

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

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

आयकर अपील सं./ITA No. 246/JP/2024
निर्धारण वर्ष / Assessment Year : 2012-13

Shri Madan Mohan Gupta 205-C, Talwandi, Kota	बनाम Vs.	The ITO Ward 1(3) Kota
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ADFPG 0108D		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Rajendra Sisodia Adv.
राजस्व की ओर से / Revenue by: Shri Rajesh Kumar Meena, Addl. CIT-DR

सुनवाई की तारीख / Date of Hearing : 29/05/2024
उदघोषणा की तारीख / Date of Pronouncement: 07/08/2024

आदेश / ORDER

PER: SANDEEP GOSAIN, JM

This appeal filed by the assessee is directed against order of the Id. CIT(A), Udaipur-2 dated 17.01.2024 for the assessment year 2012-13 wherein the assessee has raised the following grounds of appeal-

1. The learned CIT(A) erred in law as well as facts in confirming the addition of Rs.9,45,817/- and Rs. 18,916/- made u/s 68 and 69C, which is contrary to law, facts and circumstances of the case.
2. That the learned CIT(A) erred in denial of exemption u/s 10(38) basing his observations upon presumption and surmises simply concluding that the case was within the ambit of 'Penny Stocks' not having any place under the provisions of tax laws.

3. That the learned CIT(A) failed to appreciate that the transaction of purchase and sale were genuine and all the requisite prescribed conditions were in existence.
4. That there is a straight denial of a reasonable and sufficient opportunity viz. absence of cross examination of witnesses, a right the appellant legally deserves under the provisions of law.
5. That the CIT(A) simply based the decisions on judgments which were not relevant to the appellant's case and at the same time failed to give any weightage to decisions cited during the appellate level.

2.1 Apropos Ground No. 1 to 5 of the assessee, brief facts of the case are that the assessee is an individual and during the year under consideration has derived Income from Business, Share trading and Income from other sources. ITR for the year was filed on 21.09.2012 declaring total income at Rs. 12,63,540/-. The case was reopened and notice u/s 148 was issued on 29.09.2016. Details and information sought by AO were furnished and the assessment was finalized u/s 143(3) r.w.s. 147, on 29.12.2017 assessing an income of Rs.22,28,270/- , after making addition u/s 68 to the tune of Rs. 9,45,817/- by treating the long term capital gain [claimed exempt u/s 10(38)] as accommodation entry and thus bogus, and further adding an amount of Rs.18,916/- u/s 69C holding that assessee has paid commission for obtaining such accommodation entry. The relevant para of order of the AO at page 11 and 12 making total addition of Rs.9,45,817 +Rs.18,916 = 9,64,733/- is mentioned as under :-

Page 11: Thus it is held that the income of Rs.9,45,817/-[Sale consideration Rs.9,99,417/- less Cost of acquisition Rs.53,600/-] earned by the assessee on sale of shares of M/s Bakra Pratisthan Ltd.(as claimed by the assessee) is treated as bogus. The

assessee has introduced his unaccounted income under the guise of bogus LTCG and claimed it as exempt u/s 10(38) of the Act. His claim to have exempt income u/s 10(38) is rejected and addition of Rs.9,45,817/- is made to the total income of the assessee as unexplained cash credit u/s 68 of the Income Tax act, 1961 introduced in the books of account....’’

Page 12: As mentioned earlier, to get such accommodation entries, commission was paid to the person who managed all these affairs of the scheme. The commission is approximately 2%. Thus, the amount of Rs.18,916/-(2% of Rs.9,45,817/-) is unexplained expenditure of the assessee incurred towards payment of commission to obtain accommodation entries. Hence, an addition of Rs.18,916/- is made u/s 69C to the returned income of the assessee.....’’

2.2 Aggrieved by the addition so made, assessee preferred appeal to the Id.CIT(A), who dismissed the appeal primarily relying upon observation of AO and on the decision rendered by the Calcutta High Court in the case of Swati Bajaj. Present appeal has been filed against the order so passed by Id. CIT(A). The relevant observation as to the additions of Rs.9,45,817/- plus Rs.18,916/- = 9,64,733/- mentioned at page-23 & 24 are reproduced as under:-

‘‘Page. 23. It will also be worthwhile to consider the nature of burden of proof on the AO for proving a fact or circumstances in the income tax proceedings. The questions raised about the tax liability by the AO are to be answered by the assessee by furnishing reasonable and plausible explanations. If assessee is not forthcoming with proper or complete facts or his statement or explanation is contradictory, drawing of suitable inferences and estimation of facts is inevitable.

In view of the above discussion, the arguments raised by the appellant are found to be not acceptable and the addition made by AO with regard to disallowance of bogus long term capital gain (LTCG) and unexplained expenditure on commission paid for procuring these entries of LTCG is found to be justified. Therefore, the order of the AO is confirmed.

Page 24 (5.3).....In view of the discussion while deciding the ground no. 1, the arguments raised by the appellant are found to be not acceptable and the addition made by AO with regard to disallowance of bogus long term capital gain (LTCG) is confirmed.

The AO held that the assessee has to incur expenditure by way of commission for getting such accommodation entry. The source of such expenditure is not explained. Therefore, such unexplained expenditure on commission paid for procuring these entries of LTCG is found to be justified. The appellant has not furnished any evidence to prove that the findings of the AO are not correct with regard to expenditure made on commission for getting the accommodation entry. The appellant only argued that the capital gain claim was genuine and no such expenditure was incurred. In view of the discussion made while deciding the ground no. 1, the claim of the appellant is not found to be acceptable. In view of the above discussions addition made by the AO is hereby confirmed.

2.3 During the course of hearing, the ld. AR of the assessee, filed the following written submission-

Ground of Appeal No. 1 to 3:

In all these grounds of appeal, assessee has challenged the action of ld. CIT(A) in confirming the addition of Rs.9,45,817/- made by ld.AO u/s 68 of the Act by treating genuine Long Term Capital Gain earned by assessee as mere accommodation entry and bogus and thereby withdrawing exemption u/s 10(38); and making further addition of Rs.18,916/- u/s 69C holding it to be commission paid for getting accommodation entries. As all the grounds of appeal are interrelated, the same are dealt with together for the sake of convenience.

Submission of the assessee is as under:

- 1.1 The assessee purchased 268 shares of Dhanlabh Merchandise Ltd. at the rate of Rs.200/- per share in September, 2010, through offline mode. The payment to the broker M/s Panchmukhi Marketing Pvt. Ltd. was made through cheque drawn on S/B account of the assessee with Central Bank of India. The shares were thereafter credited to the Demat account of the assessee with the Depository (Central Bank of India.) on 19.10.2010. Dhanlabh Merchandise Ltd. later got amalgamated with Bakra Pratisthan Ltd. Post demerger, 10 shares of Bakra Pratishan were allotted against 1 share of Dhanlabh Merchandise Ltd. As a result, the assessee got 2680 shares of Bakra Pratisthan Ltd. After holding the shares for a period of more than one year, when the assessee felt to book the profits since the investment yielded good returns, assessee sold the shares in March, 2012, through online trading at CSE portal through a registered broker M/s Fix Fit Securities Pvt. Ltd. as per sale bill of respective dates 26.03.2012 &

30.03.2012. STT was duly paid on the sale transaction. The assessee received the consideration through two cheques, which were credited in assessee's saving bank account with Central Bank of India. The shares were sold through broker, viz. M/s Fix Fit Securities Pvt. Ltd. who was never alleged as part of the racket involved in providing accommodation entry. Having fulfilled all the conditions for claiming exemption u/s 10(38) of the Income Tax Act, the assessee rightly claimed the exemption.

- 1.2 For proving the genuineness of the purchase and sale of shares of the Company, the assessee filed the following documents before the Assessing officer - (a) Copy of invoice of the broker dated 08.09.2010 showing the details of shares purchased (b) Copy of relevant Bank statement evidencing amount paid for acquiring the shares (c) copy of Balance sheet of the assessee reflecting the investment made in shares of Dhanlabh Merchandise Ltd. (d) Copy of Holding statement with Depository participant as on 31.03.2011, reflecting the above shares have been dematerialized (e) Copy of Calcutta High Court approving the merger of Dhanlabh Merchandise Ltd. with Bakra Pratisthan Ltd. (f) Copy of Demat account evidencing merger and subsequent sale (g) Copy of sale bills issued by broker (h) Copy of cheques received from the broker (i) Relevant Bank Statement showing deposit of the above cheques.
- 1.3 It may be noted that that all evidences of purchase and sales were submitted by the assessee, as were called for by the AO. The Assessing officer has not found any fault in these documents. The payments were received from the broker through cheques and transactions were done through recognized stock exchange (CSE). The inflow and outflow of shares is duly reflected in demat account. The shares were transferred through demat account and the assessee does not know the buyer. There is no evidence that assessee has paid cash in return of the receipt through cheque. In other words, there is no evidence that the cash was recycled. The assessee is not a party to alleged price rigging. He has no nexus with the company, its directors or operators. He is not concerned with the activity of broker and has no control over the same. Even there is no evidence that directors of company or broker were involved in price rigging. The assessee has got only incidental benefit of price rise. The fact that the assessee invested in shares, which gave rise to capital gains in a short period, does not mean that the transaction is bogus, as all the documents and evidences have been produced before Assessing officer. The shares were sold in piecemeal on different dates through recognized stock exchange at quoted price. The genuineness of share transactions for claiming exemption u/s 10(38) need to be

proved by contract notes for sale apart from other ingredients like authentic supporting documents like bank statements and sales through stock exchange platform, and the same have been proved by the assessee.

- 1.4 The case of the assessee is supported by the purchase bill, payment by cheque and sale by assessee on recognized stock exchange through a registered broker receiving the sale consideration through the settlement mechanism of the exchange by cheque. There is no doubt on the broker who sold the shares. In the present case, the AO did not raise any question to the broker who sold the shares. It is in fact, the broker who sold the shares, logged in to his terminal and sold the shares on electronic online platform of the exchange. It is not the case of the assessee that the shares have not been sold by the assessee on the stock exchange. Here, the learned Assessing officer is challenging the whole cycle of the transaction, starting from purchase of the shares by the assessee and subsequently holding it and selling it on stock exchange at prevailing prices as sham transaction as an attempt to convert the unaccounted money of the assessee in the form of non-taxable long-term capital gain.
- 1.5 It is submitted that the basic principles of law as have been consistently adopted by the courts are:

- a. The person who alleges should prove
- b. All adverse material is required to be supplied to the person against whom the allegation is made
- c. No findings can be recorded on surmises and conjectures
- d. Adverse action can be initiated only based on evidence

- 1.6 As against the aforesaid principles of law, in the present case, the transaction of the assessee is held bogus only and only on the basis of general report of the Investigation Wing. The report was prepared only on the basis of statements of various persons without referring to any underlying documents. From the extract of report, as appearing in the assessment order, it can be seen that the name of the assessee or his broker or his transaction has not been discussed. Thus, no link with the case of the assessee has been established, no direct evidence is found against the assessee. Chain of flow of cash has also not be established. Except oral testimony, which also remains uncorroborated, as there is no reference of any material found, nothing was brought on record by Id. AO. The evidences submitted by the assessee have not been found to be false or

forged. Documentary evidences shall prevail when weighed against the oral evidences. Reports of Investigation Wings have not been confronted to the assessee. The assessee has not been provided with the opportunity to cross examine the persons whose statements have been relied upon. The assessee has also not been provided opportunity to cross examine the persons who have prepared the said report. It is submitted that if the information is gathered behind the back of the assessee and the same is acted upon then, as per the principles of natural justice, the assessee should be provided with such information and should be allowed opportunity of cross examination.

- 1.7 A perusal of the assessment order clearly shows that the Assessing officer was carried away by the report of the Investigation Wing, Chapter-I in particular. It can be seen that the entire assessment has been framed by the Assessing Officer without even going through the entire report meticulously or conducting any enquiry from the relevant parties or independent source or evidence. He has merely relied upon the information received from the Investigation Wing and the statements recorded by them. It is apparent from the Assessment Order that the Assessing Officer has not conducted any independent and separate enquiry in the case of the assessee. Even, the statement recorded by the Investigation Wing has not been got confirmed or corroborated by the person during the assessment proceedings.
- 1.8 Regarding the statements of operators, entry providers and stock brokers recorded by the investigation wing, referred to by the AO in his Assessment Order at Page 8, wherein they have admitted providing accommodation entries of LTCG and M/s Bakra Pratisthan has been held as a penny stock company, the same is irrelevant because the assessee has no connection with the said operators, entry providers or stock brokers. Their statements can only be used against those assesseees who have carried out the transactions through them. Moreover, these statements were never provided to the assessee. Even no Show cause notice of the proposed additions was issued in the case. The assessee does not have any connection with any of the operators, entry providers or stock brokers. So, these statements could not implicate the assessee. Moreover, these statements were never made available to the assessee and even their existence is dubious. It would not be out of place to mention here that apart from the so called information received from Investigation Wing, Calcutta, stated to be containing statements of operators, entry providers and stock brokers, there was no corroborative material available with the Ld. AO or referred to by him in the

assessment order found as a result or gathered during the course of assessment proceedings in support of the impugned addition made by him.

- 1.9 The AO after holding that the transactions of purchase and sale of shares by the assessee are sham, made the addition of the LTCG u/s 68. Section 68 of the Act places the burden of proof on the tax payer, to explain the nature of source of any credit but not the source of the source. Hence, when an assessee gives evidences of identity of the payer (*M/s Fix Fit Securities Pvt. Ltd.*), source of the credit (*Sale proceeds of shares*), evidences of the transactions to prove the genuineness (*Contract note, Bill of the broker & Demat account*), the assessee is said to have discharged his initial burden. In this case, the assessee has explained and submitted evidences to prove identity, nature and source of the cash credit on account of sale proceeds credited / received in the bank account of the assessee and also furnished all evidences comprising contract notes, brokers, banking details in support of the genuineness of the transactions. The AO has not pointed out any deficiency in the documents or inherent weakness in the explanation or doubted genuineness of the transactions for want of any evidence. The AO did not produce any evidence whatsoever to prove the allegation that unaccounted money changed hands between the assessee and the broker or any other person including the alleged exit provider nor proved that the assessee has taken any type of accommodation from any person or so called exit providers to introduce unaccounted money into books by way of LTCG. With the purchase and sale, transactions of shares of *Bakra Pratisthan Ltd.* are proved genuine by third party evidences – bank, broker, DP - demat account, and in the absence of any material to prove cash changing hands in the transaction, the addition made by the AO under section 68 of the Act, by treating the sale consideration as unexplained, sham and non-genuine is baseless. The addition under section 68 of the Act made merely of the basis of suspicion, presumptions and probability of preponderance without any direct evidence to prove the transactions as non-genuine or sham or demonstrating appellant's involvement in any kind of manipulation is illegal and should not be sustained. The findings of investigation & modus operandi in other cases narrated by the AO nowhere prove any connection with the assessee nor the assessee's involvement or connection or collusion with the brokers, exit providers, accommodation providers or companies or directors etc. For making the addition, it is necessary to bring on record evidence to establish ingenuity in transactions or any connection of the assessee or its transaction with any of the alleged parties. The assessee has discharged its onus by establishing the identity of the payer, source of the credit and genuineness of the transactions. It is well

settled that evidence collected from third parties cannot be used against an assessee unless this evidence is put before him and he is given an opportunity to controvert the evidence. In this case, the AO relies only on a report as the basis for the addition which is not (during assessment) brought on record by the AO nor is it put before the assessee. The submission of the assessee is that he is just an investor and as he received some suggestion for investment and he chose to invest based on these market tips/suggestions and had taken a calculated risk and had gained in the process and that he is not party to any alleged scam or illegal trades etc. has to be controverted by the revenue with evidence when a person claims that he has done these transactions in a bona fide manner, one cannot reject this submission based on surmises and conjectures. As the report of investigation wing suggests, there are many beneficiaries of LTCG. Each case has to be assessed based on principles of legal import laid down by the courts of law.

- 1.10 At this stage, it is pertinent to discuss the Investigation report, which has been made a part of his assessment order by the AO, had been prepared by Nivedita Prasad, DDIT(Inv.) Admn. Kolkata, which runs into 48 pages. Your Honor's attention is invited to Chapter-II of this report-SCRIPWISE ANALYSIS OF SHARE CAPITAL OF PENNY STOCKS LISTED AT THE CALCUTTA STOCK EXCHANGE. On Page-15, the scrips of nine companies have been stated to be listed as penny stocks on CSE. Bakra Pratisthan Ltd. is listed at S.No.5 of the table-1. Below this table, another table containing the names of five scrips out of the nine named in Table-1 is given. The name of Bakra Pratisthan Ltd. does not figure in this table. These five scrips are stated to be controlled by Praveen Agarwal and Vijay Dokania, whose statements are stated to have been recorded and provided in CD. It is an undisputed fact that the controller/promoter of Bakra Pratisthan Ltd. was never examined. In such an eventuality, drawing adverse inference against the assessee for entering into transactions of Bakra Pratisthan Ltd., on the basis of generalization and without anybody's statement alleging the company of being involved in any bogus transactions, is arbitrary and illegal. Further, Chapter-III of this report – DETAILS OF SHARE BROKERS INVOLVED IN THE SYNDICATE AND THEIR MODUS OPERANDI may kindly be perused. On Page-25 there is a table showing the names of 10 share brokers of CSE covered by the Investigation Directorate. The name of the broker of the assessee-M/s Fix Fit Securities Pvt. Ltd. nowhere figures in this table. The rejection of the claim of the assessee in 1.9(iv) below is thus, without any basis. Thus, the findings of the AO, on the basis of the said report are baseless. It may be added that this report,

which has been made the basis for making the additions, was neither provided along with the reasons for reopening nor during the course of assessment proceedings.

1.11 The AO has given the reasons for rejecting the claim of the assessee in Para-9 (Page-9 & 10 of his order). The rebuttal of the reasons given by him is stated against the reason itself. **Para-9.** The claim of the assessee of having genuinely sold 2680 shares of M/s Bakra Pratishthan Ltd. is rejected in view of the following:-

- i) A/R of the assessee could not produce relevant documents in support of his claim and desired information from the assessee. The assessee has never held the shares in physical form. These facts make it clear that the above transactions of sale-purchase of shares were not made with an intention of investment. This was an adjustment made to generate bogus LTCG. – The assessee has produced all relevant documents[(a) Copy of invoice of the broker dated 08.09.2010 showing the details of shares purchased (b) Copy of relevant Bank statement evidencing amount paid for acquiring the shares (c) copy of Balance sheet of the assessee reflecting the investment made in shares of Dhanlabh Merchandise Ltd.(d) Copy of Holding statement with Depository participant as on 31.03.2011, reflecting the above shares have been dematerialized (e) Copy of Calcutta High Court approving the merger of Dhanlabh Merchandise Ltd. with Bara Pratishthan Ltd. (f) Copy of Demat account evidencing merger and subsequent sale (g) Copy of sale bills issued by broker (h) Copy of cheques received from the broker (i) Relevant Bank Statement showing receipt of sale proceeds] in support of purchase and sale of the shares, as there can be. The AO has not mentioned as to which relevant document he needed for establishing the genuineness of the claim of having had exempt income u/s 10(38). Further, it is a misconceived notion of the Ld.AO that a share has to be held in physical form if it is purchased with the intention of investment. The holding of share in physical or demat form is immaterial for determination of intention of investment or otherwise. How come the holding of a share in demat account be labelled as a transaction to generate bogus LTCG?*
- ii) The assessee purchased the shares on 08.09.2010. The payment was made through cheque no. 327112 dt. 19.10.2010 i.e. after expiry of a period of one month. This is not possible that one purchases shares and*

make payment after a period of one month. This makes it clear that there was no actual purchase of shares but an adjustment. A copy of bill dt.08.09.2010 is annexed as Annexure B. - *The Ld.AO is again mistaken. The raising of a bill by the broker and its payment by the client is a contract between these two parties. The terms and conditions as to the transaction are determined by mutual agreement between them. The payment against bill at a later date does not make it bogus. As a matter of fact, the payment was made when the shares were dematerialized. In the bill itself, against the Distinctive number, it was mentioned-As per **Demat Form**. So as and when above shares got dematerialized, the payment was made through cheque which was encashed by the broker, as is evident from the bank statement of the assessee.*

- iii)* The assessee purchased shares of M/s Dhanlabh Merchandise Ltd. which was amalgamated with M/s Bakra Pratishtan ltd. In his investigation, Investigation Directorate, Kolkata has concluded that M/s Bakra Pratishtan Ltd. (Scrip code 12133) is a penny stock company. – *The conclusion drawn by Investigation Directorate, Kolkata in no way implicates the assessee. It is a finding of the Directorate qua the company, M/s Bakra Pratishtan Ltd. It does not prove that every one who has dealt with the shares of this company has generated bogus LTCG.*
- iv)* The assessee has purchased shares from M/s Marshall Commodities Pvt.Ltd. and sold the shares through M/s Fix fit Securities Pvt. Ltd. Both these brokers have been covered by the Investigation Directorate and it has been held that both these brokers were involved in this dubious scheme. The name of these brokers have been given in the report in the following manner..... *Again, the observation and the comment of the Ld.AO are baseless and false. There is no evidence of these entities having been covered by the Investigation Directorate. In the report of the Investigation Directorate running into 36 pages, which was attached with the assessment order, there is no mention of the name of M/s Marshall Commodities Pvt. Ltd. or M/s Fix Fit Securities Pvt. Ltd., what to talk of their involvement in the dubious scheme.*
- v)* The assessee has purchased and sold the shares in the same pattern as discussed by the Investigation Directorate in his information. The

assessee firstly purchased shares of M/s Dhanlabh Merchandise Ltd. which was amalgamated with M/s Bakra Pratishtan Ltd. and in his way, the assessee received 10 shares of M/s Bakra Pratishtan Ltd. against 1 share of M/s Dhanlabh Merchandise Ltd. Then the prices of shares were rigged up from Rs. 20 per share to Rs.353.32 per share i.e. up to 1600% on which the shares were sold and Long Term Capital Gain was generated. This makes it clear that there was an adjustment made by the assessee to generate Long Term Capital Gain. – *The conclusion is based on surmises and conjectures ignoring all the direct evidences produced by the assessee.*

1.12 The AO has also relied on a direct decision on the issue of penny stock rendered by Bombay High court approving the decision of ITAT, Nagpur Bench, in the case of **Sanjay Bimalchand Jain**. The decision is distinguishable, being based on its own peculiar set of facts, which are stated below-

- The assessee invested in the shares of two companies for the first time on the advice of an Income tax consultant / *whereas here the assessee was a regular investor in shares from last five years.*
- The issue involved was whether the profit on sale of alleged shares constituted long term capital gains or business income. The AO held the profits to be Business income / *where as here the AO has held it to be income from unexplained sources u/s 68 and undisclosed expenditure u/s 69C.*
- At the time of acquisition of shares of both the companies, the payments were made in cash / *whereas in the instant case the payment for purchase of shares has been made through banking channel and it's source is fully verifiable.*
- The address of both the companies whose shares were purchased were interestingly the same / *which is not the case here.*
- The authorized signatory of both the companies were also the same person/ *which is not the case here.*
- The purchase of shares of both the companies was done by the assessee through broker Globle Stock and Securities Ltd. and the address of the said broker was incidentally the address of the two companies / *where as here the address of the company whose shares have been purchased and the broker are distinct and different.*
- The AO made extensive inquiries in the case / *whereas no inquiries at all were made by the AO in the instant case.*

- The broker, viz. Ashish Stock Broking Pvt. Ltd. did not respond to AO's letter seeking information about the purchasers of the shares of the two companies / *whereas no such letters were sent to the broker by the AO in this case.*

Based on these crucial facts and since no substantial question of law was involved, the appeal of the assessee was dismissed by the Hon'ble High Court. The said decision is not applicable to the assessee, as the assessee has successfully demonstrated with help of evidences on record to have made the transaction of purchase and sale of alleged shares. No enquiry, whatsoever, was made by the AO in this case. No single material was brought on record indicating name of any of the entry provider taking assessee's name or the name of assessee's broker. Thus, the decision relied upon by the AO is wholly distinguishable on facts, and is not applicable to reach an adverse finding in the case on hand and has been erroneously applied and relied on by the AO.

- 1.13 The AO has further relied on the decision in the case of **ACIT vs. Som Nath Maini** [(2006) 100 TTJ 917 Chd.]. The decision in this case was again rendered in the light of its peculiar facts and circumstances. The facts briefly stated are that during the course of assessment proceedings, the AO observed that assessee had incurred a long-term capital loss on account of sale of gold jewelry declared under the VDIS, 1997, amounting to Rs. 19,87,705/- and also there was a short-term capital gain near to this amount of long-term capital loss amounting to Rs. 20,36,700/- resulting into net capital gain of Rs. 48,995/-. The AO on perusal of record further observed that in the case of a family member of the same assessee, Shri D.C. Maini, in the same assessment year, similar exercise has been done, wherein a long-term capital loss of Rs. 11,59,066/- had been incurred on account of sale of gold jewellery declared under the VDIS and short-term capital gain of Rs. 11,75,100/- resulting into a net gain of Rs. 16,034/-. On going through the nature of transactions, the AO doubted the genuineness of the short-term capital gain in the case of the assessee and **he made further inquiry** (*in the case of the assessee no enquiries were made*) that during the year assessee had purchased 45,000 shares of M/s Ankur International Ltd. at varying rates from Rs. 2.06 to Rs. 3.10 per share and sold them within a short span of six-seven months at the rate varying from Rs. 47.75 to Rs. 55. These shares were purchased through a broker Munish Arora & Co. and sold through another broker M/s S.K. Sharma & Co. The AO took by surprise the astronomical rise in share price of a company from Rs. 3 to Rs. 55 and started further inquiry. **The AO issued notices under Section 131 to both**

the brokers (*No notices u/s 131 were issued to the broker*) from whom shares were purchased and sold and statements were recorded. **The AO also analyzed the balance sheet of M/s Ankur International Ltd.** (*The balance sheet of Bakra Pratisthan was not available before the AO, what to talk of its analysis*) to justify as to how the share price of a company can go up from a mere Rs. 3 to Rs. 55 in a short span of six to seven months' time. **The AO made detailed and extraneous exercise of finding the fundamental of the share of the company by different methods** (*No such exercise was undertaken by the AO*) and **concluded that these shares were not genuine** and transactions were so arranged so as to cover up the loss incurred on account of sale of jewelry only. **The AO also recorded the finding that transactions were done at Ludhiana where also the share price of the company is quoted but maximum value of the share quoted was Rs. 17/-** (*Shares were traded at prevailing market rates on the stock exchange*) and that too in July, 1997, i.e. long before the shares were sold by the assessee to M/s S.K. Sharma & Co. in the months of February and March, 1998. **The shares have been sold at Ludhiana when actually stock exchange was not functional** (*Shares sold at Calcutta Stock Exchange which was fully functional*) - a fact which is also recorded by the AO. The AO also recorded the finding that **although the shares were transferred, they were still lying in the name of assessee much after the sale to M/s S.K. Sharma & Co.** (*The impugned shares ceased to exist in the demat account of the assessee post sale*) The only positive aspect was the receipt of sale consideration through cheques. It was under these circumstances that the Hon'ble Tribunal made the observations quoted by the Ld.AO. Here, in this case, the genuineness of the sale has been established through a number of documentary evidences and none of the adverse facts as stated herein above (*in bold letters*) exist. Consequently the ratio of the said decision has no applicability in the case.

- 1.14 It is submitted that the impugned assessment order is prima facie illegal in as much as it is solely based on the report of the Investigation wing and the so called statements of third parties who are completely unknown and unrelated to the assessee. It must be noted that the statements of the said third parties were not recorded by the Assessing Officer of assessee during the course of assessment proceedings, but were recorded in some other proceedings carried out by the Investigation Wing of Calcutta. Moreover, the parties whose statements have been recorded are in no way connected to the company Bakra

Pratisthan Ltd., as has been demonstrated in Para-1.8 above. In the present case, the Ld. AO has based his entire assessment order upon the statements of third parties which were recorded at the back of the assessee, by some other authorities without even going through those statements and the same were never made available to the assessee. On the other hand the assessee has filed various documents duly evidencing purchase of shares, copy of D- mat Account, payments being made by account payees cheque and similarly also the evidence related to sale, which was made online on the Calcutta Stock Exchange and through recognized stock exchange broker namely M/s Fix Fit Securities Pvt. Ltd. However all these evidences were just ignored and not rebutted by the AO before making addition. In view of these facts, it is submitted that the impugned addition being solely based upon such uncorroborated statements of third parties is clearly bad in law. Once the assessee has furnished all evidences in support of the genuineness of the transactions, the onus to disprove the same is on revenue. Reference in this regard may be made to the judgment of Hon'ble Supreme Court in the case of **Krishnanand Agnihotri vs. The State of Madhya Pradesh** [1977] 1 SCC 816 (SC). In this case the Hon'ble Apex Court held that the burden of showing that a particular transaction is benami and the appellant owner is not the real owner always rests on the person asserting it to be so and the burden has to be strictly discharged by adducing evidence of a definite character which would directly prove the fact of benami or establish circumstances unerringly and reasonably raising inference of that fact. The Hon'ble Apex Court further held that it is not enough to show circumstances which might create suspicion because the court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence. Just the modus operandi, generalization, preponderance of human probabilities cannot be the only basis for rejecting the claim of the assessee. Unless specific evidence is brought on record to controvert the validity and correctness of the documentary evidences produced, the same cannot be rejected by the AO.

- 1.15 In the present case, the Assessing officer has been guided by the report of the Investigation wing, Kolkata, prepared with respect to bogus capital gains transactions. He has believed the report to be a gospel truth. The assessing

officer has not brought out any part of the investigation wing report in which the assessee has been investigated and /or found to be a part of any arrangement for the purpose of generating bogus long term capital gains. Nothing has been brought on record to show that the persons investigated, including entry operators or stock brokers, have named that the assessee was in collusion with them. In absence of such findings how is it possible to link their wrong doings with the assessee. In fact, the investigation wing is a separate department which has not been assigned assessment work and has been delegated the work of only making Investigation. The Act has vested widest powers on this wing. It is the duty of the investigation wing to conduct proper and detailed inquiry in any matter where there is allegation of tax evasion; and after making proper inquiry and collecting proper evidence, the matter would be sent to the assessment wing for assessing the income as per law. No such action was executed by investigation wing against the assessee. In absence of any findings specifically against the assessee in the investigation wing report, the assessee cannot be held to be guilty or linked to the wrong acts of the persons investigated, solely on the basis of generalisation. In this case, the AO at best could have considered the investigation report as a starting point of Investigation. The report only informed the AO that some persons may have misused the scrip, for the purpose of collusive transactions. The AO was duty bound to make inquiry from all concerned parties relating to the transactions and then to collect evidences that the transaction entered into by the assessee was also a collusive transaction. However, the AO has not brought on record any evidence to prove that the transactions entered by the assessee which are otherwise supported by proper third party documents are collusive transactions. The documentary evidence put forth by the assessee ought to have been given preference over oral evidences of the operators/share brokers (*if any*) alleging the company Bakra Pratisthan facilitating generation of bogus long term capital gain.

- 1.16 It is further submitted that the various observations and the conclusions drawn by the AO in the assessment are based on suspicion, surmises and hearsay. It is trite law that suspicion however strong cannot partake the character of legal evidence (**Lal Chand Bhagat Ambika Ram vs. CIT 37 ITR 288 SC**). The

suspicion or presumption, however strong it may appear to be true, needs to be corroborated by some evidence to establish a link that the assessee has brought back his unaccounted income in form of LTCG. In this connection, reference can be made to the judgment of Special Bench of Mumbai, ITAT in case of **GTC Industries vs. ACIT** 164 ITD 1, wherein it has been held that conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee. Further, reliance is placed on the following decisions:

1. **Vijayrattan Balkrishan Mittal Vs. DCIT** (2019) 33 NYPTTJ 740 (Mum.) (Trib.)
2. **Smt. Karuna Garg Vs. ITO** (2019) 178 ITD 823 (Delhi) (Trib.)
3. **Chandra Prakash Jhunjunwala Vs. DCIT** (2019) 201 TTJ 831 (Kol.) (Trib.)
4. **Smt. Madhu Killa Vs. ACIT** (2019) 178 DTR 236 (Kol.) (Trib.)
5. **Ramprasad Agarwal Vs. ITO** (2019) 174 ITD 286 (Mum.) (Trib.)
6. **DCIT Vs. Saurabh Mittal** (2018) 172 DTR 291 (Jaipur) (Trib.)
7. **Mahavir Jhanwar Vs. ITO** (2019) 55 CCH 150 (Kol.) (Trib.)
8. **Arun Kumar & Ors. Vs. ACIT** (ITA No.457/Del/2018, 2825/Del/2018 & 2826/Del/2018 order dt. 05.11.2018)
9. **DCIT Vs. Rakesh Saraogi & Sons (HUF)** (2018) 32 NYPTTJ 1116 (Raipur) (Trib.)

1.17 The Hon'ble Supreme Court in the case of **Omar Salay Mohamed Sait v. CIT** [1959] 37 ITR 151 (SC) had held that no addition can be made on the basis of surmises, suspicion and conjectures. In the case of **CIT v. Daulat Ram Rawatmull** [1973] 87 ITR 349 (SC) (SC) the Hon'ble Supreme Court held that, the onus to prove that the apparent is not real is on the party who claims it to be so. The burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidences, which would directly prove the fact of bogusness or establish circumstance unerringly and reasonably raising inference to that effect. The Hon'ble Supreme Court in the case of **Umacharan Shaw & Bros. v. CIT** (1959) [1959] 37 ITR 271 (SC) held that suspicion however strong, cannot take the place of evidence. In this connection reference may be made to the general view on the topic of Conveyance of immovable properties. The rates/sale prices

are at variance with the circle rates fixed by the Registration authorities of the Government in most cases and the general impression is that cash would have changed hands. The courts have laid down that judicial notice of such notorious facts cannot be taken based on generalization. Courts of law are bound to go by evidence.

- 1.18 It is provided u/s 142 (2) of the Act that for the purpose of obtaining full information in respect of income or loss of any person, the Assessing Officer may make such enquiry as he considers necessary. Therefore, the Assessing Officer ought to have conducted a separate and independent enquiry and any information received from the Investigation Wing was required to be corroborated and affirmed during the assessment by the Assessing Officer, by examining the concerned persons who can affirm the statements already recorded by any other authority of the department. Facts narrated above clearly show that the Assessing Officer has not made any enquiry whatsoever and the entire assessment order is devoid of any such enquiry. Even the CIT(A) on Page-16 of his appellate order has observed - *After careful perusal of facts of the case it is noted that the addition made by the AO is based on the findings of search and survey proceedings conducted by investigation wing where syndicate operating to provide accommodation entry of bogus gain and Bogus loss is detected.* There is nothing on record to show that the trading by the broker/company was ever suspended by the SEBI nor is there anything on record to show that the broker of the appellant mentioned here in above was involved in the alleged scam. The Assessing Officer has not even considered examining the broker of the appellant. It is a matter of fact that SEBI looks into irregular movements in share prices on range and warns investors against any such unusual increase in shares prices. No such warnings were issued by the SEBI.
- 1.19 The evidence with regard to source and purpose for which amount had been received and credited in the books has been submitted by the assessee, that has not been found to be false, forged or fabricated by the AO. The identity of the party is established from the contract note itself wherein it has been prominently stated that name of the Share Broker is M/s Fix Fit Securities Pvt. Ltd. and that they are member of the Calcutta Stock Exchange Ltd. The Demat

Account statement evidences holding of equity shares of Company of which shares have been dealt with at Calcutta Stock Exchange. The transaction statement contains CSE settlement number, the quantity which has been sold and the date on which such quantity was sold, which very much matches with settlement number appearing in the contract note issued by the share broker. The Bank statement evidencing receipt of funds from the Share Broker has already been furnished in the course of assessment proceedings. The AO has not brought any material indicating that said amount proposed to be taxed has not been received from the Share Broker or the sum received is from the sources other than the sale consideration claimed against sale of shares. In view of these facts, addition could not have been made under section 68 of the Act.

- 1.20 There is no dispute that the statements which were relied by the Assessing Officer were not recorded by the Assessing Officer in the assessment proceedings but they were pre-existing statements recorded by the Investigation Wing and the same cannot be the sole basis of assessment without conducting proper enquiry and examination during the assessment proceedings itself. It is an undisputed fact that the Assessing Officer neither conducted any enquiry nor brought any clinching evidences to disprove the evidences produced by the assessee. Nowhere SEBI has declared the transaction transacted at earlier dates as void. Considering the vortex of evidences, it can be said that the assessee has successfully discharged the onus cast upon it by provisions of section 68 of the Act as mentioned elsewhere, such discharge of onus is purely a question of fact and therefore the judicial decisions relied upon by the AO would do no good on the peculiar plethora of evidences in respect of the facts of the case in hand.
- 1.21 Now coming on to the decision of the Ld.CIT(A) confirming the action of the AO, the CIT(A) has erred in overlooking the facts which are as under:
- a) The assessee had purchased 268 shares of Dhanlabh Merchandise Ltd. through broker in the FY 2010-11;
 - b) Payment for purchase of shares had been made through banking channel;
 - c) Investment so made was reflected in the Balance sheet of the assessee in the earlier year for which "return" had duly been filed;
 - d) The shares so acquired were held in demat account;

- e) The shares were sold through registered broker on CSE;
- f) The sale of shares was supported by the bills issued by the brokers and further supported by corresponding movement in demat account;
- g) The price on which sale consideration had been realized was in full conformity with the rates prevalent in the stock exchange at the relevant time;
- h) The transactions were Security Transaction Tax (STT) paid and thus, requirement of condition for exemption as contained in [section 10\(38\)](#) had been fully complied with;
- i) In addition to payment of brokerage, service tax had also been paid by the assessee through bills issued by the brokers;
- j) The sale consideration has been received from the broker through cheques;
- k) The amount received, being properly explained, can neither be considered as unexplained nor as undisclosed;

1.22 The Ld.CIT(A) has turned a blind eye to all the evidences put forth by the appellant and has miserably failed to distinguish any of the direct case laws cited by the appellant on the subject. In his entire order running into 39 odd pages, he has not addressed as to why the direct evidence put forth by the appellant in respect of purchase and sale of shares does not appeal him. He has not even bothered to distinguish even a single case as to why the decision therein is not applicable to the appellant's case. He seems to have carried out a cut paste exercise with the least application of his mind to the facts of the case as is evident from his decision in three other related cases of the assessee. The least that is expected from an CIT(A) is justice through a speaking order, after considering the order of the AO and the stand of the assessee against it. But, what the Ld.CIT(A) is up to, is not discernible from his present order. He has stepped into the shoes of the AO and acted and commented as an AO rather than as an appellate authority. He has blindly endorsed the AO's action which is a breach of section 250(6) of the Income Tax Act.

1.23 The Id. CIT(A) without appreciating the evidences and details submitted, confirmed the action of the Id. AO by primarily quoting numerous case laws on human probabilities, however again no defect whatsoever was pointed out in the documentary evidences furnished by assessee and these documentary evidences

were not rebutted by Id. CIT(A) also. Ld. CIT(A) on his own theories and assumptions has denied the opportunity of cross examination and further tried to deviate his finding from the direct judgment of Hon'ble jurisdictional high court on this issue where the Hon'ble court has confirmed the order passed by the Hon'ble Jaipur bench of ITAT.

1.24 Interestingly, in last para of his order at Page-16, the CIT(A) has observed

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After careful perusal of facts of the case it is noted that the addition made by the AO is based on the findings of search and survey proceedings conducted by investigation wing where syndicate operating to provide accommodation entry of bogus gain and Bogus loss is detected. Such entry providers confirmed that they were involved in providing accommodation entries before the Investigation wing during search and survey proceedings. There is astronomical rise and fall in prices of these shares which are not related to the fundamentals or any projections made by these companies. The rise and fall were disproportionate to real financial position of the companies. Steep rise in the shares purchased by the appellant was also not related to financials of the companies. The pattern of chart of share price of these companies is bell shaped typical to these types of manipulated stocks where the price rises without any reason and falls without any reason. The prices were clearly manipulated by the operators. The share prices and sale purchase transactions are not genuine but planned to provide entries of fictitious gains and losses to the beneficiaries by these operators. The appellant failed to justify purchase and sale of these shares. The appellant has not given name of the person who recommended purchase of these shares to the appellant. The appellant failed to prove that there was no such scheme as identified by the Income Tax Department. The appellant failed to prove that no benefit derived by it from such scheme. In fact as per return of Income there is profit of Rs. 9,45,817/- . It is also important to note that similar type of transaction in the same scrip was made by related person Mr. Pawan Gupta, Mrs. Rajeshwari Gupta and Mr. Shailendra Gupta. This also supports the view of the AO that these shares were transacted as per the scheme of getting accommodation entry of bogus LTCG. This clearly establishes that the appellant got the entry of bogus long term capital gain. The CIT(A) has discussed

everything except the facts of the case. The appellant has given ample documentary evidence of purchase and sale of these shares. During the course of assessment proceedings, the AO never asked the name of the person recommending the purchase of these shares. It may however be mentioned that only Shri Shailendra Kumar Gupta was examined by the AO, who in his reply to Q.No.6 of his statements recorded by the AO on 18/09/2017 in very clear terms stated that Shri Ravindra, his acquaintance from Raipur(CG) had recommended the purchase of shares of Dhanlabh Merchandise Ltd. The impugned order is full of suspicion, surmises & conjectures, presumptions and assumptions, drawing inferences and is also full of repetitions. The only purpose of writing a thesis type of appellate order running into 39 pages, by itself goes to show the serious lack of direct evidences in favor of AO to support the impugned addition. Not only there is a serious lack of contrary evidences and other supporting material but even the direct cogent evidences admittedly submitted and available before him, have not at all been (successfully) adversely commented upon, what to talk of disproving or rebutting or falsifying the same.

1.25 The Ld.CIT(A) has finally relied on the decision rendered by Calcutta High Court in the case of **Pr. CIT Vs Swati Bajaj** on the subject. As regards the Calcutta High Court decision, in the case of **Pr. CIT Vs Swati Bajaj & others**, the department had challenged 90 orders passed by the Hon'ble ITAT Kolkata in assessee's favor from time to time and the Hon'ble division bench of HC, after hearing was pleased to pass a lengthy order in favor of the department, thus nullifying all ITAT orders including the pending cases. On going through the entire judgement, wherein it appeared that the central spirit which has driven the Hon'ble bench to pass the order in favor of the department, is the non consideration of principle of preponderance of probabilities or what is apparent is not real, the principal laid down by the Apex court in *Sumati Dayal vs CIT* and *P. Mohonkala vs CIT*, wherein the Honble Apex court had pronounced a new rule of law that in taxation matters department is not bound by only documentary evidences furnished by the assessee before the A.O. The A.O as an investigator is empowered to look at the surrounding circumstances, including the circumstantial evidences, apart from documentary evidences. It means that what is apparent in documentary evidences furnished by the assessee is not real, if the department goes for further investigation

on these matters. Therefore, Hon'ble bench mostly relied on the investigation report of DIT(Inv), Kolkata wherein entire modus operandi of penny stock is dealt with including the gullible method of price rigging by a well organized syndicate of brokers and shell companies. In the opinion of the Hon'ble bench, while passing orders in penny stock cases, ITAT should have given weightage to this well established legal principle of Apex court and should have looked into the surrounding circumstances, which they did not. Therefore, these bunch of orders of ITAT are vitiated with injustice to the department. That now, in this factual backdrop my humble contention is that as per income tax law, ITAT is the highest fact finding quasi judicial forum. Neither High court nor the Supreme Court has any power to interfere with the factual findings of tribunal. Only they have the power to admit and adjudicate the question of law, if involved in any appellate matter. Now in this context, can Hon'ble bench deal with factual matrix like modus operandi of penny stock, findings by the DIT(Inv) and deficiency in evidential values of documentary evidences furnished by the assesses on the touch stone of circumstantial evidences, as the modus operandi of syndicate, brokers etc. are all questions of fact, where ITAT is the full and final adjudicator and when it is clearly seen from the perusal of High Court's order that Hon'ble bench is highly enamoured by the lack of fact findings by the tribunal on circumstantial evidences. Is it not a good case of assumption of jurisdiction of ITAT by the Hon'ble HC?

The next observation is that in the said order, Hon'ble bench has not noticed a vital observation made by Tribunal in most penny stock cases that investigation and assessment are different proceedings in Income tax law. Investigation is mostly of a general nature conducted by a separate wing of the department and in penny stock cases the report of DIT(Inv) is general in nature and in most of the cases, the names of the assesseees and their brokers has not figured out at all. Assessment being a separate proceeding, all benches of the Tribunal have correctly observed in their orders that AO as an investigator is duty bound to initiate a separate assessee specific enquiry, including looking into the involvement of concerned assessee, which only matters in assessment proceedings in the penny stock racket and the AO had ample powers to look in to the circumstantial evidences apart from documentary evidences, which he did not. Therefore, Tribunal most correctly concluded that where A.O has failed to

prove the involvement of the assessee in the price rigging process and where the name of the assessee has nowhere figured out in investigation report, then the assessee can not be crucified by the department in penny stock cases, as being bogus and colorable. But alas, Hon'ble HC has totally overlapped this most crucial legal and factual point in its adjudication. Hon'ble bench was duty bound either to establish the involvement of assesses in the racket which was actually department's job or to set aside all files to A.O for fresh investigation. But instead of doing so, the Hon'ble bench appeared too earnest and anxious to establish the guilt of assesses, relying upon the case laws which are in a different context and such a serious issue like country wide investigation by the government was not issue in those cases. The Hon'ble bench totally misread the said judgements of Apex court contextually. One basic question can fall flat the impugned order of HC and that is can any body be held guilty for an offence when his or her name has nowhere figured out in the investigation report? If the reasoning of the Hon'ble bench is accepted, then it means that any person can be hanged in the country, although the investigation or enquiry report, which is basis of charging a person for any offence, has not spared a word or evidence about the involvement of that hanged person in any offence. Will it not be travesty of justice or a judgement by a kangaroo court of law? Further, the assessee is based in Rajasthan. All the Courts/Tribunals within the jurisdiction of Hon'ble Rajasthan High Court are bound by the decision of Hon'ble Rajasthan High Court.

- 1.26 The Ld.CIT(A) has heavily relied on the tests of human probability in confirming the addition, referring to the decisions in the case of **Sumati Dayal vs. CIT** (214 ITR 801) Reliance placed by him on the decision of the Apex Court in the case of Sumati Dayal (supra) is wholly misplaced. In that case, the assessee therein had claimed income from horse races and the finding of fact recorded was that the assessee therein had not participated in races, but purchased winning tickets after the race, with the unaccounted money. However, this is quite different from the factual matrix at hand. In the present case, the documentary evidence clearly shows that the transactions were at the rate prevailing in the stock market and there was no question of introducing unaccounted money by the assessee. As regards the decision of Sumati Dayal vs CIT (supra), the Hon'ble Delhi High Court

in a recent judgment in the case of **Pr. CIT vs. Smt. Krishna Devi** (431 ITR 361) under similar facts and circumstances, has disregarded the principle of preponderance and has held that evidence produced by the assessee over power the principle of preponderance. Entire conspectus of law on alleged penny stock issue was discussed at length by Hon'ble Delhi high court in this case. The order of Hon'ble ITAT order was approved by Hon'ble High court and the gist of the decision was - *S. 10(38) Bogus Capital Gains from Penny Stock: The fact that there was an astounding 4849.2% jump in the share price within two years, which is not supported by the financials, does not justify the AO's conclusion that the assessee converted unaccounted money into fictitious exempt LTCG to evade taxes. The finding is unsupported by material on record & is purely an assumption based on conjecture. The theory of human behavior and preponderance of probabilities, based on Sumati Dayal v. CIT 214 ITR 801 (SC), cannot be cited as a basis to turn a blind eye to the evidence.* The above decision (**Pr. CIT vs. Smt. Krishna Devi**) has been applied and followed extensively by various ITAT benches across India, a list of which is given below for ready reference-

- 1) Delhi ITAT **Shivani Gupta** G bench order dated 06.04.2021 in ITA 5204/Del/2019 – Para 7 & 7.1
- 2) Delhi ITAT **Mukesh Mittal** E bench order dated 26.03.2021 in ITA 761/Del/2020 Para 5.6 & 5.7, 5.11
- 3) Delhi ITAT G bench order dated 19.03.2021 in **Tapas Kumar Mullick** case para 16 to 21
- 4) Hyderabad A bench of ITAT in **Tarun Kumar Goyal** ITA 456/Hyd/20 order dated 20.04.2021
- 5) Surat bench of ITAT in case of **Mukesh Nanubhai Desai** ITA 781/SRT/2018 order dated 06.05.2021
- 6) Lucknow bench of ITAT in case of **Uma Shanker Dhandhanania** ITA 475 & 681/LKW/2019 (order dated 16.02.2021)

Further reference may be made to Gujarat High court order in case of **Parasben Kochar** (dated 17.09.2020 approving Ahmedabad ITAT's order dated 20.02.2020 in ITA No.549/Ahd./2018).

- 1.27 In this regard, reference may also be made to decision in the case of **Sanjay Singhal vs. DCIT**, in ITA Nos.708, 710, 711/Chd/2018 decided on 20/09/2021, wherein the Chandigarh ITAT has rebutted the issue and held - *34. The next issue discussed by the learned assessing officer was with respect to the preponderance*

*of the probabilities in para number 4.12 of the assessment order. The learned assessing officer noted that in the instant case, there are many statements duly supported by the evidences that the individuals of Bhushan Steel Ltd. group has received bogus long-term capital gain entries from various companies managed and controlled by entry operators. Further, the assessee has invested in shares of various penny stock companies, which were not doing any meaningful business, and even the earning was minimal. No prudent investor will ever invest huge sums in a company, which does not have history of declaring dividends and sound financial conditions. All the transactions of the sale of shares have resulted into huge abnormal profits, which is not possible in normal course of investment. However, evidence indicating sham transactions by all the investors were not found by the Department, but the pattern of investment, the modus operandi adopted is largely same for 100% of investors. The rates of return, pattern of movement of funds were glaring, non-existence of genuine business activities of such investors etc. safely lead to conclusion that long-term capital gain received from these penny stock companies is bogus and taxable. The learned assessing officer relied upon the decision of the Hon'ble Supreme Court in case of **Sumati Dayal vs. CIT, 125 CTR 124**. The learned authorized representative vehemently opposed the same and stated that long-term capital gain were originally disclosed by the assessee in his return of income for earlier assessment years for assessment year 2010 – 11 and 2011 – 12, which were assessed under section 143 (3) of the Income tax act. Therefore, it is not the case of the revenue that there are no positive evidences produced by the assessee. Even in those cases, the assessee has produced complete details of the purchase, share applications, payment by cheque, sale on a stock exchange, receipt of sale consideration and most importantly the holding period of those shares in the balance sheet of the assessee's which were accepted by the revenue for all those years. He therefore submitted that the theory of preponderance of probabilities invoked by the learned assessing officer is merely a conjecture and surmise. He further stated that when originally the assessee is assessed under section 143 (3) of the act, long-term capital gain were accepted after detailed enquiries, now it cannot be said that the capital gain earned by the assessee is to be taxed u/s 68 of the act on the principles of preponderance of the probabilities. He further submitted that it was argued before the bench in appeal from earlier years that no incriminating evidences were found during the course of search. The order is awaited. He further stated that the preponderance of probabilities would come into play only when the basic test of direct and factual evidences fails. He stated that in the present case the complete evidences have been placed by the assessee before the revenue authorities, they are not found to be false but only allegation*

has been made that transactions are sham. He further stated that the decision relied upon by the learned AO of honorable Supreme Court is quite distinct on its fact. On careful analysis of the evidences placed before us, findings rendered by the lower authorities, we proceed to consider the taxability of the long-term capital gain earned by the assessee under section 68 of the income tax act whether in situations like this, one may fall into realm of "preponderance of probability" where there are many probable factors, some in favour of the assessee and some may go against the assessee. However, the probable factors have to be weighed on material facts so collected. Here, in this case, material facts strongly indicate a probability supported by the evidences produced by the assessee that assessee has earned long-term capital gain on sale of the shares. The another very strong probability arises is that assessee has introduced its unaccounted money in the guise of profit on sale of shares holding it is a long term capital gain and showing it is a tax exempt income. The probable factors could have gone against the assessee, only if -

- i. there would have been some evidence found from searches conducted by the department that assessee was the person who at the time of purchase of the shares has issued the cheques to the company for purchase of shares and has received cash back and at the time of sale of those shares; have paid cash to the operators/brokers or their associates alleged by the AO, and then only has received the cheques towards sale of those shares.*
- ii. Such evidences found were duly corroborated with the statements of the parties*
- iii. Cross examination of those parties afforded to the assessee*
- iv. Opportunity to the assessee to confront and rebut the materials gathered.*

Firstly, No such evidences were found during the course of search and all those evidences which are relied upon by the learned revenue authorities have been held by the coordinate bench in assessee's own case to not to be an incriminating material which can impact the taxable income of the assessee and his family members. Even the investigation made by the Securities and Exchange Commission of India has also held that assessee is not at all involved in the manipulation of the prices of those scripts. The revenue has also not shown us any security and exchange Board of India's order which even implicated the share broker, which is alleged to have arranged these long-term capital gains fraudulently for the assessee. At least something would have been unearthed from such high level investigation by two Central Government authorities.

Further whatever evidences were found by the revenue; they were not confronted to the assessee for rebutting the same. Statements recorded of several persons by revenue were not allowed to be cross-examined by the assessee. In this situations, only on the theory of preponderance of probabilities addition cannot be sustained. The theory of "preponderance of probability" is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn based on certain admitted facts and materials and not based on presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee. The reliance placed by the learned AO on the decision of the hon'ble Supreme Court is clearly distinguishable. So far as the facts of that case with the case on hand before us are compared, in that particular situation before the hon'ble Supreme Court where the assessee was constantly earning money from the jackpot, further was not having any losses, it was confessed before the settlement commission that the expenditure incurred or the losses suffered by the assessee have been adjusted against the unaccounted income of the assessee, books of the assessee did not show in that particular case any drawings for purchase of tickets and incurring travel expenditure to 3 different cities prior to the date of winning of the jackpot races. The assessee has given up the winning from the jackpots immediately on same becoming taxable due to the amendment in the income tax act. Contradistinction to the above facts in the present case, assessee is consistently an investor in the shares. The holding period of the shares is also quite long. The assessee is also a shareholder in various companies of the Bhushan steel group limited. The assessee has shown purchase consideration paid by the cheque and recorded in its books of accounts and accepted by the revenue in earlier years under the scrutiny assessment. The prices at which the shares have been sold are traded prices on a stock exchange on which assessee does not have any control. The regulatory authority i.e. securities and exchange board of India, stock exchange authorities has not questioned the conduct of the assessee and broker selling the shares , on price variation in the shares of the companies in which assessee has made investment. The assessee has also paid securities transaction tax on the sale of shares and the sale consideration has been received from the SEBI registered broker against which there is no allegation. In view of this, it is apparent that assessee has produced overwhelming evidences that were not found to be false. In view of this, the reliance by the learned AO on the decision of the hon'ble Supreme Court is misplaced. Therefore In view of this we do not subscribe to the opinion

of the learned assessing officer that on the preponderance of the probabilities the income should have been taxed in the hands of the assessee.

- 1.28 Kind attention of hon'ble bench is also invited to the holding statements of assessee as on 31.03.2011, (PB-37), which also shows various scrips of reputed companies, which also proves that assessee was regular investor in shares and investment in Dhanlabh Merchandise was not the only instance of investment. It is therefore submitted that the transaction entered into by assessee was completely genuine and by no stretch of imagination, it can be regarded as bogus and therefore addition made by ld.AO is not in accordance with law.
- 1.29 In the case of **DCIT vs. Rakesh Saraogi & Sons (HUF)**, ITAT, Raipur clarified that *even assuming brokers may have done manipulation, assessee cannot be held liable when the entire transaction is done through banking channels duly recorded in demat accounts with Government depository and traded on the stock exchange. There is nothing on record to suggest that assessee gave cash and purchased cheque from broker.*
- 1.30 In the case of **CIT vs. Shyam R. Pawar**, 54 taxmann.com 108 (Bom) ITAT, Bombay concluded that *where DMAT account and contract note showed details of share transaction, and Assessing Officer had not proved said transaction as bogus, capital gain earned on said transaction could not be treated as unaccounted income under section 68.*
- 1.31 As the issue involved is of chargeability of long term capital gain as undisclosed income of the assessee u/s 68 of the Act, it may be mentioned that many High courts and ITAT benches have held in favour of the assessee. In one of the cases (**CIT vs. Mukesh Ratilal Marolia**) SLP filed by the Revenue against the order of the Hon'ble Bombay High Court has also been dismissed by Hon'ble Supreme Court. Many of the decision of the coordinate benches have also discussed the facts similar to the issue in the present case and decided in favour of the assessee. Some of such recent cases are listed here as under:-

S.No	Title of the case	Appeal number /date of decision	Authority rendering that decision
1.	CIT vs. Shreyashi Ganguli	ITA 196 of 2012	Cal. High Court
2.	Classic Growers Ltd vs. CIT	ITA 129 of 2012	Cal. High Court
3.	PCIT vs. Pramod Jain	ITA No.209/2018	Rajasthan High

			Court
4.	CIT vs. Rungta Properties Limited	ITA No. 105 of 2016	Cal. High court
5.	CIT vs. Sumitra Devi	ITA No.54/2012	Rajasthan High Court
6.	Commissioner of Income Tax vs. Kesar A. Gada	ITA No. 300 OF 2013	Bombay High Court
7.	CIT vs. Prempal Gandhi	ITA No. 95 of 2017; 401 ITR 253	Punjab & Haryana High Court
8.	PCIT vs. Hitesh Gandhi	ITA No. 18 of 2017	Punjab & Haryana High Court
9.	CIT vs. Pooja Agarwal	ITA No. No 385 of 2011	Rajasthan High Court
10.	CIT vs. Sudeep Goenka	29 taxmann.com 402 dated 3/1/2013	Allahabad high Court
11.	CIT vs. Anupam Kapoor	299 ITR 179	Punjab & Haryana High Court
12.	Arunkumar Agarwal HUF	26 taxmann.com 113	Jharkhand High Court
13.	CIT vs. Shyam R Pawar	54 taxmann.com; 108 229 TAXMAN 0256	Bombay High Court
14.	Pr. Commissioner of Income Tax vs. Deepali Mahendra Shah	2018 (3) TMI 1084	Gujarat High Court
15.	Commissioner of Income Tax vs. Mukesh Ratilal Marolia	2011 (9) TMI 919	Bombay High Court, SLP dismissed by SC on 27/1/2015 SLP (Civil) No(s) 20146/2012
16.	PCIT-5 vs. Dhvani Mahendra Shah	Tax Appeal No.674 of 2017	Gujarat High Court
17.	Commissioner of Income Tax vs. Pushpa Malpani	IT Appeal No. 50 of 2010 2010 (11) TMI 799	Rajasthan High Court
18.	Smt. Bharti Arvind Jain vs. ITO	6102/Mum/2016)	Mumbai ITAT
19.	ITO vs. M/s Indravadan Jain	4861/Mum/2014	Mumbai ITAT

	HUF		
20.	Swati Mall vs. ITO Ward-36(2)	I.T.A No. 2423/Kol/2017 dt. 7/12/2018	Kolakatta ITAT
21.	Vaishal Suryakant Shah vs. ITO	9 CCH 106	Ahmedabad ITAT
22.	Sunita Jain vs. ITO	49 CCH 330	Ahmedabad ITAT
23.	DCIT central circle vs. PRB Securities P Ltd	ITA No. 211/Kol/2017 dt. 5/12/2018	Kolakata ITAT
24.	Prakashchand Bhutoria vs. ITO	53 CCH 275	Kolkata ITAT
25.	Ramprasad Agarwal vs. ITO	174 ITD 286 / 68 ITR 74 (Mum.)(Trib),	Mumbai ITAT
26.	Aditya Vikram Sureka HUF V ITO	ITA No.1839/KOL/2017 dt. 28/11/2018	Kolakata ITAT
27.	Rashmi Maheshwari vs. ITO	ITA No. 4424/DEL/2018 dt. 28/11/2018	Delhi ITAT
28.	Mohanlal Agarwal HUF vs. ITO	ITA No. 2766/DEL/2018 dt. 26/11/2018	Delhi ITAT
29.	Jaishree Bamboly vs. ITO	ITANo. 1679/CHNY/2018 dt. 08/11/2018	Chennai ITAT
30.	Simi Verma vs. ITO	ITA No.3387/DEL/2018 dt. 06/11/2018	Delhi ITAT
31.	Manoj Kumar Gupta vs. ITO	ITA No. 457/Del/2018 dt. 05/11/2018	Delhi ITAT
32.	Madhu Killa vs. ACIT	ITA No. 834/Kol/2018 Dt. 2/11/2018	Kolkata ITAT
33.	Kanthilal Kamla Bai vs. ITO	ITA No.1538/CHNY/2018 Dt. 29/10/2018	Chennai ITAT
34.	K Praveen Kumar HUF vs. ITO	ITA No.1539/CHNY/2018 Dt. 29/10/2018	Chennai ITAT
35.	Rukmani Devi Manpuria vs. DCIT	ITA No. 1724/Kol/2017 Dt. 24/10/2018	Kolkata ITAT
36.	Bishwanath Agarwal vs. ITO	ITA No. 2280/Kol/2017 Dt. 16/10/2018	Kolkata ITAT
37.	Bhanshali Fincom Pvt. Ltd vs.	ITA Nos. 59 &	Kolkata ITAT

	DCIT	60/Kol/2018 Dt. 10/10/2018	
38.	Sanjay Mehta vs. ITAT	ITA No.1089/Kol/2018 Dt. 28/09/2018	Kolkata ITAT
39.	Mina Mehta vs. ITO	ITA No.918/Kol/2018 Dt. 28/09/2018	Kolkatta ITAT
40.	Vikas Jhavar vs. ITO	ITA No.1051/Kol/2018 Dt. 26/09/2018	Kolkatta ITAT
41.	Neelam Agarwal vs. ITO	ITA No.844/Kol/2018 Dt. 26/09/2018	Kolkatta ITAT
42.	Rajkumar Goenka vs. ITO	ITA No.1267/Kol/2018 Dt. 26/09/2018	Kolkatta ITAT
43.	Shobhit Goel vs. ITO	ITA No.2022/Del/2018 Dt. 25/09/2018	Delhi ITAT
44.	Kaushlaya Devi vs. ITO	ITA No.1496/Hyd/2018 dt. 19/09/2018	Hyderabad ITAT
45.	Amit Shah vs. ITO	ITA No.519/Kol/2018 Dt. 26/09/2018	Kolkatta ITAT
46.	Deepak Bhattad HUF vs. ITO	ITA No.1287/CHNY/2018 Dt. 19/09/2018	Chennai ITAT
47.	Arun Kumar Bhaiyya vs. ITO	ITA No.2701/Del/2018 Dt. 30/08/2018	Delhi ITAT
48.	ITO vs. Kapil Mittal	ITA No.17/JP/2018 dated 28/09/2018	Jaipur ITAT
50.	Shikha Dhawan vs. ITO	ITA No.3035/Del/2018 Dt. 27/06/2018	Delhi ITAT
51.	Meghraj Singh Shekhawat vs. DCIT	ITA No.443 & 444/JP/2018 dated 07/03/2018	Jaipur ITAT
52.	DCIT vs. Vimlesh Kumar Singh	ITA No.21/BIL/2013 Dated 15/01/2018	Raipur ITAT
53.	Ketulkumar D Jaiswal V ITO	(2017)10 TMI 168	Ahmedabad ITAT
54.	ITO vs. Arvind Kumar Jain HUF	ITA No. 4862/MUM/2014 18/09/2017	Mumbai ITAT
55.	Bharti Navin Cheda vs. ITO	ITA No. 897/Mum/2017 11/09/2017	Mumbai ITAT

56.	Kamladevi S Doshi vs. ITO	ITA No.1957/Mum/2015 22/05/2017	Mumbai ITAT
57.	Bhavesh Sambhulal Somani vs. ITO	ITA No. 2263/Ahd/ 2015 dt. 20/3/2017	Ahmedabad ITAT
58.	Rachna Sachin Jain vs. ITO	ITA No.501/502/Ahd./2016 dt.09/03/2017	Ahmedabad ITAT
59.	Malti Ghanshyambhai vs. ITO	ITA No.3400/Ahd. /2015dt. 06/02/2017	Ahmedabad ITAT
60.	Rajendr Kumar Ratilal Jariwala vs. ITO	ITA No.1753/Ahd /2012 dt. 29/2/2016	Ahmedabad ITAT
61.	ITO vs. Arvind Kumar Jain HUF	51 CCH 281	Mumbai ITAT
62.	Arvind Kumar Mool Chand vs. ITO	ITA No.509/Bang./ 2017 dt. 19/05/2017	Bangalore ITAT
63.	Chetan Prakash vs. ITO	ITA No.506/Bang./ 2017 dt. 19/05/2017	Bangalore ITAT
64.	Smt. Sadhana vs. ITO	ITA No.508/Bang./ 2017 dt. 26/05/2017	Bangalore ITAT

1.32 The AO has further made an addition of Rs.18,916/- which has been worked out by him alleging that the assessee has paid commission for arranging bogus LTCG @ 2%. It may be mentioned that nowhere in the report, charging of commission @ 2% by the brokers/entry operators, has been mentioned. The AO has calculated the rate of commission paid as 2% out of thin air. The assessee during assessment proceedings, specifically said that he has not paid any commission or brokerage outside the books. He questioned the basis for proposing the rate of commission to be adopted.

1.33 While making the addition, the AO baldly mentioned that during the course of investigation by the Wing, it was found that the beneficiaries paid 2% commission on acquiring accommodation entries for bogus LTCG. No such percentage has been specified in the report of the Investigation wing. The AO did not conduct any independent inquiry in this regard. He did not even deem it proper to at least name the persons who had said that the beneficiaries have paid 2% commission. It may be mentioned that no statements of any beneficiaries admitting payment of commission @ 2% was available with the AO. Even otherwise, if there existed any such statements, the confessions have been made by the beneficiaries in their own cases. These confessions cannot be generalized and used against the assessee. These beneficiaries never said that the assessee has

also paid such commission. The assessee had emphatically denied having paid any such commission. The AO had absolutely no evidence to prove that the assessee had paid commission to manage bogus LTCG and make addition as unexplained expenditure u/s 69C. The ratio laid down in [S.F.Wadia vs. ITO](#) (19 ITD 306) that the burden of proving that the assessee has incurred any unexplained expenditure which is assessable u/s.69C of the I.T. Act is on the Department. Similar views have been taken in the cases of **Yogeshwar Prasad** (16-TTJ-175) **Naren Singh Bhatti** (40-TTJ-381) and **Pradip C. Patel** (58-TTJ-409). In the instant case, this burden has not been discharged. The entire addition being made on surmises and conjectures deserves to be deleted.

1.34 The appellant finally relies on recent decisions rendered by the jurisdictional Jaipur Bench, on exactly identical facts, in which the additions made u/s 68 and 69C, have been deleted, in the following cases-

- **Pramod Jain vs. DCIT** ITA No.368/JP/2017 decided on **31.01.2018**
- **Meghraj Singh Shekhawat vs. DCIT** ITA No. 443 & 444/JP/2017 decided on **07.03.2018**
- **Vivek Agarwal vs. ITO** ITA No.292/JP/2017 decided on **06.04.2018**
- **Pramod Kumar Lodha vs. ITO** ITA No. 826/JP/2014 decided on **16.07.2018**
- **DCIT vs. Saurabh Mittal** ITA No. 16/JP/2018 decided on **29.08.2018**
- **ITO vs. Kapil Mittal** ITA No. 17/JP/2018 decided on **29.08.2018**
- **ITO vs. Gaurav Bagaria** ITA No.550/JP/2019 decided on **10.07.2019**
- **DCIT vs. Sandeep Chhabra** ITA 44/JPR/2020 decided on **19.08.2020**
- **DCIT vs. Prakash Chand Sharma & Smt. Kalawati Sharma**, ITA No. 780 & 781/JP/2019 decided on **18.11.2020**
- **ACIT vs. Saroj Parwal** ITA No. 753/JP/2019 decided on **24.02.2022**
- **Manohar Lal Chugh vs. ITO** ITA No.312/JP /2021 decided on **31.08.2022**
- **DCIT vs. Vigyan Lodha** ITA No. 169/JP/2022 decided on **20.12.2022**
- **Arnav Goyal vs. ITO** in ITA No. 275/JP/2020 decided on **03.04.2023**
- **Prabha Agarwal vs. ACIT** in ITA No.163 & 164/JP/2021 decided on **05.10.2023**
- **Navratan Devi vs. ITO** in ITA No.61 & 65/JP/2023 decided on **21.02.2024**

following the decision of Hon'ble Jurisdictional High Court in case of [CIT vs. Smt. Pooja Agarwal](#) and/or **CIT vs. Sumitra Devi** wherein the Hon'ble High Court has also upheld the finding of the Id. CIT (A) and this Tribunal when the assessee produced all the relevant details and evidence in support of the transaction of purchase and sale of shares to establish the genuineness of the transaction and there is no contrary evidence to doubt the correctness of the

evidences produced by the assessee, then treating the transaction of purchase and sale as sham is not justified. It may also be added that Hon'ble Rajasthan High Court in the case of **PCIT vs. Arnav Goyal** (DBIT 14/2024) vide its order dated **19.02.2024**, has dismissed the appeal of the Revenue and confirmed the order of the ITAT.

Ground of Appeal No. 4 - In this ground, the assessee has challenged the action of the AO alleging that there is a straight denial of a reasonable and sufficient opportunity viz. absence of cross examination of witnesses, a right the appellant legally deserves under the provisions of law.

Submission of the assessee is as under:

- 2.1 The Ld.CIT(A) on the point of not providing the material used against the assessee and further in not providing an opportunity to cross examine the witness has solely relied on the decision of Calcutta High Court rendered in the case of Swati Bajaj, in which the Court observed - *Therefore, merely by mentioning that statements have not been furnished can in no manner advance the case of the assessee. If the report was available in the public domain as has been downloaded and produced by the revenue, nothing prevented the assessee who are ably defended by the Chartered Accountants and Advocates to download such reports and examine the same and thereafter put up their defence. Therefore, based on such general statements of violation of principles of natural justice, the assessee have not made out any case.* [Para 65] It would be pertinent to mention that report of the Investigation wing running into 401 pages prepared by Dhruva Purari Singh, DDIT, referred to by the Hon'ble Court in the case of Swati Bajaj is dated 27.04.2015 (scrip - Surabhi Chemicals and Investment Limited) was available in public domain at <https://taxguru.in/wp-content/uploads/2017/12/Investigation-Report-5.pdf> However, in the instant case, the Investigation report running into 48 pages prepared by Nivedita Prasad, DDIT, was not in public domain and was available only with the department. The findings of CIT(A) are as follows - In this case also the appellant has not specifically indicated as to how he was prejudiced by not providing of cross examination. Unless and until the appellant shows and proves that she/he was prejudiced on account of such report/statement mere mentioning that non-furnishing of the report or non-availability of the person for cross examination cannot vitiate the proceedings. The appellant has miserably failed to prove the test of prejudice or that the test of fair hearing has

not been satisfied in their individual cases. It may be mentioned that the assessee had requested to provide the copies of all the material gathered by the department which was being relied upon for making the impugned additions and simultaneously requested to afford an opportunity to cross examine the persons whose statements were being relied upon.

- 2.2 It is thus clear that the assessee specifically demanded an opportunity to cross-examine the persons on whose statements the AO sought to rely for making the proposed additions, which was denied to him. The Ld.AO has not even referred to this issue in his assessment order. The requirement of allowing cross-examination of witnesses, whose statements are sought to be used against the assessee, is a *sine qua non* for validity of adjudication proceedings. The Ld. CIT(A) has unlawfully tried to dispense with this requirement by stating that unless and until the appellant shows and proves that she/he was prejudiced on account of such report/statement mere mentioning that non-furnishing of the report or non-availability of the person for cross examination cannot vitiate the proceedings. In this regard, it is submitted that such requirement is not a technical rule of evidence, but is one of the principles of natural justice which the Assessing Officer being a quasi-judicial authority is bound by law to follow. In the present case however, the impugned assessment order has been passed in violation of the principles of natural justice and therefore, is bad in law.
- 2.3 It is further submitted that the one of the main principles of Natural Justice is '*audi alteram partem*', that is, 'hear the other side.' This principle makes cross examination as a *sine qua non* of due process of taking evidence and no adverse inference can be drawn against a party unless the party is put on notice of the case made out against him. The assessee must be supplied the contents of all such evidences, both oral and documentary, so that he can prepare the case against him. This necessarily also postulates that he should cross examine the witness on whose statement the AO relies to hold the sale or purchase of shares as sham or not genuine. It is trite that if an Authority is relying on the testimony of a witness, the assessee is required to be afforded an opportunity to cross-examine him failing which the testimony cannot be utilized against the assessee. If this procedure is not followed, then there would be a case of denial of natural justice to the assessee and the addition on the basis of such statements/ material cannot stand. Addition on account of accommodation entry cannot be made on basis of unconfrosted oral statement(s) of third party(ies). The assessment based on statement without giving an opportunity is not sustainable in law.

2.4 The above view is supported by the decision of Honble Supreme Court in the case of **Andaman Timber Industries vs. Commissioner of Central Excise** (2015) 281 CTR 241 (SC) wherein the Honble Court observed - 6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

2.5 The appellant in support of his contentions further relies upon the following judicial authorities:

- (i) **Kishinchand Chellaram** (AIR 1980 SC 2117)
- (ii) **State of M.P. v. Chintaman Sadashiva Waishampayan** AIR 1961 SC 1623
- (iii) **Lakshman Exports Ltd. v. Collector of Central Excise** (2005) 10 SCC 634
- (iv) **Rajiv Arora v. Union of India and Ors.** AIR 2009 SC 1100
- (v) **CIT Vs. SMC Share Brokers Ltd.,** (2007) 288 ITR 345 (Del)
- (vi) **Prakash Chand Nahta Vs. CIT,** (2008) 301 ITR 134 (MP)
- (vii) **Bangodaya Cotton Mills Ltd. vs. CIT** [2009] 21 DTK 200 (Cal)
- (viii) **CIT Vs. Sanjeev Kumar Jain** (2009) 310 ITR 178 (P&H) (
- (ix) **CIT & Anr. Vs. Land Development Corporation** (2009) 316 ITR 328 (Kar)
- (x) **CIT Vs. Rajesh Kumar** (2008) 306 ITR 27 (Del)
- (xi) **Heirs & LRs of Late Laxmanbhai S. Patel Vs. CIT** (2009) 222 CTR (Guj) 138
- (xii) **CIT Vs. Pradeep Kumar Gupta** (2008) 303 ITR 95 (Del)
- (xiii) **CIT Vs. Dharam Pal Prem Chand Ltd.** (2007) 295 ITR 105 (Del)
- (xiv) **CIT Vs. A.N. Dyaneswaran** (2008) 297 ITR 135 (Mad)

- (xv) **CIT Vs. S.M Aggarwal** 292 ITR 43
- (xvi) **Straptex India (P) Ltd. Vs. DCIT** [2003] 84 ITD 320 (Mum)
- (xvii) **R.W. Promotions (P.) Ltd. v. Asstt. CIT** [2015] 61 taxmann.com 54 (Bom.)
- (xviii) **Obulapuram Mining Co, (P.) Ltd. v. Dy. CIT** 160 ITD 224 (Bang. - Trib.)
- (xix) **CIT v. Indrajit Singh Suri** [2013] 33 taxmann.com 281/215 Taxman 581 (Guj.)
- (xx) **Smt. Sunita Dhadda v. Dy. CIT** [2013] 33 taxmann.com 639 (JP.- Trib.)

2.6 Reliance is place on the judgement of ITAT, Mumbai, in the case of **Kamla Devi S. Doshi** in ITA No.1957/Mum/2015 reported on 22.05.2017. The headnote of the said judgement is to the effect - **Bogus penny stocks capital gains: Section 131 statement implicating the assessee is not sufficient to draw an adverse inference against the assessee when the documentary evidence in the form of contract notes, bank statements, STT payments, etc. prove genuine purchase and sale of penny stock. Failure to provide cross-examination is a fatal error.**''

Apart from the above written submission, the ld.AR during the course of hearing, invited the attention of the Bench to a decision of Hon'ble Supreme Court in the case of **PCIT vs. Kuntala Mohapatra** delivered on 04.03.2024. The Court delivered a significant judgement in this case, addressing the eligibility of Long Term Capital Gains (LTCG) for exemption u/s 10(38) when transfer occurs through banking channels, stock exchanges and there was violation of natural justice. In this judgement, the Hon'ble Court has upheld the judgement of Orissa High Court. The Court has reaffirmed the importance of adhering to principles of natural justice in tax proceedings

2.4 On the other hand, the ld. DR supported the orders of the ld. CIT(A) .

2.5 As regards Ground No. 1 to 3 and of the assessee, the Bench has have considered the rival contentions, perused the material available on record and gone through findings of the lower authorities recorded in their respective orders as well as gone through the various judicial rulings placed before me by both the parties to drive home their contentions. Brief facts pertaining to the issue are that assessee was holding 268 shares of M/s Dhanlabh Merchandise Ltd. which were acquired by him in F.Y. 2010-11 in September, 2010, for Rs. 53,600/- (@ Rs.200/- each). M/s Dhanlabh Merchandise Ltd. later got merged with M/s Bakra Pratisthan Ltd. Post merger 10 shares of Bakra Pratisthan Ltd. were allotted against each share of Dhanlabh Merchandise Ltd. These shares were eventually sold during the year under consideration for Rs. 9,99,417/- [in March, 2012], after holding the same for more than 12 months [more particularly around 18 months]. Consequent long term capital gain of Rs. 9,45,817/- earned from sale of these shares was declared in the return of income and as shares were of listed public limited company, sold through recognized stock exchange after holding for a period of more than one year and due STT [Securities Transaction Tax] was paid, long term capital gain was claimed exempt u/s 10(38) of Income Tax Act, 1961. These shares were purchased after making payment through account payee's cheque which stood debited in the bank account of the assessee. These shares were credited in the D-mat account of the assessee maintained with independent third party.

Subsequently, these shares were sold online through registered share broker and sale proceeds were received through banking channels. However, the AO, based on some information received from Investigation Wing, Calcutta that statement of various operators, entry providers and stock brokers were recorded, wherein they have admitted to be engaged in providing accommodation entries in the guise of LTCG/STCL, has considered the transaction of sale of shares of M/s Bakra Pratisthan Ltd. made by assessee, as bogus. It is uncontroverted fact that assessee has furnished copy of bank statement showing payment so made for purchase of shares, copy of statement of holding of shares reflecting the impugned equity shares, copy of contract notes regarding sale of shares, copy of D-MAT account reflecting shares as sold, copy of bank passbook of the assessee reflecting sale consideration received, before the ld. AO. However, ld. AO has not controverted any of these evidences furnished before him in support of the long term capital gain so claimed exempted. The ld. AO has narrated the modus operandi of the various entry providers which is a general statement and also referred to the statement of certain persons recorded by Investigation wing (no name of any such person is mentioned by him). These statements have not been made a part of the order or were either made available to the assessee. There is no allegation that any of the operator, entry provider or broker has named the assessee to be beneficiary of their arrangement of providing accommodation entry. Considering the aforesaid facts, it

is clear that these observations and findings of the AO in the assessment order is based on generalized statement of third party recorded behind the back of the assessee, recorded in some other case and not in the case of assessee, cannot constitute tangible evidence to lead to the conclusion that transaction of sale of share shown by the assessee is bogus being an accommodation entry. The AO has though referred to the statement of unnamed persons but there is no reference by the AO about the assessee being one of the beneficiary, nor any material has been brought on record, otherwise also by the AO, to prove the assessee being beneficiary through them. There is no doubt that if the assessee has claimed LTCG from purchase and sale of shares, as exempt u/s 10(38) of I.T. Act, 1961, the primary onus is on the assessee to substantiate his claim by producing supporting evidences. On perusal of the details so submitted by the ld. AR of the assessee, it is seen by me that the assessee has furnished various documentary evidences in support of purchase and subsequent sale of the shares leading to earning of LTCG by the assessee, as mentioned in brief just herein above and mentioned in detail in the submission of the ld. AR. The assessee has purchased 268 shares for Rs. 53,600/- and made payment through banking channel which stood debited in the bank account of the assessee. These shares were dematerialized on 19.10.2010 and deposited in the D- MAT account maintained by Central bank of India, the independent third party. Thus it is clear that 268 shares

were purchased by the assessee and same is quite evident not only from the books on accounts of the assessee but also D-MAT account of the assessee maintained by independent third party, duly recognized by the concerned authorities. The amount of purchase consideration stood debited in the bank account of assessee. These facts and evidences more particularly the shares being reflected in D-MAT account of the assessee maintained by independent third party clearly lead to infer that holding of the share and consequently also the purchase of these shares by assessee cannot be disputed.

2.6 Now coming to the sale of share, it is seen that assessee has sold these shares (shares of Bakra Pratisthan Ltd.) through online transaction via recognized stock broker M/s Fix Fit Securities Pvt. Ltd. Transaction of sale is supported by contract notes and as per the contract notes, these shares were sold on 26.03.2012 & 30.03.2012. The contract notes are having time stamped, trade number, order time and trade time etc. As the sale of shares have been made through online system on stock exchange, obviously same has been made at the prevailing market rate of the shares. Accordingly, the sale rate so shown by the assessee cannot be doubted. Moreover, security transaction tax has also been deducted and paid and the assessee has received the net sale consideration through banking channels. These evidences leave no doubt about the sale of shares made by the assessee at the prevailing market rate. Once the assessee has produced all the

supporting evidences not only of sales but also of the purchase of the shares which include purchase bill, bank account showing payment of the purchase consideration, D-MAT account reflecting holding of the shares in the D-MAT account of the assessee, sale of shares through online on stock exchange which are also reflected in the D-MAT account, contract notes for sale and receipt of sale consideration in the bank account of the assessee as is evident from the bank account, then in absence of any contrary material or evidence brought on record by the Id. AO, the transaction of purchase and sale of shares in question cannot be held as bogus merely on the basis of investigation carried out by the department in some other case behind the back of the assessee where some persons were found to be indulged in providing accommodation entry and more particularly when even those persons have not specifically stated anywhere in their statement that the assessee is one of the beneficiary of arrangement of accommodation entry provided by them. In the entire assessment order the AO has not made any reference to any documentary evidence which can be said to be an incriminating material against the assessee which may reflect that the assessee has availed the accommodation entry of bogus long term capital gain. Mere uncorroborated statement of third person with which assessee has not at all dealt with in purchase and sale of share and even the person has not named the assessee being beneficiary from him / them or through his / their companies cannot be a ground for treating the transaction of

purchase and sale of shares so made by the assessee as bogus, in absence of any cogent evidence or material brought on record by the AO. The statement of those third person about accommodation entry may be the starting point for doubting the transaction (though it is evident that assessee has not carried out any transaction through these persons or their companies) but for converting a doubt into certainty, the AO is required to produce the contrary material evidence and evidence produced by the assessee need to be controverted, but the AO has failed to do so. It is to mention here that evidence produced by the assessee is otherwise independently verifiable being the document in the shape of bank account, D-MAT account maintained by independent third party, bills of purchase and also of the sales on which assessee has no control or say and therefore said evidences cannot be manipulated by assessee. Once the evidences produced by assessee is neither prepared by it nor is any scope of manipulation by him, then transaction of purchase and sale of shares and consequent capital gain shown by the assessee cannot be doubted. It is reiterated that all the various evidences were filed by the assessee before the Id. AO and are now also filed before us in paper book in support of long term capital gain shown on sale of shares, which are as under -

S.No.	Particulars	Page No.
1.	Copy of invoice for purchase of shares of Dhanlabh Merchandise Ltd. dated 08.09.2010	42

2.	Copy of Bank A/c evidencing payment through cheque made for purchase of shares	43
3.	Copy of Holding statement of the Depository evidencing the dematerialization and holding of shares of Dhanlabh Merchandise Ltd.	44-45
4.	Copy of Balance sheet of assessee as on 31st March, 2011 showing the shares of Dhanlabh Merchandise as investment	46-47
5.	Copy of order of Calcutta High Court in respect of amalgamation of Dhanlabh Merchandise Ltd. with Bakra Pratisthan Ltd.	48-50
6.	Copy of Transaction statement (Central Bank of India) for the period 01.04.2010 to 31.03.2013 evidencing purchase, merger and sale of the impugned shares	51-53
7.	Copy of bills of Broker showing sale of shares of Bakra Pratisthan in different lots on various dates	54-55
8.	Copy of cheques received from broker on settlement of sale of the shares	56-57
9.	Copy of bank statement evidencing receipt of consideration on sale of shares of Bakra Pratisthan from Fix Fit Securities Pvt. Ltd.	58
10.	Copy of ITR and Computation for AY 2012-13	59-62

On the other hand, the AO has merely relied upon the statement of third person recorded behind the back of the assessee and without giving any opportunity to the assessee to cross examine the person before using these statements against the assessee. The ld. AR has submitted that despite specific request opportunity of cross examination was not provided, which is against the ratio of decision of Hon'ble Supreme Court in the case of **Andman Timber Industries vs. CCE (324) ELT 641**, wherein Hon'ble Court has stated that not allowing the opportunity to cross

examine the witness though the statement of those witness were made the basis of impugned order, is a serious flaw which makes the order a nullity is as much as it amounted to violation of principle of natural justice. The AO has ignored this binding decision of Hon'ble Supreme Court. On this issue, the Ld. CIT(A) has placed heavy reliance on the decision of the Swati Bajaj of hon'ble Calcutta High Court and has highlighted the relevant portion of the judgement *The assesseees have not been shown to be prejudiced on account of non-furnishing of the investigation report or non-production of the persons for cross examination as the assessee has not specifically indicated as to how he was prejudiced, coupled with the fact as admitted by the revenue, the statements do not indict the assessee* and submitted that the judgement of Andaman Timber is not applicable to the facts of the case. In this regard ld. AR submitted that the Hon'ble Supreme Court has once again reaffirmed the importance of adhering to principles of natural justice in tax proceedings, in the case of **PCIT vs. Kuntala Mohapatra**. Hon'ble Rajasthan High Court in the case of **PCIT vs Sanjay Chhabra** D.B. ITA No. 22/2021 noted that prejudice is caused to the assessee when material used against him is not provided and opportunity of cross examination is not provided. The assessee is based in Rajasthan. All the Courts/Tribunals within the jurisdiction of Hon'ble Rajasthan High Court are bound by the decision of Hon'ble Rajasthan High Court, and therefore, reliance by the CIT(A) on the decision in the case of Swati Bajaj is of no

help to the revenue. The ld. AR has also brought to my notice through its written submission that judgment in the case of **Suman Poddar** 423 ITR 480 has already been distinguished by Hon'ble Delhi High Court itself in the case of **PCIT vs. Krishna Devi** in ITA No. 125/2020 and issue was decided in favour of assessee. In confirming the addition made by the AO holding the transactions to be bogus, the Ld. CIT(A) has once again relied on the decision of Calcutta High Court in the case of Swati Bajaj. The ld.AR elaborately differentiated the facts of the case with that of the assessee in point 1.25 of his submission. He has placed reliance on the decisions of jurisdictional High Courts in the case of **CIT Vs. Pooja Agarwal**, and **PCIT Vs. Pramod Jain & Ors.** Considering the above facts and circumstances and taking into consideration, the various documentary evidences furnished by the assessee in support of his claim and further relying upon the decisions of this tribunal as well as decision of Hon'ble Jurisdictional High Court including the decision in the case of **CIT Vs. Pooja Agarwal** (supra) and in the case of **PCIT Vs. Pramod Jain & Ors.** (supra), it is held that claim of long term capital gain of exemption u/s 10(38) of I.T. Act do not suffer from infirmities and cannot be held as bogus and accordingly addition so made by the AO and confirmed by the CIT(A) is hereby deleted.

3.1 As regards Ground No. 4 of the assessee, the Bench after hearing both the parties finds that this ground relates to addition of commission paid for accommodation

entry and is therefore consequential to the issue involved in earlier grounds. As the transaction of purchase and sale of shares and consequent long term capital gain so earned has been held to be not bogus, therefore, addition made by the AO on account of notional commission allegedly paid, is not sustainable and is therefore deleted.

4.0 In the result, the appeal of the assessee stands allowed with no orders as to costs.

Order pronounced in the open court on 07/08/2024.

Sd/-
(संदीप गोसाई)
(Sandeep Gosain)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 07/08/2024

*Mishra

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

1. The Appellant- Shri Madan Mohan Gupta, Kota
2. प्रत्यर्थी / The Respondent- The ITO, Ward 1(3), Jaipur
3. आयकर आयुक्त / The Id CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्ड फाईल / Guard File (ITA No. 246/JP/2024)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar