stipulated under the Act so it shows grave and patent non application of mind on part of Ld AO in issuing notice u/s 143(2) and accordingly all subsequent proceeding including orders passed by Ld AO and Ld CIT-A are void ab initio

Other grounds on merits qua addition of Rs 64,90,468

2. That order passed by Ld AO dated 28/12/2017 and further order passed by ld CIT A dated 31/10/2019 are bad in law in as much as addition of Rs 64,90,468/- (break up addition made & confirmed by CIT-A u/s 68 on a/c of alleged bogus LTCG Rs 63,01,425/- being receipt by cheque and Rs 189,043 being alleged commission @3% on above amount addition made u/s 69C Rs 189,043) is made without appreciating that LTCG arising from share sales on floor of stock exchange after due payment of STT through recognized stock broker for which voluminous evidence of purchase and sale are no where contradicted and overruled as per law and on basis of stereotype narrative additions are made and even relevant assessment related office manual of revenue is not abided while making additions.

2.1 That order passed by Ld AO dated 28/12/2017 and further order passed by ld CIT A dated 31/10/2019 are bad in law in as much as addition of Rs 64,90,468/- is made violating principles of natural justice without confronting any investigation wing report relevant extract, statements recorded by investigation wing, etc and without offering cross examination of revenues witness whose statements is extensively relied in impugned orders, which is sufficient to quash the assessment order and order passed by Ld CIT-A. (refer para 7 & 10 of assessment order as Ld AO has himself observed that "the same (assessee's reply) is rejected in view of investigation made by Kolkata wing") We rely on section 142(2)& 142(3) of the Act & office manual of revenue which is glaringly violated in present case.

3. That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the action of ld AO in making addition of Rs 64,90,468/- without appreciating that burden to prove that transaction is bogus/sham has remained un-

discharged from side of revenue and contrary findings of Ld CIT-A are repudiated at length).

4. That on the facts and in the circumstances of the case and in law, both ld CIT-A and ld AO erred in making subject additions without appreciating that the modus operandi relied extensively in impugned orders is never co-related even remotely to the facts of the present case as there is no iota of evidence brought on record which can display that assessee herein has inducted certain cash at the time of sale to certain unidentified broker/middleman/syndicate member who has in turn introduced certain identified artificial paper company for alleged parking of said cash to buy the shares sold by the assessee which theoretical trail has remained inchoate completely nullifying the entire basis of the addition.

5. That on the facts and in the circumstances of the case and in law, ld AO and Ld CIT-A erred in making and sustaining subject additions without appreciating that addition made by Ld AO in deeming fiction of section 68 of the Act (in para 10 & 19) without having any books (even as per para 2 of assessment order where assessee is only enjoying income from other sources only no legit is there on assessee to maintain books u/s 2(12A)/44AA of the Act) and so arbitrary invocation of deeming fiction of section 68 of the Act without application of mind on part of Ld AO/Ld CIT-A to mere share sale which does not give rise to any cash credit in eyes of law, cant be legally countenanced.

6. That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the action of ld AO in making addition of Rs 64,90,468/- without appreciating that basis of findings of the lower authorities is "suspicion" and "human probabilities" only which is never converted to reliable and trustworthy material and entire assessment order is passed on sole basis of "borrowed satisfaction" and without any independent application of mind (like a rubber stamp order).

7. That on the facts and in the circumstances of the case and in law, ld CIT-A erred in sustaining the action of ld AO in making addition of Rs 64,90,468/- without appreciating that no opportunity is given to the assessee to be confronted with back

material relied extensively in impugned orders like investigation wing report etc and no opportunity to cross examine the revenue's witness was given despite specific written request in this regard made to Ld AO/CIT-A.

8. That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the action of ld AO in making addition of Rs 64,90,468/- without appreciating that in identical facts in various orders relief has been granted to assessee accepting LTCG (long term capital gains) as genuine.

9. That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the action of ld AO in making addition of Rs 64,90,468/- without appreciating spirit of law contained in section 10(38) and section 43(5)(d) where statutory status is provided to evidences generated from stock exchange system treating the same to be impeccable and only from finance act 2017 with prospective effective from AY 2018-2019, amendment is made in section 10(38), prior to which such gains would remain exempt.

10. That the appellant craves leave to add add/alter any/all grounds of appeal before or at the time of hearing of the appeal.

Humble Prayer:

i) To delete the addition of Rs 64,90,468/- on a/c of alleged bogus LTCG

ii) To quash assessment order and ld CIT-A order for being passed in serious violation of audi altrem partem

iii) To hold section 68 etc does not apply to sale of shares and that too sans credit in books of account maintained by assessee;

iv) To restore returned income

v) Any other appropriate relief.”

3. When the Appeal is called neither the assessee nor the representative of the assessee appeared before the Bench to advanced

any argument on behalf of the assessee. The assessee has been continuously absent before the Tribunal, therefore, we compelled to decide the Appeal after hearing the Ld. Departmental Representative.

4. Brief facts of the case as mentioned in the order of the Ld. CIT (A) are as under:-

“1. The assessee is an individual having PAN BGJPK0712P and has earned interest and commission income during the year under 10(38) of the Act. The assessee has also earned long term capital gain claimed exempt u/s the Act.

2. The assessee filed his return of income vide acknowledgement no. 720656000270815 for AY 2015-16 on 27.08.2015 declaring total income at Rs. 8,63,640/- .

3. The case was selected for scrutiny through CASS and accordingly notice u/s 143(2) was issue to the assessee.

4. Thereafter, the Id. AO issued notice u/s 142(1) dated 19.04.2016 along with detailed questionnaire to the assessee wherein assessee was asked by the Id. AQ to submit details of shares purchased and sold during the year under consideration.

5. In response to the above mentioned notice and questionnaire, the assessee, vide its reply dated 26.09.2017 submitted all the information and documents in respect capital gain earned on sale of shares which is mentioned below:

a) Copy of Statement of Bank Account maintained with the South Indian Bank, Rohini evidencing the receipts of sale of investment in shares directly in the bank account of the assessee.

b) Copy of ledger account of bank account maintained with South Indian Bank, Rohini.

c) *Copy of Acknowledgment slip from ALPS Motor Finance Limited evidencing the payment of purchase consideration to the company.*

d) *Copy of Share certificate of ALPS Motor Finance Limited evidencing the Assessee's ownership on the said investment in the shares.*

e) *Copy of contract notes of the sale of ALPS Motor Finance Limited shares evidencing the sale of the said shares on a recognized stock exchange with duly paid STT.*

6. *Afterwards a notice u/s 142(1) of the Act was issue on the assessee on 08.12.2017 requesting the assessee to submit various details regarding the purchase of shares of M/s Alps Motor Ltd.*

7. *In response to the above mentioned notice and questionnaire, the assessee, vide its reply submitted all the information and documents as mentioned below:*

a) *Copy of transaction statement maintained with The South Indian Bank Limited showing the debit and credit of the shares in the D-mat Account of the assessee,*

b) *Copy of ledger account of the assessee maintained in the books of the broker "Shri Parasram Holdings Pvt. Ltd." evidencing the payment of sale consideration to the bank account of the assessee from the broker.*

8. *Subsequently, the Id. AO issued show cause notice dated 22.12.2017 wherein he had alleged the assessee's long term capital gain earned from investment in M/s ALPS Motor Finance Limited is a sham transaction by contending that the prices of the share fluctuated abnormally during the tenure of investment. Further in addition to above the Id. AO also show caused regarding 3% commission expenditure incurred by the assessee for availing such accommodation entries.*

9. *In response to the show cause notice assessee vide reply dated 27.12.2017 submitted that the assessee has fulfilled every condition which is required by the Act u/s 10(38) for*

claiming exemption. Further assessee also stated that no data regarding the report of Directorate of the Investigation of the Income tax Department is being provided to the assessee and the name of the assessee is not mentioned anywhere which proves that the assessee has taken accommodation entries. Further assessee purchased such shares as the same was listed on the recognized stock exchanges.

10. However, ld. Assessing officer, ignoring the replies and supporting documents submitted during the course of assessment proceedings made an addition of Rs. 64,90,468/- as mentioned below:-

<i>S. No</i>	<i>Particulars</i>	<i>Amount (In Rs.)</i>
<i>1</i>	<i>Addition on the account Long Term Capital Gain treated as Unexplained cash credits u/s 68 of the Act.</i>	<i>63,01,425/-</i>
<i>2</i>	<i>Addition on account of unexplained expenditure u/s of the Act.</i>	<i>1,89,043/-</i>
	<i>Total Addition</i>	<i>64,90,468/-</i>

5. Aggrieved by the above addition, the assessee preferred an Appeal before the CIT(A), the Ld. CIT(A) while dealing with the Appeal filed by the assessee, dismissed the same in following manners:-

“5. Findings/Determination:

The appellant had filed return of income declaring income of Rs.8,63,640/-. An exemption of Rs. 63,01,425/- under section 10(38) was also claimed. This exempt income has formed the very basis for the selection of the case for scrutiny in CASS. The grounds being interrelated are disposed of together.

It was seen that income of the assessee reveals that a long term capital gain of Rs. 63,01,425/- was earned on sale of the shares of M/s Alps Motors Finance Limited. The said LTCG has been claimed as exempt with the provisions of section 10(38) of IT Act, 1961. The said claim of long terms Capital gain of Re 63,01,425/- as exempt income has formed

the very basis for the selection of the case for scrutiny in CASS. The grounds being interrelated are disposed of together.

5.1.1 It was also noted by the AD that Investigation directorate of the Income Tax department carried out large scale searches in Kolkata and Mumbai during the F.Y. 2014-15, followed by enquiries which ultimately resulted in unearthing of LTCO entry scam of a very large magnitude involving a syndicate of operators based in Delhi, Kolkata & Mumbai. These operators acted in tandem to manipulate the market price of shares of certain companies in an organized manner to provide entries of bogus Long Term Capital Gain to interested persons through a complex web of prearranged transactions.

5.1.2 The AO further went on to examine the entire modus operandi being followed for such transactions. The appellant was given a specific show cause to explain as to why the said transactions of long term capital gain not be treated as sham. There were no fixed assets and no investments. There were zero profits, zero sales and zero dividends. On the basis of the financial health, it was highly improbable that a prudent man would invest in such a company. It is even more unlikely or rather impossible that the value of shares of such company would result in gain of Rs. 63,01,425/-. To reiterate, the investment of Rs. 10 in a single share would go up to nearly Rs 500 of such company is not possible. The AO has also placed extracts of the statements of Sh. Sanjay Vora Jain who admitted that the said scrip M/s Alps Motor Finance Ltd was a penny stock. The appellant in his submissions has only tried to place reliance on documentary evidence which is in the nature of the payments made in the account of the assessee. These events, in no manner justify the initial transaction which is clearly in the nature of a sham transaction. The legal position is also examined for such cases and lay in the order.

5.2 The financial health of the company has been examined in detail by the AO and can be rated as poor. Without any proven management or future prospects, the share price has risen by leaps and bounds in a short span of time. There doesn't seem to be any reason due to which any prudent person would have invested in the shares of this company in the normal course. The investigation conducted by the Department has also

identified this company which has been used by the entry operators to provide accommodation entries to various persons by artificially inflating the share price of the company. The AO has also applied the test of human probabilities to evaluate the genuineness of the transactions and has concluded that the transactions involving sale and purchase of shares of the company are nothing but sham transactions undertaken with the purpose of obtaining bogus long-term capital gains which are exempt from tax u/s 10(38) of the Act.

5.2.1 A perusal of the shareholding pattern of the company on internet also shows that none of the shares of the company are or were ever held by any mutual fund/FII etc. Had the prospects of the company been so bright, it would have definitely come to knowledge of professional managers/investors who would have picked the shares of this company, which is not the case. This factum adds to the circumstantial evidence placed on record by the AO.

5.2.2 With respect to the circumstantial evidence and in the matter related to the discharge of 'onus of proof and the relevance of surrounding circumstances of the case, the relevant observations and findings of Hon'ble Supreme Court in the case of CIT vs. Durga Prasad More, are:

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

5.2.3 The above ratio laid down by the Hon'ble Supreme Court has been reiterated and applied by the Hon'ble Apex Court in

the case of Sumati Dayal V CIT 214 ITR 801 (S.C). It is essential on the part of the AO to look into the real nature of transaction and what happens in the real word and contextualize the same to such transactions in the real market situation. It is pertinent to state here the wisdom of Hon'ble Supreme Court in CIT V Arvinda Raju (TN) (1979) 120 ITR 46 (S.C) wherein it was held that-

"One day, in our welfare state geared to social justice, this clever concept of 'avoidance' as against 'evasion' may have to be exposed."

5.2.4 Hon'ble Supreme Court in the case of McDowell & Co. Ltd. (1985) 154 ITR 148 (S.C), wherein the Hon'ble Supreme Court has denounced tax avoidance, if not bonafide. The relevant part of the observation of the Hon'ble Supreme Court is reproduced hereunder:

"Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honorable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges."

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

5.2.5 Mumbai ITAT in the case of Ratnakar M. Pujari vs ITO in I.T.A. No.99 5/Mum/2012 where the facts of the case are identical to that in the present case, has held that-

"F) PENNY SHARE:

The shares in which the assessee has claimed to have made a deal, are identified as Penny Shares by the investigation wing of the department because rates of these shares are not based on business results of the companies but some are fluctuated by insider's trading from zero value (negligible price) to very high price and vice versa without any reason or basis to accommodate or generate bogus capital gain or loss.

5.9 In the instant case, all the above features are present in the transaction of shares made by the assessee. Moreover, there is also a specific information that assessee is indulged in non-genuine & bogus capital gain obtained from the transactions of purchase and sale of shares of M/s Shiv Om Investments & Consultancy Ltd., a Kolkatta based company. In this respect, it is also pertinent to mention that even assessee has failed to furnish the proof of payment for these transactions.

Subject to the above discussion, it is held that the so called purchase of shares is a fabricated transaction and hence the same are held as bogus."

The said purchases have been treated as bogus and sham transactions by the Revenue as it is alleged that certain brokers have manipulated and issued pre-dated contract notes which even did not have details such as time of contract, trade number, transaction details etc and payments were also made in cash by the assessee against such sham and bogus purchase with the objective of introducing by manipulating tax free exempt long term capital gains u/s 10(38) of the Act leading to escapement of income from taxation, and the said findings of the AO with respect to bogus and sham purchases have become conclusive and final as the assessee has not challenged the findings of the learned AO made in the assessment order dated 24.12.2009 passed by the AO u/s 143(3) read with Section 147 of the Act in the first appeal filed with learned CIT(A) for the assessment year 2005-06 and hence the finding of the AO has attained finality. Since the said findings of the AO with respect to purchases of 4000 shares of M/s Shiv Om Investment and Consultancy Limited in assessment year 2005-06 have become conclusive having attained finality, the sales in consequence thereof the sham and bogus purchases cannot be accepted as genuine. The assessee has explained that the purchases were backed with contract notes of the brokers and payments were made in cash will not be of any help at this stage as the said finding of the AO treating the purchase of shares as sham and bogus in the assessment year 2005-06 has attained finality. Since, purchases are held to be bogus and sham which has attained finality, the sale in consequence thereof whereby payments are

received through cheque or shares being sold through stock exchange are not of any help to the assessee for claiming the exemption as long term capital gains as the allegation of the Revenue is that the assessee has in collusion with the Brokers has manipulated and camouflaged the entire transactions of sale and purchase of shares in getting issued pre-dated contract notes for purchases of shares for which payments were also made for these purchase in cash and hence these purchases never existed at that relevant time. It is the allegation of the Revenue that the entire sale and purchase of shares were manipulated by the assessee in collusion with the brokers in order to earn tax free exempt long term capital gains on sales of shares u/s 10(38) of the Act whereby un-accounted cash of the assessee has been introduced in disguise in lieu of sale proceeds of shares. Keeping in view facts and circumstances of the case and as per our discussions and reasoning as set out above, we find no infirmity in the orders of the learned CIT(A) which we uphold and sustain. The assessee relied upon the decision of the ITAT, Hyderabad in the case of ITO v. Smt Aarti Mittal (2014) 41 taxmann.com 118(Hyd.-Trib) whereby the Tribunal has arrived at the decision that sale and purchase was genuine even though purchase was off-market transaction which was routed not through stock exchange but backed by physical delivery of shares which was later demated and under the circumstances the ITAT held the transactions as genuine in nature and the assessee claim was found to be in order, but in the instant case there is a conclusive and final finding of fact that purchases of shares were bogus and sham as was held by the Revenue in the assessment year 2005-06 which has not been dislodged so far as the assessee accepted the said findings which became conclusive, thus the facts in the instant case are distinguishable as against the relied upon case of the assessee in Smt Aarti Mittal/supra) on that ground itself. Similarly, contentions of the assessee that the Revenue has accepted the gains on sale of 1500 shares of M/s Shiv Om Investment and Consultancy Limited in the succeeding assessment year 2007-08 as long term capital gains while processing of return u/s 143(1) of the Act is not of help to the assessee as every assessment year is separate assessment year and merely because the Revenue has not selected the case under scrutiny by issuing notice u/s 143(2) of the Act and framing detailed

scrutiny u/s 143(3) of the Act instead chose to process the return u/s 143(1) of the Act without scrutiny will not entitle the assessee to get the well reasoned assessment orders and appellate orders of the learned CIT(A) dislodged in the absence of the cogent material and evidences to demolish the findings of the authorities below. The Revenue in the case of the assessee's brother has also declared the purchase and sale of shares as bogus but brought to tax, gains arising from sale of shares as short term capital gains. This in our considered view, is also not of help as the Revenue in the instant case has come to the conclusive finding which attained finality that the transactions of purchase of shares are sham and bogus transactions camouflaged with an intention to evade taxes. We order accordingly.

12. In the result, the appeal filed by the assessee in ITA NO. 995/Mum/2012 for the assessment year 2006-07 is dismissed."

5.2.6 Reference is also made to the decision of ITAT Chandigarh in the case of ACIT vs Som Nath Maini (2006) 100 TTJ Chd 917 where in the Hon'ble tribunal has observed as under:

**6. After hearing the rival submissions, going through the orders of authorities below and paper book, we find that M/s Ankur International Ltd., although it is a quoted company, its shares were not being transacted at Ludhiana Stock Exchange at, the relevant time. Shares have been purchased and sold through the brokers and payments have been received in cheque on different dates as per the statement of account of M/s S.K. Sharma & Co, Factual matrix of the case from start of the purchase of shares at the rate of Rs. 3 to the sale of shares at Rs. 55 in a short span of time and shares being not, quoted at Ludhiana Stock Exchange and the way in which different, installment payments have been received from the brokers and non-availability of the records of the brokers and the shares remaining in the name of assessee even long after the sale of the shares does not stand the test of probabilities. As rightly pointed out by the learned Departmental Representative, these types of companies function in the capital market whose sale price is manipulated to astronomical height only to create the*

artificial transaction in the form of capital gain. Surrounding circumstances differ from the normal share market transactions in which they are ordinarily carried out. Taking all the steps together, final conclusion does not accord with the human probabilities. The Hon'ble Supreme Court in the case of CIT v. Durga Prasad More held as under:

"It is a story that does not accord with human probabilities. It is strange that High Court found fault with the Tribunal for not swallowing that story. If that story is found to be unbelievable as the Tribunal has found and in our opinion, rightly that the decisions remains that the consideration for the sale proceeded from the assessee and therefore, it must be assumed to be his money.

It is surprising that the High Court has found fault with the ITO for not examining the wife and the father-in-law of the assessee for proving the Department's case. All that we can say is that the High Court has ignored the facts of life. It is unfortunate that, the High Court has taken a superficial view of the onus that lay on the Department."

6 The learned CIT(A) only got swayed by the issuance of notice by the AO under Section 131 to both the brokers from whom shares were purchased and sold and came to the conclusion that share transactions were genuine overlooking the material gathered by the AO from the statements recorded of broker M/s S.K. Sharma & Co. and the other facts and circumstances that volume of transactions of Jaipur Stock Exchange is only 600 shares and 1000 shares. Payments have been received from the brokers only in installments over a period of 6-7 months. It is true that when transactions are through cheques, it looks like real transaction but authorities are permitted to look behind the transactions and find out the motive behind transactions. Generally, it is expected that apparent is real but it is not sacrosanct. If facts and circumstances so warrant that it does not accord with the test of human probabilities, transactions have been held to be non-genuine, it is highly improbable that share price of a worthless company can go from Rs. 3 to Rs. 55 in a short span of time. Mere payment by cheque and receipt by cheque does not render a transaction genuine. Capital gain tax was created to operate in a real

world and not that of make belief. Facts of the case only lead to the inference that these transactions are not genuine and make believe only to offset the loss incurred on the sale of jewellery declared under VDIS. In the totality of facts and circumstances of this case and material on record, we are of the considered view that the CITA) was not justified in deleting the impugned addition. We, accordingly set aside the order of the CITA) and restore that of the AO."

5.2.7 While confirming the decision of ITAT Chandigarh Berich (SOM NATH MAINI vs. CIT, Hon'ble P&H High Court has held as under-

"The assessee incurred capital loss on account of sale of gold jewellery and also had short-term capital gain of almost equal amount. The AO observed that short-term gain was not genuine inasmuch as the assessee had purchased 45,000 shares of M/s Ankur International Ltd. at varying rates from Rs. 2.06 to Rs. 3.1 per share and sold them within a short span of six-seven months at the rate varying from Rs. 47.75 paise to Rs. 55. These shares were purchased through a broker, Munish Arora & Co. and sold through another broker, M/s SK Sharma & Co. The AO was taken by surprise by the astronomical rise in share price of a company from Rs. 3 to Rs. 55 and started further enquiry. The AO after enquiry made addition to the income of the assessee, which was upheld by the CIT (A) as well as by the Tribunal.

4. Learned counsel for the assessee submitted that the view taken by the Tribunal is perverse. The assessee having discharged the burden of proving the transactions of sale and purchase of the shares to be genuine, burden of proving that the said transactions were not genuine, was on the Department and in the absence of any material on record, holding the transactions to be not genuine, was not permissible. We are unable to accept the submission made. The burden of proving that income is subject to tax is on the Revenue but on the facts, to show that the transaction is genuine, burden is primarily on the assessee. The AO is to apply the test of human probabilities for deciding genuineness or otherwise of a particular transaction. Mere leading of evidence that the transaction was genuine, cannot be

conclusive. Such evidence is required to be assessed by the AO in a reasonable way. Genuineness of the transaction can be rejected even if the assessee leads evidence which is not trustworthy, even if the Department does not lead any evidence on such an issue. In view of the above, we are of the view that the finding recorded by the Tribunal is a finding of fact and cannot be held to be perverse. No substantial question of law arises. The appeal is dismissed."

As stated by the Hon'ble P&H High Court in the above-mentioned case, mere leading the evidence that the transaction was genuine, cannot be taken as conclusive. Such evidence is required to be assessed by the AO in a reasonable way. Genuineness of the transaction can be rejected if the assessee leads evidence which is not trustworthy, even if the Department does not lead any evidence on such an issue. In the present case, prima facie the appellant has produced the documents showing the details of the transaction, but she miserably fails to satisfy the test of human probabilities as discussed by the AO in detail in the assessment order.

5.2.9 Reliance is also place on the decision of the Hon'ble Supreme Court in the case of CIT vs P. Mohankala (15/05/2007), wherein it has been held that-

"The question is what is the true nature and scope of Section 68 of the Act? When and in what circumstances Section 68 of the Act would come into play? That a bare reading of Section 68 suggests that there has to be credit of amounts in the books maintained by an assessee; such credit has to be of a sum during the previous year, and the assessee offers no explanation about the nature and source of such credit found in the books; or the explanation offered by the assessee in the opinion of the Assessing Officer is not satisfactory, it is only then the sum so credited may be charged to income-tax as the income of the assessee of that previous year. The expression "the assessee offers no explanation" means where the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. It is true the opinion of the Assessing Officer for not accepting the explanation offered by the assessee as not satisfactory is required to be based on

proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the sine qua non for forming the opinion."

In this case the Hon'ble Supreme Court has reversed the decision of the Hon'ble Madras High Court and upheld the findings of the lower authorities regarding the transactions of gift received by assessee even though these were done through banking channels, to be though apparent, but not be real one.

5.2.10 In this connection, I would also like to refer to the decision of the Hon'ble ITAT Bombay Bench 'B' (ITA No.614/Bom/87 A.Y. 1983-84) in the case of M/s. Mont Blane Properties and Industries Pvt. Ltd., which was upheld by the Hon'ble Supreme Court. The Hon'ble Tribunal had held that the word 'evidence' as used in sec. 143(3) covered circumstantial evidence also. The word 'evidence' as used in sec. 143 (3) obviously could not be confined to direct evidence. The word 'evidence' was comprehensive enough to cover the circumstantial evidence also. Under the tax jurisprudence, the word 'evidence' had much wider connotations. While the word 'evidence' might recall the oral and documentary evidence as may be admissible under the Indian Evidence Act, the use of word 'material' in Sec. 143(3) showed that the assessing officer, not being a court could rely upon material, which might not strictly be evidence admissible under the Indian Evidence Act for the purpose of making an order of assessment. Court often took judicial notice of certain facts which need not be proved before them. The plain reading of section 142 and 143 clearly suggests that the assessing officer may also act on the material gathered by him. The word 'material' clearly shows that the assessing officer is not fettered by the technical rules of evidence and the like, and that he may act on material which may not strictly speaking be accepted evidence in a court of law.

5.2.11 It must also be stated here that in CIT vs NR Portfolio Pvt. Ltd on 22 November, 2013, the Hon'ble Delhi High court has held that-

"The Assessing Officer is both an investigator and an adjudicator. When a fact is alleged and stated before the Assessing Officer by an assessee, he must and should examine and verify, when in doubt or when the assertion is debatable. Normally a factual assertion made should be accepted by the Assessing Officer unless for justification and reasons the assessing officer feels that he needs/requires a deeper and detailed verification of the facts alleged. The assessee in such circumstances should cooperate and furnish papers, details and particulars. This may entail issue of notices to third parties to furnish and supply information or confirm facts or even attend as witnesses. The Assessing Officer can also refer to incriminating material or evidence available with him and call upon the assessee to file their response. We cannot lay down or state a general or universal procedure or method which should be adopted by the assessing officer when verification of facts is required. The manner and mode of conducting assessment proceedings has to be left to the discretion of the assessing officer, and the same should be just, fair and should not cause any harassment to the assessee or third persons from whom confirmation or verification is required. The verification and investigation should be one with the least amount of intrusion, inconvenience or harassment especially to third parties, who may have entered into transactions with the assessee. The ultimate finding of the assessing officer should reflect due application of mind on the relevant facts and the decision should take into consideration the entire material, which is germane and which should not be ignored and exclude that which is irrelevant. Certain facts or aspects may be neutral and should be noted. These should not be ignored but they cannot become the bedrock or substratum of the conclusion. The provisions of Evidence Act are not applicable, but the assessing officer being a quasi-judicial authority, must take care and caution to ensure that the decision is reasonable and satisfies the canons of equity, fairness and justice. The evidence should be impartially and objectively analyzed to ensure that the adverse findings against the assessee when recorded are adequately and duly supported by material and evidence and can withstand the challenge in appellate proceedings. Principle of preponderance of probabilities applies. What is stated and the said standard, equally apply to the Tribunal and indeed this Court. The reasoning and the

grounds given in any decision or pronouncement while dealing with the contentions and issues should reflect application of mind on the relevant aspects. When an assessee does not produce evidence or tries to avoid appearance before the Assessing Officer, it necessarily creates difficulties and prevents ascertainment of true and correct facts as the Assessing Officer is denied advantage of the contention or factual assertion by the assessee before him. In case an assessee deliberately and intentionally fails to produce evidence before the Assessing Officer with the desire to prevent inquiry or investigation, an adverse view should be taken".

5.2.12 Further reliance is also place on the decision of Hon'ble ITAT Delhi in the case of Hersh Win Chadha in I.T.A.Nos. 3088 to 3098 & 3107/Del/2005 where the Hon'ble ITAT has held as under-

"6.13. It would, at this stage, be relevant to consider the admissibility and use of circumstantial evidence in income tax proceedings. Circumstantial evidence is evidence of the circumstances, as opposed to direct evidence. It may consist of evidence afforded by the bearing on the fact to be proved, of other and subsidiary facts, which are relied on as inconsistent with any result other than the truth of the principal fact. It is evidence of various facts, other than the fact in issue which are so associated with the fact in issue, that taken together, they form a chain of circumstances leading to an inference or presumption of the existence of the principal fact. In the appreciation of circumstantial evidence, the relevant aspects, as laid down from time to time are-

(1) the circumstances alleged must be established by such evidence, as in the case of other evidence;

(2) the circumstances proved must be of a conclusive nature and not totally inconsistent with the circumstances or contradictory to other evidence.

(3) although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced; some of these links may have to be inferred from the proved facts;

(4) in drawing those inferences or presumptions, the Authorities must have regard to the common course of natural events, to human conduct and their relation to the facts of the particular case.

(5)The circumstantial evidence can, with equal facility, be resorted to in proof of a fact in issue which arises in proceedings for the assessment of taxes both direct and indirect, circumstantial evidence can be made use of in order to prove or disprove a fact alleged or in issue. In fact, in whatever proceedings or context inferences are required to be drawn from the evidence or materials available or lacking, circumstantial evidence has its place to assist the process of arriving at the truth."

5.2.13 Similar reference is also made to the decisions of Hon'ble ITAT, Mumbai in the case of Smt. Usha Chandresh Shah in 1.T.A. No. 6858/Mum/2011, Hon'ble ITAT, Pune in the case of Sh. Zikrullah Chaudhary in ITA.No.669/PN/2012 dated 04.03.2014, Hon'ble ITAT, Mumbai in the case of Sh. Arvind M. Kariya in I.T.A. No.7024/Mum/2010 dated 16.01.2013, Hon'ble ITAT Chandigarh in the case of Sh. Chandan Gupta, ITA No. 552/Chd/2008 dated 26.09.2013 and Hon'ble ITAT, Delhi Bench 98 ITD 285 in the case of M/s Napar Drugs Limited.

5.2.14 Reference is made to the recent decision in the case of Sanjay Bimalchand Jain vs. Pr CIT in which Hon'ble Bombay High Court has vide its order dated 16.12.2017 has held as under:

"(iv) The authorities have recorded a clear finding of fact that the assessee had indulged in a dubious share transaction meant to account for the undisclosed income in the garb of long term capital gain. While so observing, the authorities held that the assessee had not tendered cogent evidence to explain as to how the shares in an unknown company worth Rs.5/had jumped to Rs.485/in no time. The Income Tax Appellate Tribunal held that the fantastic sale price was not at all possible as there was no economic or financial basis as to how a share worth Rs.5/of a little-known company would jump from Rs.5/to Rs.485/. The findings recorded by the authorities

are pure findings of facts based on a proper appreciation of the material on record. While recording the said findings, the authorities have followed the tests laid down by the Hon'ble Supreme Court and this Court in several decisions. The findings do not give rise to any substantial question of law. The judgments reported in (2012) 20 Taxman.com 529 (Bombay) (CIT Versus Jamnadevi Agrawal), (1957) 31 ITR 294 (Bombay) (Puranmal Radhakishan Versus CIT), (1970) 77 ITR 253 (SC) (Raja Bahadur Versus CIT) and (2015) 235 Taxman 1 (Bom) (CIT Versus Smt. Datta M. Shah) and relied on by the learned counsel for the assessee are distinguishable on facts and cannot be applied to the case in hand."

Further The H'ble Chennai Tribunal on a similar penny stock case Of Rajnish Agarwal Vs CIT and others, decided on has upheld the addition stating that the transaction was not genuine. The extract of the order is as under.

"The brief facts in all these appeals are that the assessee's cases were selected for scrutiny and orders were passed U/s.143(3) of the Act on 29.12.2016, wherein the Ld.AO treated the purchase and sale of shares of M/s. SRK Industries Ltd., as sham transaction and thereby the claim of exemption U/s.10(38) of the Act, with respect to the Long Term Capital Gain earned by the assessee's on those transactions were denied and the same was treated as unexplained cash credit U/s.68 of the Act....."

4. While doing so, the Ld.AO analyzing the issue in detail arrived at the conclusion that the following findings of the wing corroborates with the findings of the SEBI:-

"(i) The company in which the assessee's had purchased the equity shares had no creditability and no prudent investor would make such investment.

(ii) As per the finding of the investigation report of the investigation wing, the members who participated in the trading of the scrip during mid-2013 to mid-2014 were part of the syndicate of brokers and brokering entities indulging in price rigging.

(i) *The ultimate beneficiary of all the price manipulation is the beneficiaries like the assesseees who sold the shares when the share price was sufficiently brought to a high level and could take the benefit of Section 10(38) of the Act.*

(iv) *For facilitating such bogus entries, the brokers were paid commission in cash generally around 6% of the value of the transaction or Rs.0.50 to Rs.1/- for every Rs.100/-transacted.*

(v) *But for the price rigging and manipulative actions of the brokers the assessee would not have earned such Long Term Capital Gain.*

(vi) *The motive of the price manipulation is only to bring out their black money as legitimately earned Long Term Capital Gain for which exemption. U/s.10(38) of the Act is available.*

8. *We have heard the rival submissions and carefully perused the materials on record. At the outset we must say that the Ld.AR could not justify before us any of their claims made before the Ld. Revenue Authorities that the transaction was genuine. Further the Ld.AR could not successfully controvert to any of the findings of the Ld. Revenue Authorities before us which are against the assesseees. Instead the Ld.AR has only come out with the plea that the assesseees were not provided with opportunity of cross-examining the witness, the investigation report was not furnished and proper opportunity was not provided of being heard. However we find that all these arguments raised by the Ld.AR before us was never alleged before the Ld. Revenue Authorities when the matter was before them. In this situation we do not have any other option but to confirm the orders of the Ld. Revenue Authorities in the case of all the assesseees because the Id.AO as well as the Ld.CIT(A) have arrived at their respective decisions after considering the issues in the appeal in detail and there is nothing before us to disturb their findings. Accordingly we hereby confirm the Order of the Ld. Revenue Authorities on this issue."*

THE INCOME TAX APPELLATE TRIBUNAL, DELHI in UDIT KALRA, Vs. ITO, WARD-50(1), ITA No. 6717/DEL/2017 [Assessment Year: 2014-15] held "5. I have heard both the parties and perused the records especially the impugned order.

I find that the assessee is an individual and the amount of cash credit Rs. 27,68,457/. However, on perusing the assessment order, I find that there was a specific information that assessee has indulged in non-genuine and bogus capital gain obtained from the transactions of purchase and sale of shares of M/s Kappac Pharma Ltd., a Mumbai based company. It is noticed that the purchase transaction has been done off market in physical form by paying cash. The assessee has purchased the share M/s Kappac Pharma Ltd. in physical form and thereafter, the same have been converted into electronic mode. The purchase payments were made in cash and not through the normal banking channel therefore the same were non-verifiable from the authentic supporting details such as bank account/documents. Assessee is not a regular investor in shares. The assessee has failed to furnish the proof of source for the purchase transactions. Thus, the entire transactions are against human probability. Also considering the findings of the Investigation Wing, inquiries conducted in the case of assessee, brokers, operators and the entry providers and the nature of transaction entered into by the assessee the LTCG of Rs. 27,20,457/- claimed exempt u/s. 10(38) of the Act by the assessee cannot be allowed and the amount of Rs. 27,68,457/ received back as sales proceeds on sale of shares was required to be added back towards his taxable income under section 68 of the Act. The above amount of Rs. 27,68,457/- was deemed as income of the assessee u/s. 68 of the Act, over and above, the income already declared in ITR during AY 2014-15. In view of above discussions, the landmark decision of the Hon'ble Supreme Court in the case of McDowell and Company Limited, 154 ITR 148 is squarely applicable in this case wherein it has been held that tax planning may be legitimate provided it is within the framework of the law and any colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by dubious methods. However, the case laws cited by the Ld. counsel for the assessee are on distinguished facts, hence, not applicable in the instant case. The assessee has not raised any legal ground and argued only on merit for which assessee has failed to substantiate his claim before the lower revenue authorities as well as before this Bench. In view of above discussions, I am of the considered opinion that Ld. CIT(A) has rightly confirmed the

addition in dispute, which does not need any interference on my part, therefore, I uphold the action of the Ld. CIT(A) on the issue in dispute and reject the grounds raised by the Assessee.

6. In the result, the Appeal of the Assessee is dismissed."

It is also seen that the aforesaid judgment was not disturbed by the H'ble Delhi High Court in Appeal no ITA 220/2019 & CM No. 10774/2019 dated 8.3.2019.

THE INCOME TAX APPELLATE TRIBUNAL, DELHI in Pooja Ajmani, New Delhi vs Ito, Ward-20(4), New Delhi on 25 April, 2019 held

5. I have heard both the parties and perused the records especially the impugned order. I find that AO after a detailed analysis of the investigation report with the materials available on record in the case of the assessee and on further examination of the financials of Kappac Pharma Ltd., price & volume of the scrip of Kappac Pharma Ltd., concluded that the modus operandi adopted by the assessee followed the pattern discovered by the Investigation wing during various search and survey operations. It was held that that the transactions showing long term capital gain, which had been claimed by the assessee as exempt under section 10(38), were sham transactions. It was held that it was a case of bogus long-term capital gain obtained through brokers and that the assessee had used colourable device for avoidance of tax. The receipt of Rs.23,68,313/- was deemed to be income under section 69A. The assessee has contended that 4,000 shares of Kappac Pharma Ltd. purchased from Corporate Stock Broking (P) Ltd. at a price of Rs. 13.09 per share in physical form. It has also been submitted that out of the 4,000 shares, 3000 shares were sold on 04/02/2014 for @Rs.677 per share and another 500 were sold on 18/02/2014 for a sum of @Rs.691 per share. It has also been submitted that the assessee did not indulge in any manipulation which may have been done by some broker and that the appellant was not given opportunity for cross examination. It has also been submitted that the Assessing Officer has made the addition without considering the facts of the case and only on the basis of presumption and presuppositions. It is noticed that prima facie, copies of all documents have been submitted to substantiate the

genuineness of transactions related to purchase and subsequent sale of shares leading to long-term capital gain claim by the appellant. I find that these documents were also placed before the Assessing Officer who, after detailed examination and discussion and going beyond the said documents has established that the said documents were a mere mask to hide the real nature of transactions. By analysing the Balance Sheet, Profit & Loss account and the trade pattern of Kappac Pharma Ltd. during the period March, 2010 to March 2014, the Assessing Officer has pointed out that the share price of this company was neither affected by the movement of sensx nor the financials of the company justified such extraordinary jump in the price of its shares. It is noticed that apart from being based on evidences gathered during search and survey operations, analysis of the material on record and analysis of information from various sources, the findings of the Assessing Officer are also based on strong surrounding circumstances, preponderance of probability and human conduct in the light of detailed analysis of the modus operandi adopted by brokers and operators engaged in the business of providing entries of long term capital gains to the interested beneficiaries which has come to surface as a result of deep and wide investigation. Initial investment in a company of unknown credentials and subsequent jump in the share price of such a company cannot be an accident or windfall but was possible, as clearly brought on record by the Assessing Officer, because of the manipulations in the price of shares in a pre-planned manner by the interested broker and entry operators. The insistence of the assessee that the transactions leading to long-term capital gains are supported by documents such as sale and purchase invoices, bank statements etc. cannot be accepted in view of the fact and circumstances of the case brought on record by the Assessing Officer after proper examination of the material facts and after taking into account the findings of SEBI and corroborating evidences gathered by the Directorate of Investigation, Kolkata against a network of brokers and operators engaged in manipulation of market price of shares of certain companies controlled and managed by such persons with a purpose to provide accommodation entries in the form of long term capital gains. Further, the contention of the assessee that long term capital gains cannot be treated as bogus merely because some investigation with regard to

certain company and broker or investigation has been carried out by the Directorate of Investigation, Kolkata only proves that the appellant wants to take shelter under such documentary evidences which themselves have been created as masks to cover up the true nature of transaction. A genuine transaction must be proved to be genuine in all respect. The onus was on the appellant to prove that the transaction leading to claim of long term capital gains was distinctly genuine transaction and not bogus, premeditated transaction arranged with a view to evade taxes. The onus was on the assessee to contradict the findings that Kappac Pharma Ltd. was a company whose scrip was capable of being traded at high price as it was the appellant who had traded in the shares of the this company which resulted into claim of long term capital gains which is exempt under section 10(38). Once the assessee was made aware of the result of the investigation which proved that trading of shares leading to long term capital gains was not genuine, as per section 101 of the Indian Evidence Act, 1972, the onus was on the assessee to prove that she had earned genuine long term capital gains as it was the assessee who has made a claim that she was engaged in genuine share transactions. I find that in the case of Shri Charan Singh vs. Chandra Bhan Singh (AIR 1988 SC 6370), the Hon'ble Supreme Court have clarified that the burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. It has been further held that the party cannot, on failure to establish a prima facie case, take advantage of the weakness of his adversary's case. The party must succeed by the strength of his own right and the clearness of his own proof. He cannot be heard to say that it was too difficult or virtually impossible to prove the matter in question. In the case under consideration, since it is the appellant who had made the claim that she had earned genuine long term capital gain, all the facts were especially within her knowledge. Section 102 of Indian Evidence Act makes it clear that initial onus is on person who substantially asserts a claim. If the onus is discharged by him and a case is made out, the onus shifts on to deponent. It is pertinent to mention here that the phrase "burden of proof is used in two distinct meanings in the law of evidence viz, 'the burden of establishing a case', and 'the burden of introducing evidence'. The burden of establishing a case remains throughout trial

where it was originally placed, it never shifts. The burden of evidence may shift constantly as evidence is introduced by one side or the others. In this case, once the evidence that assessee has claimed bogus long term capital gain was introduced by the Assessing Officer, the burden of evidence shifted to the assessee. During the assessment proceeding and ever during the assessee proceeding, the assessee has failed to produce any evidence to prove that the long term capital gain claimed by her was genuine. In the present case, it is seen that the assessee has failed to discharge her burden of proof and the Assessing Officer, on the other hand, has proved that the claim of the appellant was incorrect. The enquiry conducted by SEBI was further corroborated by the investigation carried out by the Directorate of Investigation, has been thoroughly analysed by the Assessing Officer to prove that the assessee has introduced bogus long term capital gains in her books of account by routing her unaccounted income through a tax evasion scheme. The statement of brokers engaged in providing bogus long term capital gains clearly proves that Kappac Pharma Ltd. is one of such companies whose scraps have been manipulated to provide bogus long term capital gains. It is noted that on similar facts and circumstances, Hon'ble ITAT A-Bench, Chandigarh in the case of Shri Abhimanyu Soin vs ACIT, Circle-7, Ludhiana in ITA No.951/Chd./2016 vide order dated 18/04/2018, have expressed the view that the undisclosed income in the garb of long term capital gain has to be assessed as unexplained. The Hon'ble ITAT have held as under:-

"14. The ratio laid down by the Hon'ble Supreme Court in the case of Sumati Dayal Vs. CIT [1995] 214 1TR 801 2002-TIOL-885-SC-IT-LB is squarely applicable in this case. Though the assessee has received the amounts by the way of account payee cheques, the assessee could nowhere prove the purchase of shares as claimed to have been made on 02/72/2008 in cash and it urns also not proved about the availability of the funds with the assessee as on the date of purchase of shares. The assessee was not in India as per the passport details available as per the record. This, coupled with the fact that the transfer of money in cash from Ludhiana to Delhi and a person representing the broker operating at Kolkata has collected the money at Delhi cannot be accepted. The tax authorities are entitled to look into the surrounding

circumstances to find out the realities and the matter has to be considered by applying test of human probabilities as enunciated by the Hon'ble Supreme Court. The fact that in-spite of earning 3072% of profits, the assessee never ventured to involve himself in any other transactions with the broker which gave him even much lower profits during the period which cannot be a mere coincidence or lack of interest or absence of advice from the financial institutions as done earlier.

15. In view of the detailed discussion above, and keeping in view the entirety of the facts and circumstances and specific peculiarity of the instant case and the judgments quoted above, we decline to interfere in the order of the Ld. CIT (A).

16. In the result, appeal of the Assessee. is dismissed."

5.1 On the issue of circumstantial evidence and in the matters related to the discharge of onus of proof and the relevance of surrounding circumstances of the case, the Hon'ble Supreme Court in the case of CIT Vs. Durga Prasad More [(1972) 82 ITR540), have observed as under: "...that though an appellant's statement must be considered real until it was shown that there were reasons to believe that the appellant was not the real, in a case where the party relied on self-sewing recitals in the documents, it was for the party to establish the transfer of those recitals, the taxing authorities were entitled to look into the surrounding circumstances to find out the reality of such recitals. Science has not yet invented any instrument to test the reliability of the evidence placed before a Court or Tribunal. Therefore, the Courts and the Tribunals have to judge the evidence before them by applying the test of human probability. Human minds may differ as to the reliability of piece of evidence, but, in the sphere, the decision of the final fact finding authority is made conclusive by law."

5.2 I further find that the above ratio as laid down by the Hon'ble Supreme Court has been reiterated and applied by the Hon'ble Apex Court in the case of Sumati Dayal vs. CIT (214 ITR 801). It is essential on the part of the Assessing Officer to look into the real nature of transaction and what happens in the real word and contextualize the same to such transactions in the real market situation. Further, in the case of McDowell &:

Co. Ltd.((1985) 154 ITR 148 (SC)), the Hon'ble Supreme Court have observed as under:

"Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges."

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

5.4 Keeping in view of the aforesaid discussions, I am of the view that documents submitted as evidences to prove the genuineness of transaction are themselves found to serve as smoke screen to cover up the true nature of the transactions in the facts and circumstances of the case as it is revealed that purchase and sale of shares are arranged transactions to create bogus profit in the garb of tax exempt long terra capital gain by well organized network of entry providers with the sole motive to sell such entries to enable the beneficiary to account for the undisclosed income for a consideration or commission. I further find that the share transactions leading to long term capital gains by the assessee are sham transaction entered into for the purpose of evading tax. I note that the landmark decision of the Hon'ble Supreme Court in the case of McDowell and Company Limited, 154 ITR 148 is squarely applicable in this case wherein it has been held that tax planning may be legitimate provided it is within the framework of the law and any colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by dubious methods. However, the case laws cited by the Ld. counsel for the assessee are on distinguished facts, hence, not applicable in the instant case. The assessee has not raised any legal ground and argued only on merit for which assessee has failed to substantiate his claim before the lower revenue authorities as well as before this Bench. In view of above discussions, I am of the considered opinion that Ld. CIT(A) has rightly confirmed the addition in dispute, which does not need any interference on

my part, therefore, I uphold the action of the Ld. CIT(A) on the issue in dispute and reject the grounds raised by the Assessee.

6. In the result, the Appeal of the Assessee is dismissed.

The H'ble Delhi High Court in a recent decision of Suman Poddar Vs CIT had held as under

7. "Thus, the Tribunal has in depth analyzed the balance sheets and the profit and loss accounts of Cressanda Solutions Ltd. which shows that the astronomical increase in the share price of the said company which led to returns of 491% for the Appellant, was completely unjustified. Pertinently, the EPS of the said company was Rs. 0.01/- as in March 2016, it was Rs. - 0.01/- as in March 2015 and -0.48/- as in March 2014. Similarly, the other financials parameters of the said company cannot justify the price in excess of Rs. 500/- at which the Appellant claims to have sold the said shares to obtain the Long Terms Capital Gains. It is not explained as to why anyone would purchase the said shares at such high price. The Tribunal goes on to observe in the impugned order as follows:

"10. With such financials and affairs of business, the purchase of share of face value Rs. 10/- at the rate of Rs.491/- by any person and the assessee's contention that such transaction is genuine and credible and arguing to accept such contention would only make the decision of the judicial authorities a fallacy.

11. The evidences put forth by the Revenue regarding the entry operation fairly leads to a conclusion that the assessee is one of the beneficiaries of the accommodation entry receipts in the form of long- term capital gains. The assessee has failed to prove that the share transactions are genuine and could not furnish evidences regarding the sale of shares except the copies of the contract notes, cheques received against the overwhelming evidences collected by the Revenue regarding the operation of the entire affairs of the assessee. This cannot be a case of intelligent investment or a simple and straight case of tax planning to gain benefit of long-term capital gains. The earnings @491% over a period of 5 months is beyond human probability and

defies business logic of any business enterprise dealing with share transactions. The net worth of the company is not known to the assessee. Even the brokers who coordinated the transactions were also unknown to the assessee. All these facts give credence to the unreliability of the entire transaction of shares giving rise to such capital gains. The ratio laid down by the Hon'ble Supreme Court in the case of Sumati Dayal vs. CIT, 214 ITR 801 is squarely applicable to the case. Though the assessee has received the amounts by way of account payee cheques, the transactions cannot be treated as genuine in the presence of the overwhelming evidences put forward by the Revenue. The fact that in spite of earning such steep profits, the assessee never ventured to involve himself in any other transaction with the broker cannot be a mere coincidence of lack of interest. Reliance is placed on the judgment in the case of Nipun Builders and Developers Pvt. Ltd. (supra), where it was held that it is the duty of the Tribunal to scratch the surface and probe the documentary evidence in depth, in the light of the conduct of assessee and other surrounding circumstances in order to see whether the assessee is liable to the provisions of section 68 or not. In the case of NR Portfolio, it was held that the genuineness and credibility are deeper and obtrusive. Similarly, the bank statements provided by the assessee to prove the genuineness of the transactions cannot be considered in view of the judgment of Hon'ble court in the case of Pratham Telecom India Pvt. Ltd., wherein, it was stated that bank statement is not sufficient enough to discharge the burden. Regarding the failure to accord the opportunity of cross examination, we rely on the judgment of Prem Castings Pvt. Ltd. Similarly, the Tribunal in the case of Udit Kalra, ITA No. 6717/Del/2017 for the assessment year 2014-15 has categorically held that when there was specific confirmation with the Revenue that the assessee has indulged in

non-genuine and bogus capital gains obtained from the transactions of purchase and sale of shares, it can be a good reason to treat the transactions as bogus.' e differences of the case of Udit kalra attempted by the Ld. AR does not add any credence to justify the transactions. The Investigation Wing has also conducted enquiries which proved that the assessee is also one of the beneficiaries of the transactions entered by the

Companies through multiple layering of transactions and entries provided. Even the BSE listed this company as being used for generating bogus LTCG. On the facts of the case and judicial pronouncements will give rise to only conclusion that the entire activities of the assessee is a colourable device to obtain bogus capital gains. The Hon'ble High Court of Delhi in the case of Udit Kalra, ITA No. 220/2009 held that the company had meager resources and astronomical growth of the value of the company's shares only excited the suspicion of the Revenue and hence, treated the receipts of the sale of shares to be bogus. Hon ble High Court has also dealt with the arguments of the assessee that he was denied the right of cross examination of the individuals whose statements led to the enquiry. The Id. AR argument that no question of law has been framed in the case of Udit Kalra also does not make any tangible difference to the decision of this case. Since the additions have been confirmed based on the enquiries by the Revenue, taking into consideration ratio laid down by the various High Courts and Hon'ble Supreme Court, our decision is equally applicable to the receipts obtained from all the three entities. Further, reliance is also placed on the orders of various Courts and Tribunals listed below.

MK. Rajeshwari vs. ITO in ITA No. 17231Bangl2018, order dated 12.10.2018.

Abhimanyu Soin vs. ACIT in ITA No. 9511Chdl2016, order dated 18.04.2018.

Sanjay Bimalchand Jain vs. ITO 89 taxmann.com 196. Dinesh Kumar Khandelwal, HUF vs. ITO in ITA No. 58 & 591Nagl2015, order dated 24.08.2016.

Ratnakar M Pujari vs. ITO in IT A No. 9951Muml2012, order dated 03.08.2016.

Disha N. Lalwani vs. ITO in ITA No. 6398 I Mum I 2012, order dated 22.03.2017.

ITO vs. Shamim. M Bharwoni [20 16] 69 taxmann.com 65. Usha Chandresh Shah Vs ITO in ITA No. 6858 I Mum I 2011, order dated 26.09.2014.

CIT vs. Smt. Jasvinder Kaur 357 ITR 638.

12. The facts as well as rationale given by the Hon 'ble High Court are squarely applicable to the case before us. Hence, keeping in view the overall facts and circumstances of the case that the profits earned by the assessee are a part of major scheme of the accommodation entries and keeping in view the ratio of the judgments quoted above, we, hereby decline to interfere in the order of the Ld. CIT(A)."

(emphasis supplied)

8. From the above extract, it would be seen that the Cressanda Solutions Ltd. was in fact identified by the Bombay Stock Exchange as a penny stock being used for obtaining bogus Long Term Capital Gain. NO evidence of actual sale except the contract notes issued by the share broker were produced by the assessee. No question of law, therefore arises in the present case and the consistent finding of fact returned against the Appellant are based on evidence on record.

9. In the aforesaid facts and circumstances, we do not find any merit in the present appeal and the same is dismissed."

5.2.15 All these cases are applicable to the facts and circumstances of the present case in which the various judicial authorities have decided the cases in favour of revenue after going through the entirety of the circumstances and not getting influenced by the picture shown by the appellant which is colored by the use of sham devices. The case laws relied upon by the AR have been perused. No doubt that the decisions in these cases are in favour of the assessee but it the entirety of the circumstances has not been examined which makes the issue distinct on facts. Moreover, the fact that the assesseses in these cases failed to clear the test of human probabilities, has not been brought to the knowledge of these judicial authorities. Therefore, these cases are not being found relevant in the present case where the AO has gone to the very root of the transactions after doing deep analysis of the facts and circumstances and after taking into account the various inputs available with him from different sources. Moreover a clear jurisdictional High Court judgment [Suman Poddar Supra] is

available on the exactly same issue is in favour of the revenue and the undersigned is bound by the same.

5.2.16 In the present case, there is an obvious and plain transaction of tax evasion which has been clothed with the smoke-screen of subterfuges, by the appellant. The facts of the present case clearly reveal that the transactions of purchase and sale of shares had been affected to create bogus profit under the head LTCG. The appellant resorted to a readymade scheme for purchase and sale of shares which was floated by some Entry Operators. Such transactions are not genuine and natural transactions, but preconceived transactions, resulting in creation of bogus profits which are tax exempt. Such transactions are mutually self-serving to the parties to the transactions. I have come to conclude on the basis of above analysis, documentary evidences, circumstantial evidences, human conduct and preponderance of probabilities that what is apparent in this case is not real, that these financial transactions were sham ones and that this entire edifice was only a colourable device used to evade tax. Moreover, the impugned transactions of shares are preordained one, not for legitimate purpose in view but for the purpose of creating non-genuine and artificial profits, with a view to reduce valid tax liability. Therefore, I agree with the view of the AO that the said transactions are sham transactions and do not constitute LTCG. The amount of Rs.63,01,425/- is assessee's own cash routed through a colorable transaction to project a gain from share sales. The addition corresponding to the commission on the same is also confirmed due to all the reasons quoted above. Accordingly, the addition made by the AO by treating the capital gains on sale of penny stocks and commission paid on the same as unexplained income is confirmed. Thus, the grounds of appeal are dismissed.”

6. The Ld. CIT(A) while deciding the Appeal filed by the Assessee has dealt with each and every grounds of appeal of the assessee and after giving findings based on the material available on record, dismissed the Appeal filed by the assessee. The assessee has not produced any material

to dispute or contradict the findings of the Lower Authorities, in our considered opinion, the Ld. CIT(A) has committed no error in dismissing the Appeal filed by the Assessee. Therefore, we find no reason to interfere with the order of the Ld. CIT(A), accordingly, the Appeal filed by the assessee is dismissed.

Order pronounced in open Court on 10th MAY, 2024

Sd/-

(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Dated: 10/05/2024

R.N, Sr.ps

Sd/-

(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI