

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No.470/Ind/2023
(Assessment Year: 2014-15)

Sadhu Ram Balani Flat No.B-503, Moti Mahal Apartment 28-A, Sector-C Scheme No.71, Indore	Vs.	ITO-5(1) Indore
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: ABSPB5367L		
Assessee by	Shri S.N. Agrawal, AR	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	04.09.2024	
Date of Pronouncement	24.09.2024	

O R D E R

Per Vijay Pal Rao, JM :

This appeal by assessee is directed against the order dated 16.10.2020 of the Commissioner of Income Tax (Appeal) National Faceless Appeal Centre (NFAC) Delhi, for A.Y.2014-15. The assessee has raised following grounds of appeal:

1. *“That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the addition of Rs. 1,41,64,369/- made by the Assessing Officer to the total income of the appellant on account of long-term capital gain earned on sale of shares of M/s Sunrise Asian Limited by*

- denying the benefit of exemption under section 10(38) of the Act without properly appreciating the facts of the case and submissions made before him/her more so when the appellant had ample documentary evidences so as to justify the genuineness of long-term capital gain earned on sale of shares*
2. *That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the addition of Rs. 1,41,64,369/- made by the Assessing Officer to the total income of the appellant on account of long-term capital gain earned on sale of shares of M/s Sunrise Asian Limited by denying the benefit of exemption under section 10(38) of the Act and by treating the transaction of purchase and sale of shares to be adventure in the nature of trade without properly appreciating the facts of the case and submissions made before him/ her*
 3. *That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the addition of Rs. 1,41,64,369/- made by the Assessing Officer to the total income of the appellant on account of long-term capital gain earned on sale of shares of M/s Sunrise Asian Limited by denying the benefit of exemption under section 10(38) of the Act and merely on the basis of third party documents/ evidences which were never confronted with the appellant thereby depriving him of an effective opportunity of being heard which is grossly violative of the principles of natural justice*
 4. *The appellant reserves the right to add, alter and modify the grounds of appeal as taken by him.*

2. The assessee is an individual and filed his return of income for the year under consideration on 26.11.2014 declaring total income of Rs.4,09,880/-. The case of the assessee was selected for scrutiny through CASS. During the scrutiny assessment the proceedings the AO noted that the assessee had declared long term capital gain of Rs.1,41,64,396/- on sale of shares of M/s Sunrise Asian Ltd. which is claimed as exempt u/s 10(38) of the Act. The AO after analyzing financial details of the said company suspected the price manipulation of the shares of the said company M/s Sunrise Asian Ltd on the stock exchange by some insider traders and therefore, the price at which the assessee sold the shares was in the opinion of the AO inflated through the manipulated practice by insider traders to provide accommodation entries of bogus long term

capital gain. The AO observed that the department has conducted various searches u/s 132 and survey u/s 133A in the cases of various brokers of the stock exchange and companies to unearth malpractices of various insider traders for providing bogus long term capital gain by manipulating shares prices at stock exchange of various penny stocks. The AO then examined the assessee by recording his statement on 14.12.2016 and then held that the long term capital gain claimed by the assessee is nothing but unaccounted income of the assessee is introduced to avoid the tax liability. Aggrieved by the said order of the AO the assessee filed the appeal before the CIT(A). The CIT(A) has dismissed the appeal of the assessee and confirmed the addition made by the AO by following the decision of Hon'ble Calcutta High Court in case of Pr. CIT vs. Swati Bajaj and Ors. 446 ITR 56.

3. Before the Tribunal Ld. AR of the assessee has submitted that the assessee purchased 30,000/- equity shares of M/s Santoshima Tradelinks Ltd. for consideration of Rs.6,00,000/- on 29.09.2011. The payment was duly reflected in the bank account statement of the assessee vide entry dated 17.09.2011 placed at page no.85 & 86 of the paper book. The assessee was allotted 30000 of equity share by M/s M/s Santoshima Tradelinks Ltd. vide allotment advice dated 10.10.2011 along with physical copy of share certificate duly transferred in the name of the assessee placed at page no.87 & 88 of the paper book. These shares were dematerialized in the De-mat account of the assessee on 06.02.2013 and also reflected in the balance sheet of the assessee as on 31.03.2013. He has pointed out

that thereafter the M/s Santoshima Tradelinks Ltd and M/s Conart Traders Ltd. were merged with M/s Sunrise Asian Ltd. vide order of Hon'ble Bombay High Court dated 22.03.2013 placed at page no.93 to 98 of the paper book. In pursuant to the merger of the said company with M/s Sunrise Asian Ltd. the assessee was allotted equal number of equity shares in lieu of the investment in the shares of M/s Sangoshima Tradelinks Ltd. Thus, the assessee received 30000 shares of M/s Sunrise Asian Ltd. in his De-mat Account on 28th June 2013. Thereafter the assessee sold these 30000 shares of M/s Sunrise Asian Ltd. for total consideration of Rs.1,47,64,396/- from July 2013 to March 2014 at stock exchange through his broker M/s Arihant Capital. Ld. AR has thus submitted that when the purchase of 30000 shares of M/s Santoshima Tradelink Ltd. is not disputed and also duly established by the relevant documents being payment of the purchase consideration made through banking channel duly reflected in the bank account of the statement. The allotment of shares by M/s Santoshima Tradelink Ltd. to the assessee vide allotment dated 10.10.2011, physical copy of shares certificate transferred in the name of the assessee dated 10.10.2011, credit of these shares in the De-mat account of the assessee on 06.02.2013, the order of the Hon'ble Bombay High court dated 22.03.2013 approving the scheme of merger of M/s Santoshima Tradelinks and M/s Conart Traders Ltd. with M/s Sunrise Asian Ltd. are also undisputed facts. Ld. AR has further submitted that as per balance sheet as on 31.03.2012 & 2013 these shares are duly reflected in the books of account of the

assesse therefore, holding of these shares of M/s Santoshima Tradelink Ltd. and then after merger of M/s Sunrise Asian Ltd. are duly established by undisputed supporting evidences. Thereafter the shares were sold through broker M/s Arihant Capital Market ltd. at the stock exchange on various dates from July 2013 to March 2014 at the prevailing rate in the stock market. The assessee has produced copies of sale note issued by M/s Arihant Capital Market Ltd. placed at page no.101 to 135 of the paper book. Ld. AR has submitted that all these transactions were duly recorded in the books of accounts of the assessee as well as in the books of the broker M/s Arihant Capital Market Ltd., the payment of purchase consideration and sale consideration received by the assessee were through banking channel and there is no allegation of the AO of any payment either made or received by the assessee cash or other than banking channel. Thus, Ld. AR has contended that when the assessee has produced all the supporting evidence which is more than sufficient to prove the genuineness of the transaction of purchase as well as sale of the shares then the long term capital gain earned by the assessee from sale of these shares cannot be treated as bogus accommodation entries. The AO has made addition merely on the basis of the suspicion without bringing any material on record to show that the documentary evidences produced by the assessee are false or bogus. Ld. AR has submitted that the AO has also examined the assessee during the assessment proceedings wherein the assessee has explained all the relevant facts and nothing was found contrary in the statement of the

assessee recorded by the AO therefore, the claim of exemption u/s 10(38) cannot be denied when all the conditions prescribed under law are satisfied being shares were sold at place of the stock exchange and also subjected to Security Transactions Tax (STT). The AO has doubted genuineness of the transactions on the ground that some of the entities as well as insider traders were involved in manipulating price of these shares at stock exchange with a view to provide accommodation entries to the parties however, no specific material or allegation has been brought on record to show that the assessee was either involved or a party to the alleged insider trading or rigging of price of these shares at stock exchange. Once the assessee has produced all supporting evidence to prove that the transactions of purchase of shares, holding of shares and sale of shares are genuine transactions then in absence of any contrary fact or material brought on record the disallowance of claim by the AO is not justified. In support of his contention he has relied upon following decisions:

1. *Hon'ble High Court of Punjab & Haryana in the case of Pr CIT[Central], Ludhiana Vs Prem Pal Gandhi [ITA- 95-2017]*
2. *Smt Shweta Agrawal Vs. ACIT 5(1), Indore [ITA No. 281/Ind/2019]*
3. *Kumari Ayushi Nyati Vs. ITO, 5(5), Indore [ITA No. 203/Ind/2019]*
4. *Shri Ayush Jain Vs. ITO 4(2), Indore [ITA No. 616/Ind/2019]*
5. *Smt. Manorama Devi Sharma Vs. ITO 3(1), Indore [ITA No. 39/Ind/2019]*
6. *Shri Shiv Narayan Sharma Vs. ACIT-3(1), Indore [ITA No. 889/Ind/2018]*

7. Hon'ble Supreme Court of India in the case of PCIT v. Renu Aggarwal reported in [2023] 153 taxmann.com 579 (SC)

3.1 Ld. AR has submitted that the Hon'ble jurisdictional High Court in the recent judgments dated 30th April 2024 in case of CCIT vs. Shri Nilesh Jain HUF and other bunch of appeals in ITANo.56 of 2021 has considered an identical issue of long term capital gain arising from purchase and sale of shares of M/s Sunrise Asian Ltd. and decided the same in favour of the assessee and against the revenue by upholding the orders of the Tribunal. Thus, Ld. AR has submitted that the impugned orders of the CIT(A) as well as AO are not sustainable and therefore, the addition made by the AO on this account is liable to be deleted.

4. On the other hand, Ld. DR has submitted that it is apparent case of availing the accommodation entry of long term capital gain on the sale of shares of M/s Sunrise Asian Ltd. at the assessee claimed purchase of 30000 shares at the rate of Rs. 20 per share and sale of these shares @ Rs.488.45 to Rs.492.05 per share which is jump of around 25 times within a short period. Thus, ld. DR has submitted that entire transactions of purchase and sale of shares are as per the scheme of manipulated transactions of these entities by certain insider traders for providing accommodation entries for long term capital gain. The transactions as claimed by the assessee is having all the traits of manipulated transactions for providing bogus long term capital gain as the assessee claimed purchase of these shares off market and thereafter these were dematerialized

just before the sale at steep rise of share price about 25 times of the purchase price. This shows that it is not a normal transaction of purchase and sale of shares but the transactions were carried out with specific purpose of availing accommodation entries and to avoid the tax on unaccounted income.

4.1 He has relied upon the orders of the authorities below and submitted that the CIT(A) has relied upon the judgment of Hon'ble Calcutta High court in case of Pr. CIT vs. Swati Bajaj and Ors.(supra). Ld. DR has also relied upon the orders of the SEBI dated 17th June 2022 and 6th October 2021 and submitted that various entities including M/s Sunrise Asia Ltd. as well as various insider traders details of which are given in these orders are found to be involved in the manipulating the price of shares of these companies during the period from October 2012 to 30 September 2015. SEBI has carried out an investigation and then passed these orders whereby the insider traders were debarred from trading in stock exchange and also imposed penalties for violating the provisions of SEBI. Ld. DR has referred to the assessment order and submitted that the AO has analysed the financial details and potential growth of M/s Sunrise Asian Ltd. and found that this company had not business during last three years and then did not have earning but shown loss during this period. Therefore, the rise in the price after the merger is not supported by the financial fundamentals of these companies and therefore, it is only as a result of manipulations by the various persons the price of these

shares rised. The assessee has availed the benefit of accommodation entries provided by these persons.

5. We have considered rival submissions as well as relevant material on record. The AO as in the assessment order has doubted the genuineness of the claim of the assessee for long term capital gain on sale of shares of M/s Sunrise Asian Ltd. and has simply proceeded on the general observations that the department has conducted various searches but no specific details is mentioned about any search or survey wherein any material is found against the assessee to show that the assessee was involved in price rigging or manipulation of price at stock market of the shares of M/s Sunrise Asian Ltd. The relevant observations of the AO are reproduced as under:

“6. The department has conducted various searches u/s 132 /surveys u/s 133A/enquiries conducted by the department on the various brokers of stock exchange and various assessee / companies. The investigation carried out by the department has proved that a scheme was hatched by various players to obtain/provide accommodation entry of bogus LTCG through manipulation of stock market. Various syndicates have arranged accommodation entry of bogus Long Term Capital Gain, bogus Short Term Capital Gains and bogus Short Term Capital Loss/bogus business loss through trading of shares of penny stocks Accommodation entry is a financial transaction between the two parties where one party enters the financial transaction in its books to accommodate the other party. These transactions are accommodated entries mostly in lieu of cash of equal amount and commission charged over and above at certain fixed percentage for providing such accommodation entry. These accommodation entries are taken by various beneficiaries for introducing their unaccounted cash into their books of accounts without paying the due taxes.

In this scheme, the shares of the penny stock companies are acquired by the beneficiaries of LTCG at very low prices generally through the route of preferential allotment (private placement) or off market transaction. These shares have a lock- in period of 1 year as per Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009. Another route to acquire the shares is through Amalgamation or merger. In this route, the beneficiaries of LTCG are allotted shares of a private limited company which is subsequently amalgamated with a listed penny stock and the beneficiaries receive shares of the listed penny stock in exchange of the shares of private limited company.

Thereafter, the prices of the shares of the penny stock companies are rigged and are raised through circular trading. This is managed by the "operator" of the scrip. An "Operator" is a person who is managing the overall affairs of the scheme and he is the one who contacts the entities who wish to take entry of bogus LTCG/STCL in their books and arranges the same through the scripts of penny stock companies. The Operator manages many paper/bogus companies and uses them to do circular transactions to rig the price of the shares. The shares of these penny stock companies, although listed on exchange, are always closely held and are controlled by the promoter of the Penny Stock Company and the Operator who is arranging for the bogus LTCG/Loss. This is due to the fact that the general public is not interested in these shares as these companies have no credentials and this helps the operator to keep a control on the price movement of the shares. Once the period of 1 year has passed and the share prices have been sufficiently rigged, the beneficiaries sell their shares at the inflated prices on the Stock Exchange. A point worth noticing here is that the purchase of the shares is not made by the public but by the bogus entities managed and controlled by the promoter of the penny stock company or the operator which are referred to as "Exit Providers". The unaccounted money of the beneficiaries is routed to these bogus entities "Exit Providers" and the shares held by the beneficiaries are bought by these bogus entities from the money which is the unaccounted money of the beneficiaries. Sometimes, the shares of the LTCG beneficiaries are purchased by the beneficiaries of LOSS who later sell their shares when the price falls and hence book bogus LOSS in their books. All these transactions are done on the stock exchange and as the sale of shares are done after a holding of one year they

fall into the category of Long Term Capital Gain which is an exempt income as per the IT Act, 1961.”

5.1 Thus, all these averments are general in nature just to explain modus operandi of operators who involved in manipulating price at stock exchange and providing accommodation entries in the penny stocks. It is pertinent to note that the assessee has produced all the relevant documentary evidences comprising of bank account statement placed at page no.85 & 86 of the paper book reflecting the payment of Rs.6 lakh as purchase consideration for purchase of these shares as per entry dated 17th September 2011. The AO has not commented event about genuineness of this payment made by the assessee through bank on 17th September 2011 against which 30,000 shares of M/s Santoshima Tradelink Ltd were allotted to the assessee vide allotment advice dated 10.10.2011 and physical share certificate transferred in the name of the assessee dated 10.10.2011 placed at page no.87 & 88 of the paper book as under:

SANTOSHIMA TRADELINKS LIMITED

Corp. off:- BFANA HOUSE, 2nd Floor, 34 Oppankara Street , Coimbatore-641001 Tamilnadu
Tel. - 0422392055/2066 E-Mail :- sanmaatrade@gmail.com

To,
SADHURAM BALANI

Date : 10.10.2011

231,GUMASHITA NAGAR
INDORE (M.P)

ALLOTMENT ADVICE

Dear Sir(s) / Madam,

Issue of Equity Shares of Rs. 10/- each for cash at the premium of Rs. 10/- each. Amount paid on Application Rs. 20/- Per share.

We thank you for your Application for Equity Share of our Company. The Board of Directors has made allotment of Equity shares in accordance with the basis of allotment approved by the directors. The allotment made to you, in accordance with the term and conditions of the application and subject to provision of the memorandum and Article of Association of the company is as under.

Regd. Folio No.	No Of Equity Share Applied for	No Of Equity Share Alloted	Amount Paid on Application (Rs.)
L/F No. 150	30000	30000	600000
Amount Adjusted (Rs.)	Certificate No.(s)	Distinctive Nos	Date Of Allotment
600000	189	8327371 8357370	29.09.2011

Relevant Share Certificate (s) are enclosed herewith

For Santoshima Tradelinks Ltd.



Authorised Signatory

Regd. Off. :- 205, A Kapadia Chamber 599, J.S.S Road MUMBAI - 400002 Tel. - 022

SANTOSHIMA TRADELINKS LTD.
599, J.S.S. Road, Mumbai-400002.

Santoshima Lease Finance And Investments (India) Limited
(Incorporated under The Companies Act, 1956)
Regd. Office : Office No 19, Building No. 3, Navjivan Society, Lamington Road,
Mumbai Central, Mumbai - 400 008.


Share Certificate

THIS IS TO CERTIFY that the person(s) named in this Certificate is / are the Registered Holder(s) of the Within-mentioned Share(s) bearing the distinctive number(s) herein specified in the above Company, subject to the Memorandum and Articles of Association of the Company and that the Share(s) mentioned below are Fully paid up.

EQUITY SHARES OF RS. 10/- EACH, FULLY PAID-UP

Register Folio No. <u>150</u>	Certificate No. <u>189</u>
Name(s) of Holder(s) <u>Sadhuram Balani</u>	
No. of Share(s) held <u>Thirty Thousand only.</u> (In Words)	<u>30,000/-</u> (In Figures)
Distinctive No(s) From <u>8327571</u>	To <u>8357370</u> (Both Inclusive)

Given under the Common Seal of the Company at Coimbatore this 10th Day of Oct. 2011

 N.P. Chauhan } Directors
D. S. Seth } Authorised Signatory

NOTE : No Transfer of the Share(s) Comprised in this Certificate can be registered unless accompanied by this Certificate

5.2 These shares were then dematerialized in the de-mat account of the assessee with M/s Arihant Capital Market Ltd. placed at page no.89 on 06.02.2023 as under:



Booking Date: 03-Feb-2022

TRANSACTION STATEMENT

Print Date & Time: 03-Feb-2022 13:24:35

National Securities Depository Limited
DP: ARIHANT CAPITAL MKT. LTD (IN301983)
6 LAB COLONY, V.N. ROAD, INDORE-491001

Phone: 0731-4217262 Fax: 0731-4217269

Selection Criteria:	Transaction From Date: 01/04/2011	Transaction To Date: 01/02/2022	ISIN: ALL
Client Id:	10771628	Status:	Active
Category:	Non House Beneficiary	Type:	Resident
Name:	SADHURAM BALANI		
Address:	231, GUMASTA NAGAR, INDORE (M.P.)		
Pin Code:	452001	Mobile Number:	9826031599

You can now hold your mutual fund investments in this demat account. Contact your Depository Participant or your stock broker for more information.

Booking Date	Transaction No.	Description	Credit	Debit	Balance
ISIN	INES01M01016	SANTOSLUMA TRADELINKS LIMITED EQ			
Beneficiary				Opening Balance:	0
01-Feb-2013	1000000004753	By Dematerialisation	30,000		30,000
26-Jan-2013	1001131628	To Scheme of amalgamation		30,000	0
				Closing Balance:	0
Pending Items				Opening Balance:	0
21-Jun-2013	1000000004753	By Dematerialisation request	30,000		30,000
06-Feb-2013	1000000004763	In Dematerialisation request confirmation		30,000	0
				Closing Balance:	0
ISIN	JNE917D01011	SUNRISE ASIAN LIMITED EQ			
Beneficiary				Opening Balance:	0
28-Jun-2013	1001135225	By scheme of amalgamation	30,000		30,000
24-Jul-2013	1020002110078	To CM ARIHANT CAP MKTS LTD ROLLING MKT LOT / 1314082		1,600	28,400
14-Aug-2013	1000002136992	To CM ARDHANT CAP MKTS LTD ROLLING MKT LOT / 1314096		2,500	25,900
02-Sep-2013	1000002169118	To CM ARIHANT CAP MKTS LTD ROLLING MKT LOT / 1314108		1,500	24,400
05-Sep-2013	1000002176050	To CM ARIHANT CAP MKTS LTD ROLLING MKT LOT / 1314111		1,500	22,900

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5.3 Thus, it is clear that the share purchased by the assessee on 10.10.2011 were dematerialized in the de-mat account on 06.02.2013 thereafter the said company M/s Santoshima Tradelink Ltd. and M/s Conart Traders Ltd were merged with M/s Sunrise Asian Ltd. as per scheme of merger approved by the Hon'ble Bombay High Court vide order dated 22.03.2013. The said order of the Hon'ble Bombay High Court is placed at page no.93 to 97 of the paper book. In pursuant to the said merger of Santoshima Tradelink Ltd. with M/s Sunrise Asian Ltd. equal numbers of shares were allotted to the assessee in lieu of shares of Santoshima Trade Link Ltd. an amalgamating company. Further the assessee has shown the shares of M/s Santoshima Tradelink Ltd. in its balance sheet as on 31.03.2012 as well as 31.03.2013 which are not disputed by the department. In any case when the assessee has established with undisputed documentary evidence that the shares were purchased for consideration paid through banking channel and were duly dematerialized in the De-mat account of the assessee then the holding of the shares by the assessee are neither disputed nor doubted by the department and particularly by the AO. The entire order of the AO is based on the surmises that sale of these shares are made by the assessee at very high price in the process of manipulation of the price at stock market with the involvement of insider traders who were found indulged in such practice of providing bogus accommodation entries of Long Term Capital Gain etc. It is pertinent to note that even as per the SEBI order there is no allegation against any individual shares holders who have

purchased and sold the shares during this period from October 2012 to September 2015 but the entire investigation and finding are directed against some of the brokers and insider traders who have manipulated the share price at stock exchange of those scripts with a view to provide accommodation entries and by carrying out the trading with themselves which is large group of about 89 persons. Therefore, even as per SEBI orders neither the assessee nor his agent were either found involved or penalized by the SEBI. Once the shares were duly held by the assessee in the books of account as well as in the de-mat account and subsequently sold at the prevailing price at stock exchange then the transactions of sale of shares cannot be held as bogus in absence of any material to show that the assessee is directly or indirectly involved in the malpractice of rigging of price at stock exchange. An identical issue has been considered by this Tribunal in various decisions which were challenged by the revenue before the Hon'ble Jurisdictional High Court and vide judgment dated 30th September 2024 in case of CCIT(OSD) 1 vs. Shri Nilesh Jain (HUF) along with other bunch of appeals the Hon'ble High court has held as under:

“This order shall govern the disposal of aforesaid ITA Nos. 56/2021, 58/2021, 64/2021, 65/2021, 88/2021, 95/2021, 96/2021, 98/2021, 99/2021, 100/2021, 102/2021, 103/2021, 109/2021, 110/2021, 111/2021, 112/2021, 113/2021, 114/2021, 115/2021, 116/2021, 120/2021, 27/2022, 28/2022, 29/2022, 31/2022, 32/2022, 33/2022, 34/2022, 35/2022, 36/2022, 121/2022, 122/2022 and 183/2023.

2. Regard being had to the similitude of the controversy involved in all the aforesaid 33 bunch of appeals, they have been heard analogously and disposed of by this common order as identical substantial questions of law are involved and have been framed by the appellant(s).

3. For the sake of convenience, the facts of ITA No.56/2021 are being taken.

4. This is an appeal filed by the appellant(s) under [Section 260A](#) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act of 1961') being aggrieved by the order dated 30.04.2021, passed by the Income Tax Appellate Tribunal (ITAT), Bench Indore in ITA No.294/Ind/2020 (Assessee's Appeal) for the Assessment Year 2014-15. The appellant has propsoed the following Substantial Question of Law in this appeal:

"Whether on the facts and in the circumstnaces of the case and in law the ITAT was justified in deleting the addition made by AO, which was confirmed by Commissioner of Income Tax(CIT)(Appeals), ignoring the findings of Investigation Wing, Kolkata that M/s Sunrise Asian Limited was clearly established as a bogus penny stock script company which was used for claiming bogus Long Term Capital Gain as exempted under [Section 10\(38\)](#) of the Income Tax Act, 1961 ?"

5. In short, the question that arises for consideration in this appeal, is whether this appeal involves any substantial question of law, as is required to be made out under [Section 260A](#) of the Act of 1961, that being the prerequisite of admission of the appeal.

6. The brief facts of the case are that respondent had purchased shares on private placement from M/s. Santoshi Maa Lease and Finance and Investment Pvt. Ltd. after due diligence and following sequence of events which has been narrated by learned ITAT in para 16 of the order. This company later was amalgamated with M/s. Sunrise Asian Limited, a listed company on Bombay Stock Exchange under an order passed by Hon'ble Bombay High Court.

7. That, soon after amalgmation, there was sudden jump in the share price on the Stock Exchange due to involvement of speculators and players of stock exchange. Learned ITAT has admitted that respondent was not involved in manipulating the prices of the shares on stock market and it was only one time investment made by the Respondent of small amount.

8. That, the SEBI, all allegation of insider trading and rigging of the prices on Stock Exchange, investigated and in its report dated 06/09/2021 which was in respect of Sunrise Asian Ltd. found that the promoters and 89 other persons/companies were involved in rigging of share prices on Stock Exchange. It is submitted that the respondent is not named in the said list. Thus, it is evident that the respondent had no role and control over manipulation of share price of Bombay Stock Exchange. When SEBI did not find the involvement of the respondent in manipulation of share prices, therefore, the Assessing Officer erred

in law and fact in making the addition of LTCG as undisclosed income under [Section 68](#) of the Income Tax Act. It is further submitted that, no player can manipulate the price of share on Bombay Stock Exchange over 5% in a day as in case the price of share goes up in any day over 5% then Stock Exchange Circuit applies and which do not allow the increase in price of share more than 5% in a day.

*9. Learned counsel for the appellants(Revenue) contended that the learned ITAT has ignored the findings of Investigation Wing, Kolkata that M/s Sunrise Asian Limited, without bringing on record, the report of investigation. The report is not in respect of the respondent, the same cannot bind the respondent. The learned ITAT, in absence of any corroborative evidence is not bound to blindly accept such report. She further contended that the investigation has gathered sufficient material and that the learned ITAT failed to consider that the abnormal increase in price of shares of M/s. Sunrise Asian Ltd. were not commensurate with the financial strength of the company. Further, investigation Wing has gathered sufficient material before concluding that the alleged transaction is a sham transaction and has been carried out across the country through various brokers. Abnormal increase in price of shares of M/s. Sunrise Asian Ltd. were not commensurate with the financial strength of the company. Learned counsel for the appellant relied on various judgments in support of her contention (i) *Suman Poddar V/s Income Tax Officer*(2019) 112 taxmann.com 330(SC) (ii) *CIT Vs. Smt. Sanghamitra Bharali*(2014) 50 taxmann.com 47(Gauhati).*

*10. Learned counsel for the appellant further contended that the ITAT erred in deleting the addition made by the Assessing Officer by referring to the decision given in the case of *Dipesh Ramesh Vardhan & Ors. Vs. DCIT Central Circle-2(2)*(ITA No.7648/Mum/2019 dated 11.08.2020) . M/s Sunrise Asian Limited is not found to be a penny stock company and not holding an alleged transaction with the assessee while it was evidently proved that M/s Sunrise Asian Limited is a shell company and permit its beneficiaries to get an alleged accommodation entry in its books. The ITAT erred in not appreciating the case of [CIT Vs. Smt. Sanghamitra Bharali](#) (2014) taxman.com 47(gauhati) as well as other case laws as mentioned in the Order of First Appellate Authority while its judgment is strictly applicable in the instant case. The ITAT erred in not relying the case law of [Suman Poddar Vs. ITO](#) (2019) 112 taxmann.com 330(SC) and allowed the appeals by mentioning that lower authorities are not able to sustain the addition without any cogent material on record while sufficient justification accompanied by relevant evidences were given to prove that M/s Sunrise Asian Limited is nothing but penny stock company.*

11. Per Contra, learned counsel for the respondent(s)(Assessee) submitted that under [Section 10\(38\)](#) the respondent has lawfully claimed exemption by complying

the conditions to avail exemption which includes share should be listed on Stock Exchange, Share should have been purchased through Stock Exchange and through Banking Channel and Security Transaction Tax(STT) has been paid thereon. The shares of Sunrise Asian Ltd.

are listed on Bombay Stock Exchange, shares have been purchased through D-mat Account and payment have been received through Banking Channel and Security Transaction Tax has been paid by Stock Exchange. Thus, all the conditions for availing exemption have been fulfilled. It is further contended that under [Income Tax Act](#) there is no provision which requires the Assessing Officer to investigate the genuineness of the shares because these share are listed, issued by the Company and records are maintained with the Register of Companies. Thus, these shares cannot be said to be bogus shares as have been issues and subscribed under the [Companies Act](#). The revenue has failed to appreciate that how these shares can be termed as Bogus Shares, when these shares have been issued by the Company incorporated under the [Companies Act](#) by following the provisions and procedures prescribed under the [Companies Act, 1956](#). The issuing company has complied with all the rules and regulations and completed all statutory formalities required for issue of shares. Thus, under such circumstances, these shares cannot be termed as Bogus Shares.

12. Learned counsel for the respondent further contended that mere sudden increase in share prices on the stock exchange, does not ipso facto determine that shares are bogus, if the shares are bogus, then these shares cannot be listed and traded on stock exchange through D-MAT accounts. Therefore, it is incorrect notion of the Revenue that these shares are bogus shares, on the contrary these shares are genuine and lawfully issued share by the company by following the law and procedure in this regard. The Assessing Officer has heavily relied upon report of Investigation Wing of Income Tax Department which was conducted in Kolkata in case of some of the Companies including M/s. Sunrise Asian Limited. This report has never been provided to the respondent at any stage of the proceedings nor filed by the department before ITAT or before this Court. It is settled law that no material can be used against the assessee without providing the assessee to examine it and, if required, to cross examine. Thus, there was violation of principles of natural justice. That on similar set of facts and in respect of the same share script of M/s Sunrise Asian Ltd. the Mumbai Bench of ITAT in case of (1) Narayan Ramchandra Rathi(Page nos.50 to 61), (2) Dipesh Ranmeshchandra Vardhan(Page nos. 62 to 71) and, (3) Anraj Hiralal Shah(page nos.72 to

74) has dealt with the identical issue and decided in favour of the assesseees.

13. Learned counsel for the respondent further submitted that as many as three High Courts i.e. Delhi High Court, Bombay High Court and Gujarat High Court

also have dealt with the similar issues and has dismissed the appeal filed by the Revenue. The appellant (Revenue) had preferred SLP against an order of Gujarat High Court passed in the case of the Principal Commissioner of Income Tax-1 Vs. Parasben Kasturchand Kochar, passed in R/TAX Appeal No.204 of 2020 decided on 17.09.2020), which has been dismissed in limine upholding the orders passed by the Gujarat High Court. The Apex Court in the case of Principal Commissioner of Income Tax-12 Vs. Smt. Krishna Devi, passed in ITA No.125/2020 decided on 15.01.2021 has held that the High Court has erred by holding that the addition made under Section 68 of the Act by treating impugned Long term Capital Gain (LTCG) as bogus was unjustified and same was to be deleted.

14. For the aforesaid reasons, we have no hesitation in holding that no question of law, much less any substantial question of law arises from the order of the ITAT requiring consideration by this Court. There is no merit in the appeal. Thus, in our considered opinion, the present appeal does not involve any substantial question of law so as to meet the provisions of Section 260A of the Income Tax Act, 1961 for admitting the appeal.

15. In view of the aforesaid, we do not find any merit in these bunch of appeals and, accordingly, they are hereby dismissed. No order as to costs.

16. A copy of the order be kept in the record of connected ITA Nos.58/2021, 64/2021, 65/2021, 88/2021, 95/2021, 96/2021, 98/2021, 99/2021, 100/2021, 102/2021, 103/2021, 109/2021, 110/2021, 111/2021, 112/2021, 113/2021, 114/2021, 115/2021, 116/2021, 120/2021, 27/2022, 28/2022, 29/2022, 31/2022, 32/2022, 33/2022, 34/2022, 35/2022, 36/2022, 121/2022, 122/2022 and 183/2023.

5.4 Thus, the issue of long term capital gain arising from sale of shares of M/s. Sunrise Asian Ltd. was involved in those bunches of appeals before the Hon'ble jurisdictional High Court and after analyzing the fact the Hon'ble High Court has upheld the orders of this tribunal. Ld. AR has also relied upon various decisions of the Coordinate Benches of this Tribunal including in case of Ashok Agrawal vs. ACIT dated 18.11.2020 in ITANo.124/JP/2020 wherein the Jaipur Bench of the Tribunal has held in para 12 to 25 as under:

"12. We have considered the rival submissions as well as the relevant material on record. The AO has doubted the transactions of purchase and sale of shares by the assessee of M/s. Sunrise Asian Ltd based on the investigation carried out by the Investigation Wing, Kolkata wherein certain persons were found indulged in providing accommodation entries, inter-alia bogus Long Term Capital Gains which is claimed as exempt under section 10(38) of the Act by the beneficiaries in order to facilitate the beneficiaries to convert their black money into white without paying Income-tax. The AO has narrated the modus operandi of various entry providers which is a general statement so far as the indulgence of certain persons in providing the accommodation entry of bogus long term capital gains as well as other transactions. However, in the said narration of modus operandi, there is nothing against the particular transaction of purchase and sale of shares by the assessee. The AO has specifically mentioned that during the course of enquiry in certain cases it has come to light that large scale manipulation has been done in the market price of shares of certain companies listed on Stock Exchange by a group of persons working as a syndicate for the purpose of providing entry of tax exempt bogus long term capital gains to large number of beneficiaries in lieu of unaccounted cash. These observations of the AO in the assessment order cannot constitute any tangible material or evidence to show that the transaction of the assessee is bogus being an accommodation entry. The AO in the show cause notice has stated that information has been received from the Investigation Wing, Kolkata vide letter dated 27.04.2015 that Sunrise Asian Ltd is engaged in giving entries of bogus LTCG and further, enquiries were made in the matter and it was found that BSE vide notice No. 2016110726 has declared Sunrise Asian Ltd to be suspended due to direction from SEBI. In reply to the show-cause, the assessee vide letter dated 13.12.2016 has specifically requested for such information/documents/statements and details of enquiry which has been conducted by the AO as apparent from his reply and the contents thereof read as under:

"This refers to your Show Cause Notice (SCN) dated 08.12.2016 wherein your goodself has asked the assessee to justify as to why the Long Term Capital Gain (LTCG) and the Investment made by the assessee in the transactions of Equity Shares of M/s Sunrise Asian Ltd. (Sunrise) should not be treated as bogus and added back to the income of the assessee. In connection with the same, the assessee would like to submit as under

1. A perusal of the SCN shows that in para 1 of the SCN, your goodself has noted the following basis to treat the said transactions as bogus:

(i) Information received from Investigation Wing, Kolkata vide letter dated 27.04.2015, wherein it was stated that Sunrise Asian Ltd is engaged in giving accommodation entries of LTCG.

(ii) Enquiries were made in the matter and it was found that BSE declared Sunrise Asian Ltd., to be suspended due to direction from SEBI.

2. Before furnishing our explanation in respect of the aforesaid notes in para 1 of the SCN, we would like to state that though your goodself has doubted the

genuineness of the transactions on the basis of information received, it appears from the SCN that your goodself is not doubting the computation part of the Capital Gain transaction and its exemption u/s 10(38) read with Section 2(29A) and Section 2(29B). We may also state here that in the assessee's transaction of LTCG, the sale consideration received is Rs.7,82,75,591 pursuant to sale of Listed Scripts of Sunrise between 19.09.2013 - 25.03.2014 and the amount of capital gain as computed by the assessee is Rs.7,51,07,591/- after taking into consideration the cost of purchases of those scripts on 5.11.2011. Securities transaction tax has been duly paid on such transaction and the information is available as per the records already submitted. All the transactions are through banking channels and via means and process which is justified following all relevant laws, rules and procedures. The related documents have already been submitted and no discrepancy therein has been pointed out by your goodself in the same.

3. Your goodself has referred to certain information received vide letter no. dated 27-04-2015 wherein it was stated that Sunrise Asian Ltd is engaged in giving accommodation entries. We may submit that the same is not sufficient to make addition in this case for following reasons:

i) The information gathered has neither been made available nor confronted with the assessee.

ii) Nothing in your letter states that why and how it is found that Sunrise Asian Ltd is engaged in giving entries of bogus LTCG.

iii) Nothing has been stated to show the information where assessee's name is appearing as beneficiary of accommodation entry.

iv) Nothing has been shown that the information refers to any material showing record of cash transaction entered in to by the assessee in lieu of receiving consideration for sale/transfer of shares of Sunrise Asian Ltd.

v) Your goodself appears to neither made any further enquiry over and above information received nor applied 'any mind on the information received so as to make a conclusive connection of the same with the assessee's transaction.

vi) It appears that your goodself has some generalise information in hand rather than any specific information pertaining to assessee's transaction. If your goodself has any information in this regard, it is requested to kindly provide the same, otherwise, in absence of any such information no addition can be made by treating the captioned transaction as non genuine transaction.

vii) Even if in the departmental actions, it is found that certain transaction in shares of Sunrise Asian Ltd are non genuine, the said finding by itself cannot be a reason' for concluding that the assessee's transaction is also not genuine unless some concrete and specific evidence is brought on record so as to prove that assessee's transaction of incurring LTCG was merely an accommodation entry."

13. We however, find that no such information/documents/statements was made available to the assessee thereby violating the basic principle of confronting the assessee with the documents which the Revenue wishes to rely against the

*assessee. Further, it is noted that in the assessment order so passed, the AO has made reference to a statement of Shri Vipul Vidur Bhatt recorded u/s 132 during certain search operations by the Investigation Wing, Mumbai and has relied on the same for holding the transaction as bogus by availing the accommodation entry of long term capital gain and beneficiary of the bogus LTCG scam. As the assessee was again not confronted with such statement during the show-cause notice and he came to know of the same from perusal of the assessment order, he raised the objection before the Id CIT(A) that no such statement of Shri Vipul Vidur Bhatt recorded u/s 132 was made available to him during the course of assessment proceedings and secondly, he deserves a right to cross-examine Shri Vipul Vidur Bhatt whose statement is being used against the assessee. However, we find that even during the appellate proceedings, the assessee was not made available any such statement and even the right of cross examination was denied by the Id CIT(A) who exercises the co-terminus powers as that of the AO. Thus, in view of the decision of Hon'ble jurisdictional High Court in case of CIT vs A.L Lalpuria Construction (P) Ltd (supra) and the decision of the Hon'ble Supreme Court in case of CCE vs. Andaman Timber Industries (supra), the assessment based on statement of third party without giving an opportunity to the assessee is not sustainable in law. The **Hon'ble Supreme Court** in case of **Andaman Timber** (Supra) while dealing with the issue has held in para 5 to 8 as under:-*

"5. We have heard Mr. Kavin Gulati, learned senior counsel appearing for the assessee, and Mr. K. Radhakrishnana, learned senior counsel who appeared for the revenue.

6. According to us, not allowing the assessee to cross-examine the witness by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner as based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he as specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which could not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was no for the Tribunal to have guess work as

to for what purposes the appellant wanted to cross-examine those dealer and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross —examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and made the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000 , order dated 17.2.2005 was passed remitting the case back the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice."

14. Therefore, the statement of a third party cannot be sole basis of the assessment without given an opportunity of cross examination and consequently it is a serious flaw which renders the order a nullity. Even on perusal of such statement of Shri Shri Vipul Vidur Bhatt, we find that it is a general statement of providing bogus long term capital gain transaction to the clients without stating anything about the transaction of allotment of shares by the company to the assessee. The AO has either discussed the modus operandi of entry providers and their statements but has not made any reference of any material or documentary evidence which reveals that the assessee has indulged in availing the accommodation entry of bogus long term capital gain. There is no dispute that once the assessee has claimed the long term capital gain from purchase and sale of shares which is exempt under section 10(38) of the Act, the primary onus is on the assessee to substantiate his claim by producing the supporting evidence. We find that in the case in hand this is not an isolated transaction of purchase and sale of shares by the assessee of M/s. Sunrise Asian Ltd but the assessee has been regularly purchasing and selling the shares as it is evident from the details of the holding of various shares as reflected in the financial

statements as on 31st March, 2013 as under :-

ASHOK AGARWAL		127	
237, SONKIYON KA RASTA, KISHANPOLE BAZAR, JAIPUR.			
Balance Sheet			
1-Apr-2012 to 31-Mar-2013			
Liabilities	as at 31-Mar-2013	Assets	as at 31-Mar-2013
Loans (Liability)	7,24,65,103.93	Capital Account	2,61,406.21
Secured Loans	48,49,210.93	Reserves & Surplus	2,61,406.21
Unsecured Loans	3,59,35,131.00	Fixed Assets	2,49,49,377.16
ABHISHEK AGARWAL	10,00,000.00	AIR CONDITIONER	27,000.00
AJAY AGARWAL	47,91,445.00	CAR-AVEO	2,19,855.00
HIGH GROWTH SECURITIES & HOLDINGS PVT LTD	14,00,000.00	CAR-COROLLA ALTIS-H5	5,53,349.00
MS UDYOGA	28,30,180.00	CAR-HONDA CIVIC	4,63,067.00
PARAS GEMS	27,25,000.00	CAR-SKODA	6,44,090.00
SAVI COMMERCIAL PVT LTD	50,40,000.00	CAR TATA DI 207	30,582.00
SIDDHARTH RATNA PVT LTD	38,14,137.00	FURNITURE	1,08,262.00
UNIQUE COMMERCIAL PVT LTD	44,80,000.00	Generator	1,32,927.00
VIDEOCON INDUSTRIES LTD	56,00,000.00	GOLD ORNAMENTS	16,575.00
Current Liabilities		LAND	53,008.00
		LAND AT HYDRABAD	1,84,25,680.00
		LAND-NOIDA PLOT NO. 010,	29,40,661.00
		LAND PLOT NO. 634 YAMUNA EXP AND WKAS AUTHORITY	12,18,780.00
		SILVER UTENCILES	88,391.16
		T V	27,150.00
		Investments	2,81,68,247.97
		INVESTMENT IN FIRMS	1,32,53,697.64
		INVESTMENT TO PVT LTD COMPANYYS	40,38,750.00
		E.SHARE-JCT	4,000.00
		E.SHARE-JINDAL VIJAY NAG STEEL	3,129.00
		E.SHARE-M R P L	7,266.83
		E.Shares 3.Infotech	2,57,616.00
		E.SHARE-SANTOSHIMA TRADELINK LTD	31,68,000.00
		E.SHARE-S B I	32,030.00
		E.Shares Mahan Ind.	2,41,071.00
		E.Shares Yes Marketing	20,180.00
		E.SHARE-TEXSHELDS	10,000.00
		E Share Time Technoplast	39,89,862.00
		E.SHARE-TISCO	1,10,762.50
		E.SHARE-UNITED CHROMA LLC,OMAN	30,31,883.00
		Current Assets	1,90,86,072.59
		Deposits (Asset)	33,11,761.00
		Loans & Advances (Asset)	64,60,895.80
		Sundry Debtors	1,43,177.00
		Cash-in-hand	15,99,829.57
		Bank Accounts	57,46,674.22
		ACCRUED INT ON FDR	37,676.00
		F D R	2,96,223.00
		PROVIDENT FUND	14,89,836.00
		Profit & Loss A/c	
		Opening Balance	
		Current Period	15,77,241.43
		Less: Transferred	(-)15,77,241.43
Total	7,24,65,103.93	Total	7,24,65,103.93

15. Thus as on 31.03.2013, the assessee was holding the shares of about 12 companies which include shares of M/s. SantoshimaTradelinks Ltd worth Rs 31,68,000/- which were acquired in the financial year 2011-12 and similarly reflected in the balance sheet as on 31.03.2012. We find that the assessee has duly reflected all these shares in the Balance Sheet as on 31.03.2012 as well as 31.03.2013 and the return of income for the assessment year 2012-13 and 2013-14 was also filed in time before the date of sale of the shares starting September 2013 onwards in various lots till March 2014. Thus it is clear that 158400 shares acquired by the assessee on 08.10.2011 were reflected in the Balance Sheet as on 31st March, 2013. We further note that the assessee produced the copy of allotment advice of these shares issued by the company along with the bank statement showing the purchase consideration paid by the assessee through cheque whereby the shares were allotted of face value of Rs 10/- at a premium of Rs 10/- each. The bank account of the assessee has reflected the payment of Rs. 31,68,000/- for purchase of shares. The AO has not disputed that subsequently there were events of amalgamation of the company with M/s. Sunrise Asian Ltd. pursuant to scheme of amalgamation duly approved by the Hon'ble High Court of Mumbai and consequently the assessee was allotted 158,400 shares of M/s Sunrise Asian Ltd as against 158,400 shares of M/s. SantoshimaTradelinks Ltd originally allotted by the company. The shares acquired by the assessee are duly reflected in the Demat account of the assessee. Once the shares are dematerialized and credited in the Demat account of the assessee, the holding of the shares by the assessee cannot be disputed. The AO has treated the transaction of sale of 158400 shares as bogus being accommodation entry but has not doubted the holding of these shares in the Demat account of the assessee. Once the assessee has produced all the supporting evidences which include allotment advice, bank statement showing the payment of purchase consideration, Demat account showing holding of shares in the Demat account, sale of the shares through Stock Exchange which are also reflected in the Demat account of the assessee and receipt of the sale consideration in the bank account of the assessee as it is evident from the bank account statement of the assessee, then in the absence of any contrary material or evidence brought on record by the AO, the transaction of purchase and sale of the shares in question cannot be held as bogus merely on the basis of the investigation carried out by the Department in some other cases where some persons were found indulged in providing accommodation entry. The AO in the entire assessment order has not made reference to single documentary evidence which can be said to be an incriminating material against the assessee to show that the assessee has availed accommodation entry of bogus Long Term Capital Gain. Therefore, the mere suspicion cannot be a ground for treating the transaction as bogus in the absence of any evidence or material on record.

16. The Id. D/R has relied upon the decision of **Hon'ble Delhi High Court** in case of **Suman Poddar vs. ITO** (supra) wherein the Hon'ble High Court has confirmed the finding of the Tribunal and finally observed in para 8 as under :-

" 8. From the above extract, it would be seen that the Cressanda Solutions Ltd. was in fact identified by the Bombay Stock Exchange as a penny stock being used for obtaining bogus Long Term Capital Gain. No evidence of actual sale except the contract notes issued by the share broker were produced by the assessee. No question of law,

therefore arises in the present case and the consistent finding of fact returned against the Appellant are based on evidence on record.”

Thus it is clear that in the said case the Tribunal's finding is based on the fact that no evidence of actual sale except the contract notes issued by the share broker was produced by the assessee. In those facts, the Hon'ble High Court has held that no question of law arises in the said case. On the contrary, in the case in hand the assessee produced all the relevant documentary evidence to establish the genuineness of the transaction. Even if the AO doubted the transaction, then to establish that the transaction is bogus, the AO is required to produce the contrary material evidence so that the evidence produced by the assessee can be controverted. In the absence of such contrary material or evidence brought on record by the AO and the evidence produced by the assessee is otherwise independently verifiable being the documents in the shape of allotment advice, bank statement, Demat account, books of account and contract notes for which the assessee has no control or say, therefore, the said evidence cannot be manipulated by the assessee. Once the evidence produced by the assessee is not prepared or beyond the scope of any manipulation by the assessee, then the assessee has discharged his onus to prove the transaction of purchase and sale of shares and consequential capital gain. As we have already mentioned that this is not an isolated transaction of purchase and sale of shares in single scrip, but the assessee has been holding the shares of 12 companies out of which the AO has doubted only one scrip. Thus the decision of Hon'ble Delhi High Court will not help the case of the department.

17. The Id. D/R has also relied upon the decision of **Hon'ble Guahati High Court** in case of **CIT vs Smt. Sanghamitra** (supra). In that case, the AO, in the order of assessment, noted that though the shares were sold through bank account of the assessee, purchase of shares were not made through the bank account of the assessee. The AO also observed that since the return for the asst. yr. 2000-01 relevant to the year of purchase, was filed after the date of sale and that purchase of shares was not done through the bank account of the assessee, the actual event of purchase of the shares of assessee could not be verified and, therefore, it was apparently an afterthought and a modus operandi adopted to convert the undisclosed income into 'capital gain'. The director of the company was also summoned, but no such person was found available at the address of the company obtained from Guwahati Stock Exchange and no company by name of Birdhichand Pannalal Agency was in existence at the said given address. The share broker was also examined under section 131 and in course of examination, he stated that all records of purchase and sale of shares were lost and thus, the actual purchase and sale of shares could not be verified. The AO, therefore, treated the 'capital gain' as bogus and disallowed the long-term 'capital gain', sought to be exempted under s. 54 of the Act, to the tune of Rs. 15,33,160 and added back the same as income from undisclosed sources'. In the context of said facts, it was held by the Hon'ble High Court that where no documents could be produced in support of purchase and sale of shares and the transaction could not be verified, that in such situations, the genuineness of the transaction has to be examined from the surrounding circumstances and has held as under:

“35. In the present case, the assessee has not been able to prove that the shares were purchased, on 12th Nov., 1999, in as much as there is no documentary evidence proving the said fact in as much as the said purchase was made in cash. Further, the assessee has also not been able to show

that the said shares were listed in the stock market @ Rs. 2.50, on the day of purchase, in as much as the assessee has produced the quotation of the shares as on the date of sale, issued by the Guwahati Stock Exchange, but no such quotation, on the date of purchase, was produced by the assessee.

36. There is no dispute that the sale amount was received by the assessee through bank; but what is disputed is as to whether the long-term 'capital gain', claimed by the assessee, was really a long-term 'capital gain' or not.

40. However, in the case in hand, the assessee, although has produced documentary evidence to show that shares were sold at a price prevailing in the stock market on the date of sale, but no documentary evidence were produced to show that on the date of purchase, the market price of the shares was same at which the shares were claimed to have been purchased.

41. No doubt, apparent must be considered real until it is shown that there are reasons to believe that the apparent is not real and for that purpose, taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be examined and considered by applying the test of human probabilities.

42. In the present case, the facts that two different addresses were given of the company, one in Gauhati Stock Exchange and the other in the office of RoC, no such company was found to be in existence at both the places, the assessee had failed to furnish the address of the company and the notice sent to the director of the company was returned on the ground that no such person was found available at the address of the company, the claim that shares of the company rose from Rs. 2.50 to Rs. 67.97 within a span of one year, when the profit, upon payment of tax of the company for 3 years, was negligible and no dividend could be declared, because of the inadequacy of profits, coupled with the facts that the purchase of shares was made in cash, the share broker failed to produce the records relevant to the purchase and sale of shares on the ground that the same were lost, the share quotation price of the purchase was not produced before any authority, the return of income, relevant to the purchase and sale of shares was filed after the transaction of sale, as claimed, was over, are clearly relevant circumstances pointing out towards the fact that the transaction was not genuine and the same was an afterthought and a sort of modus operandi to convert the undisclosed income into a 'capital gain'.

43. From the facts and circumstances narrated above, it cannot be said that the explanation offered by the assessee, as regards long-term 'capital gain' was rejected unreasonably and that the finding that the said amount was not on account of long-term 'capital gain' is based on no evidence.

44. Having considered the facts and the circumstances and the materials available on record, an inference can be reasonably drawn that in reality, the transaction was bogus and it was simply a sort of modus operandi to convert the undisclosed income into a long-term 'capital gain' claiming the same to be exempted."

18. On the contrary, in the case in hand the assessee produced all the relevant documentary evidence to establish the genuineness of the transaction which are otherwise independently verifiable being the documents in the shape of allotment advice, bank statements showing payment towards the purchase and sale receipts, Demat account statement reflecting the purchase, conversion and subsequent sale of shares, financial statements and books of account and the return of income relevant for the assessment year pertaining to year of purchase and year of sale, the contract notes reflecting the transaction executed as per price prevailing on the stock exchange. We therefore find that unless these documentary evidence are proved otherwise or any

contrary evidence brought on record, the assessee has discharged his onus to prove the transaction of purchase and sale of shares and consequential capital gain. Thus the decision of Hon'ble Gauhati High Court will not help the case of the department.

19. There is another decision of the jurisdictional **Hon'ble Rajasthan High Court** in case of **Pramod Jain** (supra) relied upon by the Id A/R where the Hon'ble High Court has referred to its earlier decision in case of **CIT vs. Smt. Pooja Agrawal** (supra) and has affirmed the findings of the Coordinate Bench and held that no question of law arises and has dismissed the appeal of the Revenue. The relevant findings of the Coordinate Bench are contained at para 6 to 8 as under:

"6. We have considered the rival submissions as well as relevant material on record. The assessee purchases 800 equity shares M/s Gravity Barter Ltd. for a consideration of Rs. 4 lacs the assessee has produced the purchase bill of the shares purchase from M/s WinallVinimay Pvt. Ltd. which shows that the assessee purchase 800 equity shares having face value of Rs. 10/- each M/s Gravity Barter Pvt. Ltd. in allots of 400 each for a consideration of Rs. 2 lacs each total amount to Rs. 4 lacs @ Rs. 500 per shares. The purchase price of Rs. 500 per share itself shows that it was not a transaction of purchase of penny stock. These shares were duly reflected in the balance sheet as 31.03.2011. The payment of the purchase consideration was made by the assessee vide cheque on 17.05.2011 which is evident from the bank account of the assessee at page 40 of the paper book. In the mean time the said M/s Gravity Barter Pvt. Ltd. changed its status from private limited to a public limited and fresh certificate was issued by the Registrar of company on 05.02.2011 which is placed at page 43 of the paper book. Therefore, there is no reason to disbelief the fact of fresh certificate issued by the Registrar of companies on 05.02.2011 and hence, the date mentioned in the order of the Hon'ble Kolkata High Court as 18.04.2011 appears to be typographical mistake. Even otherwise these two dates do not have any effect on the genuineness of the transactions of purchase of equity shares by the assessee of M/s Gravity Barter Pvt. Ltd. The assessee though produced all the relevant records and evidences right from the purchase bills, certificate issued by the Registrar about the change of name, the communication between the assessee and the seller of the shares and thereafter, the amalgamation of M/s Gravity Barter Ltd. with M/s Oasis Cine Communication Ltd. which was duly approved by the Hon'ble High Court vide order dated 28.8.2011. The assessee in the mean time got the physical share certificate dematerialized into Demat account on 16.02.2012. There is no reason to doubt the allotment of the shares to the assessee after amalgamation took place between M/s Gravity Barter Ltd. and M/s Oasis Cine Communication Ltd. and subsequent to amalgamation the assessee was allotted shares of M/s Oasis Cine Communication Ltd. on 04.02.2012. Hence, the allotment of 35,200 equity shares of M/s Oasis Cine Communication Ltd. cannot be doubted or disputed as these shares were issued post amalgamation and by a listed company. It is also not in dispute that these shares of M/s Oasis Cine Communication Ltd. were issued in exchange of the shares held by the assessee of M/s Gravity Barter Ltd. Therefore, once the shares issued by M/s Oasis Cine Communication Ltd. cannot be doubted then the holding of the shares of the M/s Gravity Barter Ltd. by the assessee correspondingly cannot be doubted because of the reasons that the shares of M/s Oasis Cine Communication Ltd. could be allotted only in exchange of shares of M/s Gravity Barter Ltd. The holding the shares of M/s Gravity Barter Ltd. and the allotment of shares M/s Oasis Cine Communication Ltd. are directly interconnected. In the absence of holding of

shares M/s Gravity Barter Ltd. the shares of the M/s Oasis Cine Communication Ltd. could not be issued or allotted to the assessee. Therefore, holding of the shares by the assessee at least at time of amalgamation took place and shares of the M/s Oasis Cine Communication Ltd. on 04.02.2012 cannot be doubted. Moreover, these shares were dematerialized by the assessee in the Demat account, therefore, on the date of allotment of share of M/s Oasis Cine Communication Ltd the assessee was holding these shares and prior to that the assessee was holding the shares of M/s Gravity Barter Ltd. on exchange of the same the shares of M/s Oasis Cine Communication Ltd. were issued to the assessee. The Assessing Officer has doubted the genuineness of the transactions however, once the holding of shares of the assessee at the time of the same were issued by M/s Oasis Cine Communication Ltd. is not in dispute then the holding of shares of M/s Gravity Barter Ltd. also cannot be dispute because of the fact that without holding of the same the shares of M/s Oasis Cine Communication Ltd. could not be issued to the assessee. Once, the shares were held by the assessee then, the question of genuineness of the transaction does not arise however, the purchase consideration can be doubted by the AO if the shares were claimed to have been purchased against consideration paid in cash which is not in case of the assessee. The assessee has paid purchase consideration through cheque and therefore, even if the said consideration is found to be very less in comparison to the sale price at the time of sale of shares in the absence of any material or other facts detected or brought on record by the AO that the assessee has brought back his own unaccounted money in the shape of long term capital gain and has used the same as a device to avoid tax, the purchase consideration paid by the assessee cannot be doubted in the absence of any corroborating evidence. The Assessing Officer has not disputed that the fair market value of the shares of M/s Gravity Barter Ltd. was more than the purchase price claimed by the assessee. It may be a case that ensuring merger/amalgamation of the said company with M/s Oasis Cine Communication Ltd. the assessee might have anticipated the exceptional appreciation in the share price due to extraordinary event of merger/ amalgamation. However, the same cannot be a reason for doubting genuineness of the transaction if the motive of purchase of the share is to earn an extraordinary gain because of some internal information available to the assessee.

7. In case of equity shares M/s Paridhi Properties Ltd. the assessee purchase 50,000 equity share on 26.03.2011 by paying share application money of Rs. 5 lacs which is duly reflected in the bank account of the assessee as paid on 28.03.2011. Therefore, the payment of share application money has been duly established by the assessee through his bank account for allotment of shares of 50,000 equity shares of M/s Paridhi Properties Ltd. The share allotted in private placement as per of Rs. 10/- cannot be termed as penny stock. The AO doubted that the entire process of application and allotment of shares as it have been completed within a short duration of 5 days, which in the opinion of the AO is not possible in ordinary course. However, when the assessee has produced the record including the share application, payment of share application money, allotment of share then merely because of a short period of time will not be a sufficient reason to hold that the transaction is bogus. The shares allotted to the assessee vide share certificate dated 31.03.2011 were dematerialized on 21.10.2011, therefore, on the date of dematerialization of the shares the holding of the shares of the assessee cannot be doubted and hence the acquisition of the shares of the assessee cannot be treated as a bogus transaction. Nobody can have the shares in his own name in demant account without acquiring or allotment through due process

hence, except the purchase consideration paid by the assessee holding of shares cannot be doubted when the assessee has produced all the relevant record of issuing of allotment of shares, payment of share application money through bank, share certificate and demat account showing the shares credited in the demat account of the assessee on dematerialization. The said company M/s Paridhi Properties Ltd. was subsequently merged with M/s Luminaire Technologies Ltd. vide scheme approved by the Hon'ble Bombay High Court order dated 27.07.2012. Hence, the assessee got allotted the equity shares of M/s Luminaire Technologies Ltd. as per swap ratio approved in the scheme and consequently the assessee was allotted 5 lacs share of Rs. 1/- each on M/s Luminaire Technologies Ltd. The evidence produced by the assessee leave no scope of any doubt about the holding of the shares by the assessee.

8. As regards the purchase consideration when the assessee has shown the share application money paid through his bank account and the AO has not brought on record any material to show that apart from the share application money paid through bank account the assessee has brought his own unaccounted money back as long term capital gain. It is also pertinent to note that the shares of M/s Oasis Cine Communication Ltd. are still held by the assessee in its demat account to the extent of 17,200 shares and therefore, the holding of the shares by any parameter or stretch of imagination cannot be doubted. The AO has passed the assessment year based on the statement of Shri Deepak Patwari recorded by the Investigation Wing of Kolkata however, the assessee has specifically demanded the cross examination of Shri Deepak Patwari vide letter dated 15.03.2016 specifically in paras 3 and 4 as reproduced by the AO at page No. 7 of the assessment order as under:-

"3. Since, the shares were allotted by the company through private placement after completing the formalities of ROC and were sold through the recognized Bombay Stock Exchange (BSE) there is no question of knowing individual persons or company official personally in the whole process, so the assessee is not in position to produce any one for cross examination before your good self. Since your good self has got the authority, we humbly request you to kindly issue the notice u/s 131 of the Income tax Act 1961 to the concerned individual persons or company officials for cross examination. Please note that the assessee is ready to bear the cost of their travelling in this regards.

4. As regard your opportunity given to us to read the recorded statement of Shri Deepak Patwari and to produce him from the cross examination before your good self, we have to submit that from the reading of the statements of Shri Deepak Patwari it is clear that he has never taken the name of the assessee, nor the assessee is aware of any Shri Deepak Patwari neither he has made any transaction with him, so in what capacity he can call him for cross examination before your good self. Since your good self has got the authority, we humbly request you to kindly issue the notice u/s 131 of the income Tax act 1961 to him also for cross examination. We also request your good self to kindly provide us the copy of statements of Shri Deepak Patwari along with the other relevant documents. Please note that the assessee is ready to bear the cost of his travelling in this regard."

It is manifest from the assessee's reply to show cause notice that the assessee had specifically demanded the cross examination of Shri Deepak Patwari however, the Assessing Officer did not offer the opportunity to the assessee to cross examine Shri Deepak Patwari. Further, the AO asked the assessee to produce the Principal Officers of the M/s Gravity Barter Ltd. and M/s Paridhi Properties Ltd. However, in our view if the

Assessing Officer wanted to examine the principal Officers of those companies he was having the authority to summon them and record their statements instead of shifting burden on the assessee. It is not expected from the assessee individual to produce the principal Officers of the companies rather the AO ought to have summoned them if the examination of the officers were considered as necessary by the AO. Hence, it was improper and unjustified on the part of the AO to asked the assessee to produce the principal Officers of those companies. As regards the non grant of opportunity to cross examine, the Hon'ble Supreme Court in case of Andaman Timber Industries vs. CCE (supra) while dealing with the issue has held in para 5 to 8 as under:

"5. We have heard Mr. Kavin Gulati, learned senior counsel appearing for the assessee, and Mr. K. Radhakrishnan, learned senior counsel who appeared for the Revenue.

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.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice."

Therefore, the statement of witness cannot be sole basis of the assessment without given an opportunity of cross examination and consequently it is a serious flaw which

renders the order a nullity. The Mumbai Special of the Tribunal in case of GTC Industries vs. ACIT (supra) had the occasion to consider the addition made by the AO on the basis of suspicion and surmises and observed in para 46 as under:-

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

Therefore, when the Assessing Officer has not brought any material on record to show that the assessee has paid over and above the purchase consideration as claimed and evident from the bank account then, in the absence of any evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. The Hon'ble Jurisdiction High Court in case of CIT vs. Smt. Pooja Agrawal (supra) has upheld the finding of the Tribunal on this issue in para 12 as under:-

"12. However, counsel for the respondent has taken us to the order of CIT(A) and also to the order of Tribunal and contended that in view of the finding reached, which was done through Stock Exchange and taking into consideration the revenue transactions, the addition made was deleted by the Tribunal observing as under:-

"Contention of the AR is considered. One of the main reasons for not accepting the genuineness of the transactions declared by the appellant that at the time of survey the appellant in his statement denied having made any transactions in shares. However, subsequently the facts came on record that the appellant had transacted not only in the shares which are disputed but shares of various other companies like Satyam Computers, HCL, [IPCL](#), BPCL and Tata Tea etc. Regarding the transactions in question various details like copy of contract note regarding purchase and sale of shares of Limtex and Konark Commerce & Ind. Ltd., assessee's account with P.K. Agarwal & co. share broker, company's master details from registrar of companies, Kolkata were filed.

Copy of depository a/c or demat account with Alankrit Assignment Ltd., a subsidiary of NSDL was also filed which shows that the transactions were made through demat a/c. When the relevant documents are available the fact of transactions entered into cannot be denied simply on the ground that in his statement the appellant denied having made any transactions in shares. The payments and receipts are made through a/c payee cheques and the transactions are routed through Kolkata Stock Exchange. There is no evidence that the cash has gone back in appellants's account. Prima facie the transaction which are supported by documents appear to be genuine transactions. The AO has discussed modus operandi in some sham transactions which were detected in the search case of B.C. Purohit Group. The AO has also stated in the assessment order itself while discussing the modus operandi that accommodation entries of long term capital gain were purchased as long term capital gain either was exempted from tax or was taxable at a lower rate. As the appellant's case is of short term capital gain, it does not exactly fall under that category of accommodation transactions. Further as per the report of DCIT, Central Circle-3 Sh. P.K. Agarwal was found to be an entry provider as stated by Sh. Pawan Purohit of B.C. Purihit and Co. group. The AR made submission before the AO that the fact was not correct as in the statement of Sh. Pawan Purohit there is no mention of Sh. P. K. Agarwal. It was also submitted that there was no mention of Sh. P. K. Agarwal in the order of Settlement Commission in the case of Sh. Sushil Kumar Purohit. Copy of the order of settlement commission was submitted. The AO has failed to counter the objections raised by the appellant during the assessment proceedings. Simply mentioning that these findings are in the appraisal report and appraisal report is made by the Investing Wing after considering all thematerial facts available on record does not help much. The AO has failed to prove through any independent inquiry or relying on some material that the transactions made by the appellant through share broker P.K. Agarwal were non-genuine or there was any adverse mention about the transaction in question in statement of Sh. Pawan Purohi. Simply because in the sham transactions bank a/c were opened with HDFC bank and the appellant has also received short term capital gain in his account with HDFC bank does not establish that the transaction made by the appellant were non genuine. Considering all these facts the share transactions made through Shri P.K. Agarwal cannot be held as non-genuine. Consequently denying the claim of short term capital gain (6 of 6) [ITA-385/2011] made by the appellant before the AO is not approved. The AO is therefore, directed to accept claim of short term capital gain as shown by the appellant."

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

20. Thus, it is clear that the Tribunal in the said case has analyzed an identical issue wherein the shares allotted in the private placement @ Rs. 10 at par of face value which were dematerialized and thereafter sold by the assessee and accordingly the Tribunal after placing reliance on the decision of Hon'ble Supreme Court in case of CCE vs. Andaman Timber Industries (supra) as well as the decision of Hon'ble jurisdiction High Court in case of CIT vs. Smt. Pooja Agarwal (supra) has held that when the Assessing Officer has not brought any material on record to show that the assessee has paid over and above purchase consideration as claimed and evident from the bank account then, in the absence of any evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. Similar in the case in hand the assessee has produced the relevant record to show the allotment of shares by the company by way of private placement of face value of Rs 10/- at a premium of Rs 10/- on payment of consideration by cheque and therefore, it is not a case of payment of consideration in cash. But the transaction is established from the evidence and record which cannot be manipulated as all the entries are part of the bank account of the assessee and the assessee dematerialized the shares in the D-mat account which is also an independent material and evidence cannot be manipulated. Therefore, the holding of the shares by the assessee cannot be doubted and the finding of the AO is based merely on the suspicion and surmises without any cogent material to show that the assessee has introduction his unaccounted income in the shape of long term capital gain. The aforesaid decision of the Hon'ble Rajasthan High Court thus supports the case of the assessee and being of the jurisdictional High Court is binding on this Tribunal.

21. Further the AO has discussed the abnormal rise in the share price of the shares of Sunrise Asian Ltd without any under lying fundamentals. The **Delhi Benches of the Tribunal** in case of **Mohan Lal Agarwal (HUF) vs ITO Ward (1)(4)** (ITA 2767/DEL/2018 order dated 26-11-2018) have held that Capital gains cannot be treated as bogus solely on the basis that the price of the shares has risen manifold and the reason for astronomical rise is not related to any fundamentals of market. If the transactions are duly proved by trading from stock exchange and the documentation is proper, the gains cannot be assessed as unexplained credit or as unexplained money. It was further observed that nowhere it has been found that assessee was in any manner found to be beneficiary of any accommodation entry under any inquiry or investigation and there is no material that any action has been taken by the SEBI against the company and the company has been black-listed or suspended from trading on account of price manipulation. Once all these transactions are duly proved by trading on stock exchange, then to hold the sale of shares as unexplained and bogus cannot be upheld. Similarly, in the instant case, we find that the AO has not brought on record any material or documentary evidence to show that the assessee has availed accommodation entry of bogus long term capital gains under any enquiry or

investigation rather the assessee has produced all relevant documentary evidence in support of his purchase and sale transaction through the stock exchange and there is nothing on record that the trading in the scrip has been suspended by SEBI on account of any price manipulation. We therefore find that the assessee satisfies the necessary ingredients and conditions as so specified in section 10(38) of the Act, in terms of transfer of long term capital asset by way of sale of equity shares on which STT has been paid, he shall therefore be eligible for exemption in respect of whole of the income so realized on transfer of such shares as the provisions of section 10(38) talks about any income arising from transfer of such long term capital asset which shall be exempt from tax.

22. Further, the **Mumbai Benches of the Tribunal** in case of **Vijayrattan Balkrishan Mittal vs. DCIT [2020] 121 taxmann.com 100 (Mumbai – Trib)** has again discussed this issue in threadbare in para 7 to 37 as under:-

"7. We have heard the rival contentions and gone through the facts and circumstances of the case.

8. Before us, the learned Counsel for the assessee Shri Madhur Aggarwal stated the fact that assessee purchased the shares of listed company and held them for more than one year. He sold his shares on Bombay stock exchange platform through his broker Geojit and STT was paid on sale transactions. Thus, all the conditions of Sec 10(38) of the Act are fully complied. Hence, assessee being eligible, rightly claimed exemption of Long Term Capital Gains under Section 10(38) of the Act. He stated that the AO nowhere in the assessment order pointed out nor discussed non fulfillment or non-compliance of any conditions of Section 10(38) of the Act. Hence, rejecting the claim under section 10 (38) of the Act without giving reasons is wrong and contrary to the provisions of law. He then stated that the CIT(A) also confirmed the action of the AO just on the basis of conjunctures and surmises. He assailed the orders of the lower authorities. He argued and pointed out that Section 10(38) of the Act was inserted by Finance Act 2 of 2004 providing for exemption to long-term capital gains arising on sale/ transfer or equality shares in listed company, or unit of an equity oriented fund provided such transactions have suffered securities transaction tax under the said Chapter. If shares of listed companies purchased are sold on the exchange platform within one year paying STT then gain or loss is treated as short term capital gain taxable at concessional rate of tax as per the provisions of Income Tax Act and if these shares are sold on stock exchange after holding for exceeding one year paying STT then resultant gain or loss is treated as long term gain/ loss which is exempt from tax u/s 10(38) of the Act.

9. He referred that to the order of the AO and that of the CIT(A) and stated that both the authorities did not accept the above referred evidences filed by the assessee in support of his claim and by relying on the general study report of the investigating wing rejected the claim and held that the entire transactions undertaken by the assessee were merely an accommodation entries taken for the purpose of securing bogus long term capital gains and to claim exempt income and consequently assessed the sale proceed as an unexplained cash credit under section 68 of the Act. The AO has referred to the findings in the general study report of the Investigation Wing of Kolkata and Mumbai, wherein it laid down the purported modus operandi of converting unaccounted money into exempt LTCG. It is stated that a person acquires shares of penny stocks trading at low price either through private placement or on merger of private limited

company of which such person is a shareholder with a penny stock company. Thereafter unaccounted money flows to operator's / exit providers who artificially raise the prices of penny stocks on stock exchange. Thereafter, the penny stocks are sold to earn huge exempt LTCG.

10. In regards to the present case the learned Counsel referred to the observations of AO regarding PAL script in his show cause notice:

"In the case of M/s Pine Animation Ltd, the Investigation Wing Mumbai has conducted a survey action on M/s Saraf Equity Services Pvt. Ltd. on 03.12.2015, an exit provider in script Pine Animation Ltd. During the course of survey proceedings, statement on oath of Shri. Mandar Dilip Naik, Director of M/s. Saraf Equity Services Pvt. Ltd. was recorded wherein he has stated that M/s. Saraf Equity Services Pvt. Ltd. has indulged in providing exit to the beneficiaries in collusion with operator for making bogus LTCG transactions for a commission of 1%.

Further, on verification of the script M/s Pine Animation Ltd. it is seen that the other exit providers i.e. Dhriti Traders Pvt. Ltd, Dream valley Trading Pvt. Ltd., Dwarka purl Constructions P Led, Olympia Sales Agencies P Ltd, Particle Industries P Led, Signet Vinimay P Ltd, WinallVinimay P Ltd and Spice Merchants P Ltd have purchased shares of M/s Pine Animation Ltd to provide accommodation entry in the terms of LTCG. These entities are operated by entry operators whose statement has been recorded by the Investigation Wing wherein they have stated that they are an entry operator and is into the business of providing accommodation entries by managing and controlling various bogus entities, either directly or through his dummy directors."

AO observed that the persons listed above in the notice have purchased the shares of PAL and are exit providers and entry operator and are in the business of providing accommodation entries and relied upon their statements viz. Anil Khemka, Sanjoy Dey & Mandar Naik (director of Saraf Equity). The relevant observations in the assessment order reads as under: -

Para 7.2: "The assessee has mainly traded in mainly in one script during the year which is suspicious"

Para 7.3: "As discussed above, the assessee traded in single scrip and has made huge profits."

Para 9: "Further, a SEBI order has been passed in the case of Pine Animation Ltd order vide dated 08.05.2015 which directs that the trading in the securities of shall be suspended till further directions.....The shares are sold by the beneficiaries have been purchased by paper/ bogus entities (e)it providers).

Para 11.3:to prove genuineness, proof of physical transfer of shares, reasons to trade off-market when options to online market trading through demat account were available, trading pattern of market transactions for the last three years, have not been submitted to this office Submissions on above:

11. The learned Counsel argued that the findings of the Investigation Department are general in nature and it is basically a study report and not known which cases are investigated. As understood from the assessment order the assessee's name or his transactions are not referred in such reports and the AO has not established any link between that report and assessee's transactions. This is also fatal as reliance on such investigation report, without confronting the assessee with the same, renders the assessment bad in law. The Investigation in assessee's case by way of search did not reveal any connection with the findings or evidences as referred to in such reports.

12. He stated that the statements of Anil Khemka & Sanjay Dey and Mandar Naik relied upon the AO does not establish that the assessee has paid any unaccounted money to these parties. None of the replies to the question posed indicate that they received any unaccounted money from the assessee or that they received or utilized the unaccounted money received from the assessee with reference to shares of PAL. It is also not established that they had any arrangement or dealings or relation with the assessee leave apart the alleged accommodation or exit provided who has not stated any dealing with them against the principles of natural justice. Further, as regards the parties listed by AO in the assessment order (abstract reproduced above) as exit providers and entry operators i.e. Dhriti Traders Pvt. Ltd., Dream valley Trading Pvt. Ltd, Dwarkapuri constructions P Ltd, Olympia Sales Agencies P Ltd, Particle Industries P Ltd, Signet Vinimay P Ltd, WinallVinimay P Ltd, Spice Merchants P Ltd and Saraf Equity Services Pvt. Ltd., the assessee categorically denied the same and confirmed that, he did not know or had any relation with any of the above said parties and he never dealt with or had any business or personal relations with any of them. He further confirmed that as he did not know them, hence knowing their business or activities is out of question.

13. He argued that the assessee has neither taken exit nor accommodation entries from any party for purchase or sale of shares of the company, nor has any evidence provided by AO nor statements of such persons revealed any dealing with the assessee. All transactions done by the assessee are through BSE and Bank account in the normal course. Even otherwise also the statement of the persons referred by the AO as exit or accommodation providers (Anil Khemka, Sanjay Dey & Mandar Naik) were not recorded in the presence of assessee nor has he been provided to cross examine them before using these statements against the assessee. Hence reliance on such statements made in back of assessee cannot be admissible as evidence and makes the assessment order invalid. In the present facts, the assessee at first was allotted shares through preferential issue by the Company. The allotment of shares by the Company was made after obtaining prior approval of BSE as per SEBI Issue of Capital and Disclosure Requirements Regulation, 2009. The sale of shares of PAL is through a reputed broker Geojit. All necessary supporting evidence have been submitted to establish the genuineness of the transactions. On investigation, the role of Geojit was not found to be suspicious or questionable. Therefore, reliance on the findings of the Investigation Wing in some other cases which bears no connection with the case of the assessee irrelevant.

14. It was contended further that there is no evidence that implicate the assessee to have entered into any arrangement with any operators /exit providers or involvement of unaccounted money. The assessee took strong objections to AO linking him or his transactions with so called alleged exit providers and accommodation entry providers

without any evidence or involvement mentioned in such investigation reports and statements of such persons. The seamless process of transactions at BSE as explained hereafter does not identify and provide us the identity of persons who have purchased those shares sold by assessee. The assessee has ordered his broker to sell the shares of PAL who in turn sold the shares on BSE platform. The assessee/his broker were not aware about the buyers or their brokers who purchased the shares of PAL sold by the assessee. The allegation of AO in para 7.2 and 7.3 of the Assessment order that that the assessee mainly traded in one script (PAL) which is suspicious is completely incorrect and not supported by facts. During FY 2014-15 (AY 2015-16) the assessee also traded in following scripts:-

STCG:

ICICI Bank, b) Guj NRE, c) Gitanjali Gems, d) HFCL. E) Wondrella, f) Hind Motors, g) Tata Chem, h) Cr. Griev., i) Coal India, j) Unitech, k) Infosys, L) Tech Mahindra, m) HCL Techno

LTCG:

Pine animation, b) Sundaram Inv. C) Care rating, d) Kolte Patil, e) IDEA, f) Balmer Lawr, g) S. Clayton, h) GFL Finance, i) Sun Pharma

15. Further, the learned Counsel also narrated the fact that the assessee also incurred losses in few scripts out of the above. With regard to the observations of AO in Para 9 relating to suspicion for trading in PAL shares by SEBI vide ad-interim ex-parte order dated 08.05.2015, it was argued that the assessee and his wife along with more than 100 others entities were exonerated of all allegations as detailed in ad-interim exparte order for manipulation of price and volume of the script and also any arrangement by the assessee with the company or its promoters, exit providers, or SEBI Regulations etc. vide SEBI in its Final Order dated 19.09.2017.

16. The learned Counsel further narrated that the allegation of AO in para 11.3 that proof of physical transfer of shares, reasons for off market trading and trading pattern of market transactions for the last three years have not been submitted is also unfounded and contrary to the facts. The assessee during course of assessment submitted complete documents of preferential allotment of shares and trading in shares of seven years vide its reply dated 23.11.17. There was no physical transfer of shares during the year under appeal except one in which company has bought back shares of Sundram investment for Rs. 5,257/-. Therefore, observations regarding off market trading are absolutely wrong and contrary to the facts.

17. Ld Counsel for the assessee explained the process at Stock Exchange Network, which is filed in the shape of note as under: -

"> As per Stock Exchange Regulations, shares or securities of any of the listed companies who has signed listing agreement with SE are dealt on the stock exchange platform through a registered broker only. The purchase and sale transactions on the stock exchange (SE)platform are with the stock exchange and settled through the clearing system and payment is received from brokers or paid to brokers online to or by the exchange clearing system.

> When any customer orders the broker to sell any script, the stock broker sells the shares on trading system through the exchange terminal and generate contract note. On sale, the shares are delivered from the customer's demat a/c to the stock broker's demat a/c who in turn transfers the shares to stock exchange pool a/c, who on settlement day delivers to the buyer's demat a/c. On the other side, the buyer pays the price as per contract note to his broker who pays to the SE who then transfers the amount to the seller's broker on settlement day. Thus, the seller and the buyer or their brokers does not have direct relation nor dealing with each other. Nor they know the buying or selling parties or the brokers. The customers deal with their respective brokers and brokers deal with SE or the clearing system.

> In nutshell, the buyer's broker makes payment to SE and seller's brokers deliver shares to the SE. Thereafter, settlement is done by clearing system and transfer of amounts online to seller's brokers bank account and shares to buyer's brokers demat account who in turn pays to the sellers and transfers shares to the demat account of the buyer. Hence sellers and buyers does not deal directly or come in contact nor their broker come in direct contact and neither of them know the contra party.

> The whole system of buying and selling of shares done on the stock exchange platform is faceless and SE platform deal with brokers only and parties deal with their brokers. For example, shares sold by X through its broker bought by ABCD broker for XYZ or vice a versa are not known to each other. Even the broker does not know, the shares sold by him are delivered to which brokers or which buyer. The broker can act only for the parties who are registered with him after necessary KYC and due diligence. Nobody can directly deal in shares on stock exchange."

18. Further, the learned Counsel stated that the assessee has sold these shares through his broker Geojit who is registered broker of Bombay Stock Exchange (BSE), National Stock Exchange (NSE) and other exchanges. The broker Geojit is an old and reputed share broker and is in this business for years. The assessee is dealing with it for more than 10 years and sold equity shares of PAL on BSE platform through his regular broker Geojit and delivered the shares from his demat account and received sale proceeds directly in his designated bank account as explained in the facts of the case. STT, brokerage, Stamp duty, SEBI and other charges were duly paid on transactions done on BSE platform. The AO has accepted all the documents filed by the assessee without any doubt on its authenticity or genuineness. The relevant documents and evidence of these transactions are also submitted before us. The broker Geojit also does not know to whom the shares were sold. Only SEBI or stock exchange knows who bought these shares and these authorities do not supply such information unless called by Government Authority. Therefore, the assessee or his broker did not have any record or knowledge of the purchasers at the time of sale. However, during the course of investigation by SEBI, the information was supplied by BSE to the assessee in the form of a CD to offer his reply on the ex-parte order issued by SEBI on 08.05.2015. From the CD, the assessee came to know that his shares of PAL were bought by 50 buyers through multiple brokers. The delivery of shares is given to Geojit by the assessee from his demat account. Copy of demat statement is already filed in assessee paper book before us. The broker in turn transfers the shares to BSE Clearing account. The sale proceeds of sale of shares is settled by exchange settlement system and directly

credited to broker's bank accounts by the BSE and the assessee received payment from Geojit i.e. directly into his designated bank account. Copy of bank statement is filed in assessee's paper book (APB).

19. Further, the assessee has no connection or nexus with the buyers as also the activities of the buyers. Even if the buyers are doubtful or of suspicious character that does not affect the transactions of sale of shares by the assessee through proper channel i.e. on the recognized stock exchange through the registered broker and payments were received. He argued that during search itself and in the course of investigation the department had made exhaustive survey and enquiry for these transactions from Geojit and other brokers and nothing incriminating was found against the assessee. The details, documents and third party evidences supporting the sale transactions and payments received have been filed by the assessee. The transactions were done at prices prevailing on the date of transaction and STT was paid on such transactions cleared through exchange clearance system.

20. The learned Counsel further referred to SEBI Investigation in case of PAL. It was argued that in case of PAL, the whole time member of SEBI the market regulator, on a preliminary report of its surveillance department has passed ad interim exparte order no. WTM/RKA/ISD/36/2015 dated 08.05.2015 against PAL and 177 entities including assessee. However, despite no charge against the assessee, the whole time member of the SEBI confirmed the ex-parte order vide passing Confirmatory order no. WTM/RKA/ISD/61/2016 dated 02.06.2016. The assessee went in appeal before the Securities Appellate Tribunal against the confirmatory order of the SEBI. While the assessee's appeal with SAT was at hearing stage, the investigation department of the SEBI completed investigation in PAL and passed final order vide order no. SEBI/WTM/MPB/EFDI-DRA-III/28/09/2017 dated 19.09.2017. Relevant para no.9, 10, and 11 of SEBI order are reproduced herein below:

"9) "Upon completion of investigation by SEBI, the following are noted as regards 14 entities who were identified as Preferential Allottees, Exit providers and LTP Contributors vide the interim order:

SEBI's investigation did not find any adverse evidence against them to show any connection / nexus with PAL or its Promoters/ Directors or Promoter related entities or any role in price manipulation volume manipulation in the scrip of PAL. Hence, violation of provisions of SEBI Act, SCRA, PSUTP regulation, etc. were not observed in respect of the following 114 entities.

.....21. Mahendra B Mittal

.....32. Pooja Mahendra Mittal

and other 112 entities as per SEBI order

10) "Considering the fact, that there are no adverse findings against the aforementioned 114 entities with respect to their role in the manipulation to the scrip of PAL, I am of the considered view that the directions issued against them vide interim order dt 08.05.2015 which were confirmed vide Orders dt. June 02, 2016, July 05, 2016, August 22, 2016 and June 02, 2017 need not be continued."

11) In view of the foregoing, I in exercise of the powers conferred upon me under Section 19 of SEBI Act, 1992 read with section 11, 11(4) and 11B of the SEBI Act, hereby revoke the Confirmatory Orders dt.02.06.2016, 05.07.2016, 22.08.2016 and 02.06.2017 qua aforesaid the 114 entities with immediate effect."

21. Thus, the SEBI's final order dated 19.09.2017 clearly came to the conclusion that SEBI's investigation did not find any adverse evidence against the 114 entities including the assessee and given finding that the assessee has no connection/nexus with PAL or its promoters/directors or promoters related entities nor any role in price manipulation, volume manipulation in the script of PAL. No violation of provisions of SEBI Act, SCRA, PFUTP regulation's, etc. were observed in respect of 114 entities (including the assessee). The list of 114 entities referred in the SEBI Order also includes following alleged exit providers discussed in show cause notice and referred to in the assessment order as under: -

Sr. No.Name of Exit Provider

121 Dhriti Traders PL
127 Dreamvalley Trading FL
162 Signet Vinimay PL
165 Spice Merchants FL
172 WinallVinimay P L

22. These alleged exit providers were also exonerated by the SEBI Order and the remaining alleged exit providers viz. 1) Dwarkapuri Constructions P Ltd., 2) Olympia Sales Agencies P Ltd. and 3) Particle Industries P Ltd. were neither referred in the SEBI ex-parte order dated 08.05.2015 nor in the final order dated 19.09.2017 which goes to prove that neither the assessee nor the exit providers alleged by the AO were involved in any arrangement or accommodation and hence , allegations of AO are wrong and without any evidence. Copies of SEBI ad-interim ex-parte order dated 08.05.2015, confirmatory order dated 02.06.2016 and final order dated 19.09.2017 are enclosed at pages 217-277 of APB. Subsequently, the SAT disposed-off the appeal of the assessee as infructuous and passed order accordingly vide order no. nil dated 26.09.2017. Copy enclosed at pages 278-283 of APB.

23. In view of the above the assessee has been exonerated by SEBI in the case of PAL stating that he had no nexus/ connection or collusion with the company, its directors, or promoters and was not involved in price manipulation & volume manipulation, etc. Further, the alleged exit providers for the script have not played any role in assessee's transactions in the script as he has neither taken any accommodation nor entry or exit from any of the alleged parties.

24. On the other hand, the learned CIT DR Shri Manjunatha Swami, argued that the entire transaction is bogus. He stated that he is relying on the elaborate order written by the AO and that of the CIT(A).

25. We have noted that PAL made a preferential allotment of equity shares in the year 2013. The assessee on application for shares was allotted the same at Rs. 10 per share.

The company had split the face value of its shares in 2013. Due to this, assessee received 15,00,000 shares against 1,50,000 shares allotted earlier. The assessee acquired the shares on the basis of guidance from his father and friends. The purchase and sale of shares was neither pre-planned nor under any arrangement with the company or any party related to it. The allotment of shares by PAL was made after obtaining prior approval of BSE as per SEBI Issue of Capital and Disclosure Requirements Regulation, 2009. We noted from the facts that as per the financials provided in the assessment order, it can be seen that the company had incurred a loss in FY 11-12 of Rs. 7 lakhs and has earned profit of 16 lakhs in FY 12-13. The fact that PAL was turned from loss making to profit earning itself demonstrates the fact that there was potential in PAL due to which the assessee purchased the shares. Further, the turnover, in the FY 2013-14 increased by 10 times as compared to the preceding previous FY and increase in the net profit after tax was almost around 4 times than that of the net profit recorded in the year of purchase. Moreover, the prices of the company were almost constant for a year. When the assessee thought that the prices had reached its peak, he slowly sold all the shares in a time span of 3 months. To prove the genuineness of the transactions, the assessee provided all the supporting evidences like, share application form, bank statement highlighting the transactions, contract notes, broker's ledger, demat statement Form 10DB, SEBI's final order, SAT Order, etc.

26. However, the AO made addition under section 68 of the Act and CIT(A) confirmed the addition by ignoring all the facts and evidences and without providing any proof of assessee's involvement in the manipulation of price or volume of the shares of the company or pointing out any defect or deficiency in the process of transactions or its eligibility to deduction u/s 10(38) of the Act. We noted that the AO in his Assessment Order in para 7 and 8 has exhaustively mentioned in detail the financials of PAL, preferential allotment of shares, price of PAL, Exit providers, etc. Following paras have been ditto /copied from SEBI ad-interim ex-parte order dated 08.05.2015. Although after Investigation, SEBI in its final order exonerated the assessee and the alleged exit providers but the AO failed to consider the SEBI final order in the assessment order. It means that the AO and CIT(A) also relied on the order of SEBI dated 08.05.2015 mainly for drawing inferences and deciding the issue on the basis of conjunctures and surmises and not on evidences.

27. In view of the above, we noted that it is SEBI who monitors and regulates the stock exchanges & stock market and when their investigation did not reveal any price or volume manipulation by the assessee and these transactions are in the normal course through proper & legal channels. Then the allegations of the IT Department fall flat and denial of deduction u/s 10(38) of the Act is arbitrary and addition of sale proceeds of shares of PAL u/s 68 is against the provisions of Act. The assessee in his reply dated 20.11.2017 submitted to the AO that the allegations mentioned in paras of show cause notice are based entirely on SEBI ad-interim ex-parte order dated 08.05.2015 which was reversed after detailed investigation wherein SEBI has exonerated the assessee of all the allegations without any qualification. A copy of SEBI Final order dated 19.09.2017 was also enclosed with the APB. But the AO has failed to refer to assessee's submissions and SEBI's final order dated 19.09.2017 in the assessment order inspite of the fact that assessee's submissions and SEBI's final order were already on its record thereby contravening the principles of natural justice.

28. We also noted that as per provisions of section 68 of the Act, where any sum is found credited in the books in any previous year and assessee offers no explanation about the nature and source thereof or the explanation offered is not satisfactory to the AO, the sum credited may be charged to tax under Sec. 68 of the Act. The assessee is required to prove: (i) the identity of the creditor (ii) Source of the credit and (iii) genuineness of the transaction to the satisfaction of the AO. To prove the identity of the creditor, the nature of transactions, source of payments and the genuineness of the transactions of sale of shares of PAL, the assessee has submitted following documents/evidences: -

a) To prove the identity of creditor and nature of transaction the assessee submitted copy of Contract note on sale by Geojit on BSE platform. The contract notes shows the quantity, rate, time stamp, value, taxes and charges viz. STT, brokerage, SEBI and exchange turnover charges, service tax and stamp duty incurred on all the transactions done on BSE platform, a stock exchange recognized by the market regulator SEBI. The documents have been accepted by the AO.

b) Bank statement showing sale proceeds credited by the broker Geojit. Demat account of the assessee showing sold shares debited / transferred to broker.

c) The sale consideration is received by assessee from Geojit, a registered broker of SEBI/BSE, with who has been dealing with Geojit for more than 10 years as per contract note directly in the bank account after shares are delivered from demat account and received by the assessee. Copy of demat account and bank statements where sale proceeds are received are submitted as discussed above. Geojit has also been examined and interrogated by the Investigation Department during search proceedings. Geojit's source is BSE settlement system. This explains identity of the creditor and source of money paid by assessee for genuine transaction of sale of shares.

d) Sale is done at prevailing price quoted on the BSE. (BSE published quotations daily and rate list of the relevant dates can be produced if required)

e) The shares are sold by assessee's broker on BSE platform and not off market to any buyer hence source is BSE's clearing system and broker. The transactions on the BSE platform and settlement system who are responsible for the transactions of the demat account and prevailing price on public domain prove the genuineness of the transactions.

f) SEBI's final order dt. 19.09.2017 relating to PAL is enclosed. SEBI after detailed investigation into the transactions in the shares of these companies held that the parties to the investigation including assessee and alleged exit providers are having no nexus or connection with the company, their directors, promoters etc. and there is no price or volume manipulation in these scripts. This also explains the genuineness of the transactions and discards the theory of manipulation or accommodation to take tax advantage illegally.

29. We have also noted the facts further that the assessee has received total amount of Rs. 14,16,80,449/- on account of sale of shares of PAL during the year, in the account with Axis Bank from Geojit, registered broker of BSE with whom the assessee is dealing from last more than 10 years. The assessee has been regular investor in shares & securities and his portfolio comprises of various shares and the aggregate value of investments for 5 years have been as under: -

<u>AY (as on date)</u>	<u>Total investment</u> <u>in shares – Amount (in Rs.)</u>
31.03.2011	3,77,21,394
31.03.2012	3,33,40,018
31.03.2013	2,66,87,649
31.03.2014	2,91,24,876
31.03.2015	2,58,84,431

Copies of Balance Sheet of the assessee for the above mentioned years showing the investments made in shares were submitted to the AO vide submission dated 15.03.17 as well as before CIT(A) and even now before us. This adds to the bonafide of the assessee's transactions. In view of the above facts and circumstances of the case, we have to go through the expression of "nature and source" and has to understand the requirement of identification of the source and its genuineness. Sec. 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, source of the credit, evidences of the transactions to prove the genuineness, the assessee is said to have discharged his initial burden. In view of the above, we are of the view that 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 PAL 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, 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 cannot sustain. The findings of investigation & modus operandi in other cases narrated by the AO and also CIT(A) 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 directions 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 his onus by establishing the identity of the payer, source of the credit and genuineness of the transactions.

30. We noted that the learned CIT Departmental Representative also relied on the decision of the Hon'ble Bombay High Court, Nagpur Bench in the case of Sanjay Bimalchand Jain vs. Pr. CIT (2018) 89 taxmann.com 196 (Bom), wherein the decision on the impugned issue was discussed. Hon'ble High Court has considered the facts of Sanjay Bimalchand Jain supra from where we find that (i) in that case, the broker company through which the shares were sold did not respond to AO's letter regarding the names and address and bank account of the person who purchased the shares sold by the assessee (ii) Moreover, at the time of acquisition of shares of both the companies by the assessee, the payments were made in cash (iii) The address of both the companies were interestingly the same (iv) The authorized signatory at both the companies were also the same person (v) The purchase of shares of both the companies was done by that assessee through broker, GSSL and the address of the said broker was incidentally the address of the two companies. Based on these crucial facts, the Hon'ble Bombay High Court rendered the decision in favour of the revenue. None of these factors were present in the facts of the assessee before us. Hence it could be safely concluded that the decision of Hon'ble Bombay High Court supra is factually distinguishable.

31. Now we will discuss the modus operandi, preponderance of probability and human behavior. We noted that the AO as well as CIT(A) have rejected all evidences filed by the assessee by referring to 'Modus Operandi' of persons for earning long term capital gains which is exempt from Income tax under section 10(38) of the Act. All these observations are general in nature and are applied across the board to all including the assessee. Specific evidences produced by the assessee are not controverted by the revenue authorities. No evidence collected by the AO from third parties is confronted to assessee. No opportunity of cross-examination of persons, on whose statements the revenue relies to make the addition, it provided to the assessee. The addition is made based on a general report from the investigation wing.

32. The issue for consideration before us is whether in such cases, the legal evidence produced by the assessee has to guide our decision in the matter or the general observations based on statements, probabilities, human behavior and discovery of the modus operandi adopted in earning alleged bogus LTCG and STCG, that have surfaced during investigations, should guide the authorities in arriving at a conclusion as to whether the claim is genuine or not. An alleged scam might have taken place on LTCG etc. But it has to be established in each case, by the party alleging so, that this assessee in question was part of this scam. The chain of events and the live link of the assessee's action giving his involvement in the scam should be established. The allegation implies that cash was paid by the assessee and in return the assessee received LTCG, which is exempt from income tax, by way of cheque through banking channels. This allegation that cash had changed hands has to be proved with evidence, by the revenue. Evidence gathered by the Director Investigation's office by way of statements recorded etc. has to also be brought on recording each case, when such a statement, evidence etc. is relied upon by the revenue to make any additions. Opportunity of cross examination has to be

provided to the assessee, if the AO relies on any statements or third party as evidence to make an addition. If any material or evidence is sought to be relied upon by the AO, he has to confront the assessee with such material. The claim of the assessee cannot be rejected based on mere conjectures unverified by evidence under the pretentious garb of preponderance of human probabilities and theory of human behavior by the department.

33. 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. The evidence based on which the DDIT report is prepared is not brought on record by the AO nor is it put before the assessee. The submissions of the assessee that he is just an investor and as he received some tips and he chose to invest based on these market tips and had taken a calculated risk and had gained in the process and that he is not party to the scam 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.

34. In our view, just the modus operandi, generalisation, 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 assessee. 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 interference 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 we refer 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 generalisation. Courts of law are bound to go by evidence.

35. But in the present case, we noted that the assessing officer has been guided by the report of the investigation wing prepared with respect to bogus capital gains transactions. 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 pan 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 evidences the matter would be sent to the assessment wing to assess the income as per law. We find no such action 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. 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.

36. The Hon'ble Supreme Court way back in the case of Lalchand Bhagat Ambica Ram v. CIT [1959] 37 ITR 288 (SC) held that assessment could not be based on background of suspicion and in absence of any evidence to support the same. The Hon'ble Court held: "Adverting to the various probabilities which weighed with the ITO might be observed that the notoriety for smuggling food grains and other commodities to Bengal by country boats acquired by 'S' and the notoriety achieved by 'D' as a great receiving centre for such commodities were merely a background of suspicion and the appellant could not be tarred with the same brush as every arhatdar and grain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf. The mere possibility of the appellant earning considerable amounts in the year under consideration was a pure conjecture on the part of the ITO and the fact that the appellant indulged in speculation (in Kalai account) could not legitimately lead to the inference that the profit in a single transaction or in a chain of transactions could exceed the amounts, involved in the high denomination notes,—this also was a pure conjecture or surmise on the part of the ITO. As regards the disclosed volume of business in the year under consideration in the head office and in branches the ITO indulged in speculation when he talked of the possibility of the appellant earning a considerable sum as against which it showed a net loss of about Rs. 45,000. The ITO indicated the probable source or sources from which the appellant could have earned a large amount in the sum of Rs. 2,91,000 but the conclusion which he arrived at in regard to the appellant having earned this large amount during the year and which according to him represented the secreted profits of the appellant in its business was the result of pure conjectures and surmises on his part and had no foundation in fact and was not proved against the appellant on the record of the proceedings. If the conclusion of the ITO was thus either perverse or vitiated by suspicions, conjectures or surmises, the finding of the Tribunal was equally perverse or vitiated if the Tribunal took count of all these probabilities and without any rhyme or reason and merely by a rule of thumb, as it were, came to the conclusion that the possession of 150 high denomination notes of Rs. 1,000 each was satisfactorily explained by the appellant but not that of the balance of 141 high denomination notes of Rs. 1,000 each."

37. The observations of the Hon'ble Apex Court are equally applicable to the case of the assessee. The AO and CIT(A) both, having failed to bring on record any material to prove that the transactions of the assessee were collusive transactions could not have rejected the evidences submitted by the assessee. In fact, in this case nothing has been found against the assessee with aid of any direct evidences or material against the assessee despite the matter being investigated by various wings of the Income Tax Department and hence under these circumstances nothing can be implicated against the assessee. In view of the above, the findings / allegations of the AO and CIT(A) are baseless, without any evidence, contrary to the facts and circumstances of the case and provisions of the Act. Hence, we delete the addition made by the AO by setting aside the order of Id. CIT(A) based upon such findings. This common issue as regards to addition under section 68 of surplus arising out of sale of shares of listed companies and consequent addition under section 69C on the presumption that commission at the rate of 3% was paid is hereby deleted. Accordingly, this common and interconnected issue of the four assessee's appeals is allowed."

23. In the aforesaid decision, it has been held that it is SEBI who monitors and regulates the stock exchanges & stock market and when their investigation did not reveal any price or volume manipulation by the assessee and these transactions are in the normal course through proper & legal channels. Then the allegations of the IT Department fall flat and denial of deduction u/s 10(38) of the Act is arbitrary and addition of sale proceeds of shares of PAL u/s 68 is against the provisions of Act. In the case in hand, the Id. AO has referred to SEBI enquiry against M/s Sunrise Asian Ltd. However, we note that the said enquiry was regarding failure to comply with certain disclosure requirements and therefore, the subject matter of the enquiry has no connection with the transaction of bogus long term capital gain and has no bearing in judging the genuineness of the transaction undertaken by the assessee or for that matter, the price and realization on sale of shares so undertaken by the assessee through the stock exchange. Further, it has been held in the aforesaid case that the findings of investigation & modus operandi in other cases narrated by the AO and also CIT(A) 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 directions etc and 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. In the instant case, as we have discussed earlier, there is no finding which proves assessee's connection, involvement or collusion with so called accommodation entry providers. Further in the aforesaid case, the issue as to whether the legal evidence produced by the assessee has to guide our decision in the matter or the general observations based on statements, probabilities, human behavior and discovery of the modus operandi adopted in earning alleged bogus LTCG and STCG, that have surfaced during investigations, should guide the authorities in arriving at a conclusion as to whether the claim is genuine or not has been discussed at length. And referring to legal proposition laid down by the Hon'ble Supreme Court that the burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidence held that the modus operandi, generalisation, 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. We are in complete agreement with the said view and in the instant case, we find that evidence produced by the assessee in support of his claim of purchase and sale of shares on the stock exchange have not been refuted by any adverse findings or material which could demonstrate involvement of the assessee or collusion with so called accommodation entry providers to obtain bogus LTCG as so alleged by the authorities below.

24. We also find that while analyzing sale of shares of similar scrip of M/s Sunrise Asian Ltd and claim of exemption of long term capital gains u/s 10(38), the Mumbai Benches of the Tribunal in case of **Anraj Hiralal Shah (HUF) vs ITO** (supra) has upheld the claim of the assessee's claim of exemption under section 10(38) of the Act and the relevant findings of the Coordinate Bench contained at Para 8 read as under:-

"8. The assessee has earned speculation profit in the immediately preceding year through M/s Eden Financial Services also and the said profit has been used to purchase the shares of M/s Sunrise Asian Ltd. The assessee has offered the speculation profit for income tax purposes in the immediately preceding year and it has been accepted. Further the assessee has shown the purchase of impugned shares as investment in the Balance Sheet. Hence the purchase of shares has been accepted. Further the shares have been received in the D-mat account of the assessee and they have been sold through the D-mat account only. Hence the delivery of shares also stand proved. The AO has not brought any material on record to show that the assessee was part of fraudulent price rigging. Accordingly, in the absence of any evidence to implicate the assessee or to prove that the transactions are bogus, I am of the view that the capital gains declared by the assessee cannot be doubted with. In that view of the matter, the addition made towards expenses is not also sustainable."

25. In light of above discussions and in the entirety of facts and circumstances of the case and following the decisions of the Hon'ble jurisdictional High Court and of that of the Coordinate Benches in cases referred supra, we are of the considered view that the assessee has discharged the necessary onus cast on him in terms of claim of exemption of long term capital gains u/s 10(38) of the Act by establishing the genuineness of transaction of purchase and sale of shares and satisfying the requisite conditions specified therein and the gains so arising on sale of shares therefore has been rightly claimed as exempt u/s 10(38) of the Act. Accordingly, in the facts and circumstances of the case, we set-aside the order of the Id. CIT(Appeals) and the claim of the assessee u/s 10(38) is allowed. The matter is thus decided in favour of the assessee and against the Revenue. In the result, the ground of appeal so taken by the assessee is allowed.

5.5 Though there are series of other decisions wherein identical issue has been considered and decided in favour of the assessee however, we do not reproduce those decisions for the sake of brevity. Accordingly in the facts and circumstances of the case as discussed above as well as by following decisions of Hon'ble

jurisdictional High court as well as Coordinate Bench of this Tribunal we hold that the assessee has established without any doubt the genuineness of transactions of purchase and sale of shares with undisputed supporting evidences and therefore, addition made by the AO on account of long term capital gain claimed as exempt u/s 10(38) of the Act is unwarranted and the same is deleted.

6. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 24.09.2024.

Sd/-
(B.M. BIYANI)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

Indore, 24 .09.2024
Patel/Sr. PS

Copies to: (1) *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore