

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER  
AND SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA No.2308/Mum/2024  
Assessment Year: 2011-12**

ACIT 4(1)(1), Mumbai	Vs.	Ankur Agrawal  2401, 2402, Anmol Pride, Opp. Patel Auto Petrol Pump, Off SV Road Goregaon West, Mumbai- 400062.  PAN: AKOPA 7201 P
(Appellant)		(Respondent)

Assessee by : Shri Neelkanth Khandelwal  
Revenue by : Shri Ajay Chandra, CIT, DR

Date of Hearing : 11.09.2024  
Date of Pronouncement : 25.10.2024

**ORDER**

**PER AMARJIT SINGH, ACCOUNTANT MEMBER:**

This appeal of the revenue for the assessment year 2011-12 is directed against the order u/s 250 of the Income-tax Act, 1961 dated 08.03.2024 passed by the Id. Commissioner of Income-tax (Appeal), NFAC, Delhi. The revenue has raised the following grounds of appeal:

*"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) is justified in deleting the addition made was 68 of the Income-tax Act, 1961 for shares of Splash Media & Infra Ltd. and M/s JMD Telefilms Ltd. amounting to Rs. 26,70,49,716/- without appreciating the fact that via the findings of the search/survey proceedings, inquiries conducted in the case of the assessee, brokers, operators and the entry providers it was established that these shares are penny stocks and have been used for providing bogus LTCG/STCL to various beneficiaries?"*

2. Whether on the facts and circumstances of the case and in Law, the Ld. CIT (A) has erred in allowing the appeal of Assessee without appreciating the facts that during the course of assessment proceedings, the AO had established in the assessment order that LTCG on the sale of shares of *Splash Media & Infra Ltd.* and *M/s JMD Telefilms Ltd.*, declared by the assessee in his return of income, was a pre-arranged transaction to evade taxes in connivance with the operators/brokers/promoters etc.?

"3. Whether on the facts and circumstances of the case and in Law, the Ld. CIT (A) has erred in not appreciating the fact that Section 68 of the Act empowers the Assessing Officer to assess, the credits in the books of the assessee, as income if the assessee could not produce sufficient evidences?

4. Whether on the facts and circumstances of the case and In Law, the Ld. CIT (A) has erred in considering the documentary evidences, submitted by the assessee and ignoring the findings, as has been brought on record by the AO in respect of the structured transactions in the course of according relief?

5. Whether on the facts and circumstances of the case and in Law, the Ld. CIT (A) has erred in not appreciating the fact that the findings of the AO were also in harmony with statements of the directors and entry providers etc., in the course of making the addition in the assessment order?

6. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) is justified in deleting the initiating penalty u/s 271(1)(c) of the Act without appreciating the fact that proceedings u/s 271(1)(c) of the Act were initiated for furnishing inaccurate particulars of income with a view to concealment of income?

7. The appellant craves leave to amend or alter any ground or add new ground which may be necessary."

2. Fact in brief is that return of income declaring total income of Rs. 1,12,522/- was filed on 28.07.2011. The return was processed u/s 143(1) of the Act. Thereafter, the case was selected for scrutiny u/s 143(3) of the Act and assessment u/s 143(3) of the Act was completed on 30.03.2014 and total income was determined at Rs.

8,10,990/-. Subsequently, the case was reopened u/s 147 of the Act by issuing of notice u/s 148 of the Act on 30.03.2017. The reassessment proceedings were completed on 19.12.2017 and AO has made total addition of Rs. 26,70,49,716/- to the total income of the assessee by treating long term capital gain earned from sales of shares of JMD Telefilms Ltd. Rs. 25,14,62,940/-, Splash Media and Infra Limited Rs. 1,55,70,963/- and Adani Power Limited Rs. 15,813/- as suspicious LTCG and added to the total income of the assessee u/s 68 of the Act as unexplained cash credits and treated the same under the head income from other sources.

3. Assessee has filed appeal before the ld. CIT(A). The ld. CIT(A) has allowed the claim of the assessee after referring various decisions of Hon'ble Supreme Court and various High Courts as discussed at page no. 55 to 189 of the order of ld. CIT(A). The part of the extract of the decision of the ld. CIT(A) from page No.174 to 189 is reproduced as under:-

*“16 Judgements of Hon'ble High Courts:-*

*16.1 The Hon'ble Delhi High Court in case of PCIT & Others vs. Krishna Devi & Others reported in (2021) 431 ITR 361:*

*“ITAT Delhi Bench had deleted addition made u/s 68 of the Act in the case of assessee Smt. Krishna Devi. The Department went in appeal before the Hon'ble Delhi High Court against such deletion. The Hon'ble Delhi High Court upheld the order of the ITAT in PCIT and Others vs. Krishna Devi and Others reported in (2021) 431 ITR 361. The Hon'ble Delhi High Court observed that ITAT being the last fact finding authority, on the basis of evidence brought on record, had rightly come to the conclusion that the lower tax authorities had sustained the addition without any cogent material on record. The Hon'ble Delhi High Court found no perversity in the order of the Tribunal. Thus, the sum and substance of the judgment of the Hon'ble Delhi High Court was that mere reliance on the report of the*

*investigation wing without further corroboration does not justify the conclusion of treating the transaction as bogus and sham. The relevant part of the decision of Hon'ble Delhi High Court in case of Smt. Krishna Devi is as under:-*

*“11. On a perusal of the record, it is easily discernible that in the instant case, the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites, the AO observes that the quantum leap in the share price is not justified; the trade pattern of the aforesaid company did not move along with the sensex; and the financials of the company did not show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an agreement to convert unaccounted money by claiming fictitious LTCG, which is exempt under Section 10(38), in a preplanned manner to evade taxes. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income Tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of [www.taxguru.in](http://www.taxguru.in) ITA 125/2020 and connected matters Page 8 of 10 providing entries of bogus LTCG. However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued under Sections 133(6)/131 of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh. Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is*

therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from de-mat account and the consideration has been received through banking channels." The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material that could support the case put forth by the Appellant, the additions cannot be sustained.

12. Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent. With regard to the claim that observations made by the CIT(A) were in conflict with the Impugned Order, we may only note that the said observations are general in nature and later in the order, the CIT(A) itself notes that the broker did not respond to the notices. Be that as it may, the CIT(A) has only approved the order of the AO, following the same reasoning, and relying upon the report of the Investigation Wing. Lastly, reliance placed by the Revenue on *Suman Poddar v. ITO* (supra) and *Sumati Dayal v. CIT* (supra) is of no assistance. Upon examining the judgment of *Suman Poddar* (supra) at length, we find that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. On

such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the factual matrix at hand. Similarly, the case of *Sumati Dayal v. CIT* (supra) too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue.

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

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

16.2 Hon'ble High Court of Jharkhand, in case of *CIT vs. Arun Kumar Agarwal (HUF)* (2012 26 taxmann 113. The brief summary as narrated in the order is under:-

“11. At this juncture, it would be relevant to mention here that it is not disputed by the Revenue before us that the shares of these assesseees were already shown in the earlier Balance Sheet submitted by the assesseees, and therefore, in that situation, how the revenue condemned the transaction even on the ground of steep rise in the shares. If within a period of one year, the share price has risen from Rs.5 to 55 and from 9 to 160 and one person was holding the shares much prior to that start of rise of the share, then how it can be inferred that such person entered into sham transaction few years ago and prepared for getting the benefit Tax Appeal No.4 of 2011 with analogous case after few years when the share will start rising steeply. In present case even there was no reason for such suspicion when the shares were purchased years before the unusual fluctuation in the share price. Here in this case, we have given example of one of the Tax Appeal wherein the shares were purchased in the year 2004 and were sold in the year 2006, which is said to be one of the case wherein the gap in the purchase and sale of the shares was narrowest. In other cases as we have noticed from the various orders of the C.I.T(Appeals) that, the shares of some of the companies were purchased by the assesseees even five years ago from the time of sale and those purchasers were already disclosed in the Balance Sheet of the

*assessee, then from any angle, it is proved that the assessee had held the shares much prior to 12 months of the sale of the shares.”*

*16.3 Hon’bl Bombay High Court ITA No.454 of 2018 in the case of Pr. CIT 31, Mumbai vs. Indravadan Jain (HUF), order dated 12.07.2023 wherein Hon’ble High Court held that:-*

*“3. Respondent had shown sale proceeds of shares in scrip Ramkrishna Fincap Ltd. (RFL) as long term capital gain and claimed exemption under the Act. Respondent had claimed to have purchased this scrip at Rs.3.12/- per share in the year 2003 and sold the same in the year 2005 for Rs.155.04/- per share. It was A.O.'s case that investigation has revealed that the scrip was a penny stock and the capital gain declared was held to be accommodation entries. A broker Basant Periwal & Co. (the said broker) through whom these transactions have been effected had appeared and it was evident that the broker had indulged in price manipulation through synchronized and cross deal in scrip of RFL. SEBI had also passed an order regarding irregularities and synchronized trades carried out in the scrip of RFL by the said broker. In view thereof, respondent's case was re- opened under Section 148 of the Act.*

*4. The A.O. did not accept respondent's claim of long term capital gain and added the same in respondent's income under Section 68 of the Act. While allowing the appeal filed by respondent, the CIT[A] deleted the addition made under Section 68 of the Act. The CIT[A] has observed that the A.O. himself has stated that SEBI had conducted independent enquiry in the case of the said broker and in the scrip of RFL through whom respondent had made the said transaction and it was conclusively proved that it was the said broker who had inflated the price of the said scrip in RFL. The CIT[A] also did not find anything wrong in respondent doing only Purti Parab 3/4 3-ITXA-454-2018.doc one transaction with the said broker in the scrip of RFL. The CIT[A] came to the conclusion that respondent brought 3000 shares of RFL, on the floor of Kolkata Stock Exchange through registered share broker. In pursuance of purchase of shares the said broker had raised invoice and purchase price was paid by cheque and respondent's bank account has been debited. The shares were also transferred into respondent's Demat account where it remained for more than one year. After a period of one year the shares were sold by the said broker on various dates in the Kolkata Stock Exchange. Pursuant to sale of shares the said broker had also issued contract notes cum bill for sale and these contract notes and bills were*

*made available during the course of appellate proceedings. On the sale of shares respondent effected delivery of shares by way of Demat instructions slip and also received payment from Kolkata Stock Exchange. The cheque received was deposited in respondent's bank account. In view thereof, the CIT[A] found there was no reason to add the capital gains as unexplained cash credit under Section 68 of the Act. The tribunal while dismissing the appeals filed by the Revenue also observed on facts that these shares were purchased by respondent on the floor of Stock Exchange and not from the said broker, deliveries were taken, contract notes were issued and shares were also sold on the floor of Stock Exchange. The ITAT therefore, in our view, rightly concluded that there was no merit in the appeal.*

*5. We also find no infirmity in the order passed by the ITAT and no substantial questions of law as proposed in the appeal arises.”*

*16.4 The Hon'ble jurisdictional Bombay High Court has considered an identical issue in case of PCIT vs Ziauddin A Siddique (Income tax appeal No.2012 of 2017 dated 4<sup>th</sup> March, 2022) and relevant discussions made by Hon'ble Bombay High Court are extracted below:-*

*“2. We have considered the impugned order with the assistance of the learned Counsels and we have no reason to interfere. There is a finding of fact by the Tribunal that the transaction of purchase and sale of the shares of the alleged penny stock of shares of Ramkrishna Fincap Ltd. (“RFL”) is done through stock exchange and through the registered Stock Brokers. The payments have been made through banking channels and even Security Transaction Tax (“STT”) has also been paid. The Assessing Officer also has not criticized the documentation involving the sale and purchase of shares. The Tribunal has also come to a finding that there is no allegation against assessee that it has participated in any price rigging in the market on the shares of RFL.*

*3. Therefore we find nothing perverse in the order of the Tribunal.*

*4. Mr. Walve placed reliance on a judgment of the Apex Court in Principal Commissioner of Income-tax (Central)-1 vs. NRA Iron & Steel (P.) Ltd. 1 but that does not help the revenue in as much as the facts in that case were entirely different.*

*5. In our view, the Tribunal has not committed any perversity or applied incorrect principles to the given facts and when the facts*

*and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raises any substantial question of law.”*

*16.5 The recent case laws of Hon'ble Gujarat High Court R/Tax Appeal No. 520 of 2022 with R/Tax Appeal No. 521 of 2022 in the case of Pr. CIT Vadodra 16.5 vs. Sandip Kumar P Patel wherein Hon'ble High Court has confirm the observation considered by Hon'ble ITAT Surat by the way of ITA No. 8 and 9/ SRT/2019, order dated 07.03.2023, which is as follows:-*

*“6. Being aggrieved and dissatisfied by the aforesaid, the assessee approached the Income Tax Appellate Tribunal, Surat by way of ITA No.8 and 9/SRT/2019 for the Assessment Year 2013-14 and 2014-15. The learned ITAT, Surat having considered the submissions, allowed the said Appeal by observing as under :*

*"22. We note that all evidences of sales including contract notes were submitted by the assessee, as noted by us above. The Assessing officer has not found any fault in the documents, as noted by us above. The payments were received through account payee cheques and transaction were done through recognized stock exchange. The inflow of shares is reflected by way of physical share certificate and demat account. The shares were transferred through demat account and the assessee does not know the buyer. There is no evidence that assessee has paid cash in return of the receipt through cheque. In other words, there is no evidence that the cash was recycled. The assessee is not a party to alleged price rigging. He has no nexus with the company, its directors or operators. He is not concerned with the activity of broker and has no control over the same. Even there is no evidence that directors of company or broker were involved in price rigging. The Assessee has got only incidental benefit of price rise. The assessee invested in shares, which gave rise to capital gains in a short period, does not mean that the transaction is bogus, as all the documents and evidences have been produced before assessing officer. The shares were sold in piece meal on different date through recognized stock exchange at quoted price.*

*23. Regarding the statement of Shri Anil Khemka, alleged entry provider, which is reproduced in Assessment Order at Page 8, we note that said statement recorded neither implicate Sun & Shine Worldwide Ltd nor the broker Trade bulls Securities Pvt Ltd and nor the assessee. We note that physical delivery of shares is proved by the memorandum of transfer of shares stated in the*

*share certificate being registered on 30.10.2012. Regarding the escalation of prices of shares of M/s Sun & Shine Worldwide Ltd., that is, the prices have increased by 140 times over the period of 17 months. At this juncture, it is submitted by ld Counsel that prices of shares are determined by the market forces and not solely on the basis of financial statements.*

*24. We also note that Assessing officer and CIT(A) has relied on the case of Sumati Dayal vs. CIT (214 ITR 801) (SC). We are of the view that said decision is not applicable to the assessee under consideration, as the assessee has successfully demonstrated with help of evidences on record to have made the transaction of purchase and sale of alleged shares. No single material was brought on record indicating name of any of the entry provider taking assessee's name or assessee's broker name. We note that assessee has submitted enough evidences such as:*

*(a) Ledger Account of Jainam Share Consultancy Securities Pvt. Ltd, (b) Contract Notes of Jainam Share Consultancy Securities Pvt. Ltd. (c) Relevant Bank Statement showing that all transactions were through banking channel. (d) Contra confirmation of broker M/s Corporate Commodity Broker Private Ltd. (e) Share Certificate, (f). Share Transfer Form, (g). Debit Note and (h) Cash Receipt etc. Therefore, addition in assessee's case cannot be made on generalization, human probabilities, suspicion, conjectures and surmises.*

*25. We note that assessee submitted before lower authorities the share brokers contract note indicating name of the scrip which was traded on the stock exchange; quantity of equity shares sold; date and time on which such shares had been sold, rate at which sale was executed; stock exchange at which such share had been dealt with; amount of brokerage charged; amount of service tax charged; amount of Securities Transaction Tax charged; amount of BSE transaction charges paid; amount of stamp duty paid. Therefore, evidence with regard to source and purpose for which amount had been received and credited in the books has been submitted and which has not been found false, forged and fabricated. The Identity of the party is established from the contract note itself wherein it has been prominently stated that name of the Share Broker is Mrs. Tradebulls Securities Pvt Ltd and that they are member of the Bombay Stock Exchange Ltd. The Decial Account statement evidencing holding of equity shares of Company of which shares have been dealt with at Bombay Stock Exchange and also the quantity which has been sold and the date*

*on which such quantity was sold. The demat account statement, contains BSE settlement number which is very much matching with settlement number appearing in the contract note issued by the share broker. The Bank statement evidencing receipt of funds from the Share Broker has already been furnished in the course of assessment proceedings. The AO have not brought any material indicating that said amount proposed to be taxed has not been received from the Share Broker or the sum received is from the sources other than the sale consideration claimed against sale of shares. In view of these facts, we are of the view that addition should not be made under section 68 of the Act.*

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

*"It appears that there was loss and the whole transactions were supported by the contract notes, bills and were carried out through recognized stock broker of the Calcutta Stock Exchange and all the bills were received from the share broker through account payee which are also filed in accordance with the assessment. It appears*

*from the facts and materials placed before the Tribunal and after examining the same, the tribunal allowed the appeal by the assessee. In doing so the tribunal held that the transactions cannot be brushed a side on suspicion and surmises. However, it was held that the transactions of the shares are genuine. Therefore, we do not find that there is any reason to hold that there is no substantial question of law held in this matter. Hence the appeal being ITA No. 620/2008 is dismissed."*

*27. In the aforesaid facts and circumstances of the case, we hold that the Id.CIT(A) was not justified in upholding the addition of sale proceeds of the shares as undisclosed income of the assessee u/s 68 of the Act. We therefore delete the addition of Rs.33,15,263.*

*28. Since, we have deleted the main addition of Rs.33,15,263/-, therefore, the addition on account of commission payment of Rs.3,29,188, which is consequential in nature, and hence the same is here by deleted."*

*7. Having regard to the aforesaid finding of facts recorded by the Tribunal, we are not inclined to interfere in this appeal."*

*16.6 In the case of CIT v/s Lavanya Land Private Limited (2017) 85 taxmann.com161 (BOM), it was held that when there is no direct and clear evidence whatsoever to allege that money changed hands between the assessee and the broker or any other person including the alleged exit providers whatsoever to convert unaccounted money for getting benefit of long term capital gain, no presumption can be drawn to hold otherwise. In the said case the Hon'ble High Court has held that in absence of any tangible material to show that huge cash was transferred from one side to another, addition cannot be sustained.*

*16.7 The decision of the Hon'ble Delhi High Court in the case of Kinetic Capital Finance Ltd wherein the Hon'ble Court held that once the initial onus is discharged by the assessee regarding the unexplained credit in the books of accounts it is for the Revenue to prove that the credit found in the books of accounts of the assessee is the undisclosed income of the assessee.*

*16.8 In the case of Kamdhenu Steel & Alloys Ltd 19 taxmann.com 26/206, the Hon'ble Delhi High Court held:*

*“...once adequate evidence/material is given, as stated by us above, which would prima facie discharge the burden of the assessee in proving the identity of shareholders, genuineness of the transaction and creditworthiness of the shareholders, thereafter in case such evidence is to be discarded or it is proved that it has "created" evidence, the Revenue is supposed to make thorough probe of the nature indicated above before it could nail the assessee and fasten the assessee with such a liability under Section 68. The AO failed to carry his suspicion to logical conclusion by further investigation and therefore addition u/s 68 was not sustainable.”*

*16.9 The Hon'ble Punjab & Haryana High Court in a recent judgment in the case of CIT vs Jawaharlal Oswal and Others (I.T.A. No. 49 of 1999, Judgment delivered on 29.01.2016) dismissed the Department's appeal by holding that suspicion and doubt may be the starting point of an investigation but cannot, at the final stage of assessment, take the place of relevant facts, particularly when deeming provision is sought to be invoked. The Hon'ble Court has observed:*

*“The principle that governs a deeming provision is that the initial onus lies upon the revenue to raise a prima facie doubt on the basis of credible material. The onus, thereafter, shifts to the assessee to prove that the gift is genuine and if the assessee is unable to proffer a credible explanation, the Assessing Officer may legitimately raise an inference against the assessee. If, however, the assessee furnishes all relevant facts within his knowledge and offers a credible explanation, the onus reverts to the revenue to prove that these facts are not correct. The revenue cannot draw an inference based upon suspicion or doubt or perceptions of culpability or on the quantum of the amount, involved. Any ambiguity or any ifs and buts in the material collected by the Assessing Officer must necessarily be read in favour of the assessee, particularly when the question is one of taxation, under a deeming provision. Thus, neither suspicion/doubt, nor the quantum shall determine the exercise of jurisdiction by the Assessing Officer..... A deeming provision requires the Assessing Officer to collect relevant facts and then confront the assessee, who is thereafter, required to explain incriminating facts and in case he fails to proffer a credible information, the Assessing Officer may validly raise an inference of deemed income under section 69-A. As already held, if the assessee proffers an explanation and discloses all relevant facts within his knowledge, the onus reverts*

*to the revenue to adduce evidence and only thereafter, may an inference be raised, based upon relevant facts, by invoking the deeming provisions of Section 69-A of the Act. It is true that inferences and presumptions are integral to an adjudicatory process but cannot by themselves be raised to the status of substantial evidence or evidence sufficient to raise an inference. A deeming provision, thus, enable the revenue to raise an inference against an assessee on the basis of tangible material and not on mere suspicion, conjectures or perceptions."*

*17 Judgements of Hon'ble Supreme Courts:-*

*17.1 The Honourable Supreme Court in the case of Commissioner of Income Tax-7, New Delhi (Petitioner) Vs. M/s Odeon Builders Pvt. Ltd. (Respondent), CIVIL APPEAL NOS. 9604-9605 OF 2018, judgement dated 21/08/2019 has held that:*

*"However, on going through the judgments of the CIT, ITAT and the High Court, we find that on merits a disallowance of Rs. 19,39,60,866/- was based solely on third party information, which was not subjected to any further scrutiny. Thus, the CIT (Appeals) allowed the appeal of the assessee stating*

*"Thus, the entire disallowance in this case is based on third party information gathered by the Investigation Wing of the Department, which have not been independently subjected to further verification by the AO who has not provided the copy of such statements to the appellant, thus denying opportunity of cross examination to the appellant, who has prima facie discharged the initial burden of substantiating the purchases through various documentation including purchase bills, transportation bills, confirmed copy of accounts and the fact of payment through cheques, & VAT Registration of the sellers & their Income Tax Return. In view of the above discussion in totality, the purchases made by the appellant from M/s Padmesh Realtors Pvt. Ltd. is found to be acceptable and the consequent disallowance resulting in addition to income made for Rs. 19,39,60,866/-, is directed to be deleted."*

*The ITAT by its judgment dated 16th May, 2014 relied on the self-same reasoning and dismissed the appeal of the revenue. Likewise, the High Court by the impugned judgment dated 5th July, 2017, affirmed the judgments of the CIT and ITAT as concurrent factual findings, which have not been shown to be perverse and, therefore, dismissed the appeal stating that no*

*substantial question of law arises from the impugned order of the ITAT.*

*In these circumstances, the Review Petitions are dismissed.*

*17.2 In the case of Parasben Kasturchand Kochar [2021] 130 taxmann.com 177 (SC), the assessee-individual was engaged in business of trading in shares claimed long term capital gains arising out of sale of shares as exemption under Section 10(38). The Assessing Officer denied claim and made certain additions into assessee's income on grounds that said gains were earned through bogus penny stock transactions and companies to whom sold shares were bogus in nature. The Tribunal observing that assessee by submitting records of purchase bills, sale bills, demat statement, etc., had discharged his onus of establishing said transactions to be fair and transparent, same not being earned from bogus companies was eligible for exemption under Section 10(38) of the Act. The High court on impugned order held that no substantial question of law arose from Tribunal's order. The SC dismissed the SLP against said impugned order.*

*17.3. Recently, the Hon'ble Supreme Court of India in the case of PCIT vs. Renu Agarwal 153 taxmann.com 579 (SC) dismiss the SLP filed by the Department against the order of High Court which held that the Assessing Officer disallowed exemption claimed by the assessee under Section 10(38) of the Act and made additions, alleging involvement in penny stock which were misused for providing bogus accommodation of Long-Term Capital Gain (in short "LTTCG"). However, there was lack of adverse comments from stock exchange and officials of company involved in these transactions and no material relating to assessee was found in Investigation Wing Report, addition made by Assessing Officer has been rightly deleted.*

*17.4 In the case of Commissioner of Income Tax vs. Discovery Estates Pvt Ltd reported in 356 ITR 0159, the Hon'ble Delhi High Court referred to the judgement of the Hon'ble Supreme Court in Lal Chand Bhagat Ambica Ram vs. CIT in 37 ITR 288 wherein the Court disapproved the practice of making additions in the assessment on mere suspicion and surmises or by taking note of the "notorious practice" prevailing in trade circles. The Hon'ble Supreme Court held: 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.*

18. It is a trite law that the suspicion howsoever strong cannot partake the of legal evidence. The entire case of the AO is based on character presumption that the assessee has ploughed back his own unaccounted money in the pion of bogus LTCG. The AO has not given any finding with evidence anywhere in the order to this effect, but went ahead with addition despite not bringing any evidence to show that there was source for generation of cash by the appellant and said cash was given by the appellant to the so called exit providers. The presumption or suspicion however strong it may appear to be true, but needs to be corroborated by some evidence to establish a link that the assessee had brought back his unaccounted Income in the form of LTCG. In the present case, there is no evidence that the Appellant had introduced his own unaccounted money by way of bogus LTCG.

19. The AO has not mentioned in the assessment order that what further documents/information regarding the claiming of LTCG were asked for from the appellant, which were not produced by him. The Appellant discharged his primary onus by submitting the documents which were called for by the AO. Now, it was the onus on the AO to prove that the transactions were not genuine by making appropriate enquiry and outlining the transactions trails. Assessment order doesn't mention any such enquiry/ verification by the AO. There is no cash trail mentioned in the assessment order. There is no de-layering of the banking transactions mentioned in the assessment order. The AO didn't find any amount was deposited in cash by the Appellant in the account of dummy entities and same were transferred to the account of Appellant in the form of consideration from sale of shares. There is no finding in the assessment order that the Appellant has undisclosed money which has been introduced in the banking channel and routed through the bank accounts of so called Exit-providers. The Assessing Officer has not made any such enquiry at all, which is evident from the assessment order. Thus, secondary onus of AO has not been discharged and only on the basis of doubts & surmises, the genuineness of the transactions have been suspected. No material, whatsoever, has been brought on record (in the form of assessment order) by the AO to prove that the transactions of purchases and sales of shares by the Appellant are not genuine. Only on the basis of doubts & suspicions of the AO, the submissions of the Appellant can't be rejected. Therefore, the view taken by the AO that the transactions are not genuine is not sustainable.

20. With such details available on record provided by the appellant during the assessment proceedings as well as appellate proceedings, there was no justification for treating the LTCCG as bogus. The Hon'ble Courts have underlined the Importance of taking cognizance of documentary evidences submitted by the appellant, independent enquiries required to be conducted by the AO, cogent material to be brought on record before taking an adverse view against the appellant and making addition u/s 68 of the Act.

21. Judgement of Hon'ble Apex Court in case of *NRA Iron & Steel Pvt. Ltd. vs PCIT*:- The relevant part is reproduced below:-

"8.2 As per settled law, the initial onus is on the Assessee to establish by cogent evidence the genuineness of the transaction, and credit-worthiness of the investors under Section 68 of the Act.

The assessee is expected to establish to the satisfaction of the Assessing Officer.

- Proof of Identity of the creditors:
- Capacity of creditors to advance money, and
- Genuineness of transaction

This Court in the land mark case of *Kale Khan Mohammad Hanif v. CIT* and, *Roshan Di Hatti v. CIT* laid down that the onus of proving the source of a sum of money found to have been received by an assessee, is on the assessee. Once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness, then the AO must conduct an inquiry, and call for more details before invoking Section 68. If the Assessee is not able to provide a satisfactory explanation of the nature and source, of the investments made, it is open to the Revenue to hold that it is the income of the assessee, and there would be no further burden on the revenue to show that the income is from any particular source.

.....

8.4. Reliance was also placed on the decision of *CIT v. Kamdhenu Steel & Alloys Limited and Others* wherein the Court that:

*"38. Even in that instant case, it is projected by the Revenue that the Directorate of Income Tax (Investigation) had purportedly found such a racket of floating bogus companies with sole purpose of lending entries. But it is unfortunate that all this exercise is going in vain as few more steps which should have been taken by the Revenue in order to find out causal connection between the cash deposited in the bank accounts of the applicant banks and the assessee were not taken. It is necessary to link the assessee with the source when that link is missing, it is difficult to fasten the assessee with such a liability."*

*9. The Judgments cited hold that the Assessing Officer ought to conduct an independent enquiry to verify the genuineness of the credit entries.*

.....

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

*1. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.*

*2. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/ subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.*

*3. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established."*

*"In the instant case, the Appellant discharged the primary onus as contemplated by Section 68 of the Act regarding nature and source of credit amounts in the bank account of the Appellant by providing contract notes for purchases no sales of shares, De-mat account statement bank statements highlighting the payments for purchases and receipt as sale consideration, broker's ledger account, evidence of payments of STT Balance sheet of the Appellant showing investment made by the AO and submitted that purchases and sales of the shares were made through recognized stock Exchange i.e. BSE and the sale considerations were received from registered share Broker who in term received the credit*

amounts from BSE settlement system. However, having submitted these documents by the Appellant, the AO failed to undertake any further investigation/enquiry to prove that the transactions of sales of shares by the Appellant are bogus in nature. Thus, the AO grossly failed to discharge his onus and the additions were made only on the basis of doubts and suspicions. The principles laid down by the Hon'ble Supreme Court as mentioned above have not been followed up by the AO.

22. Having discussed above the analysis of the assessment order, contentions of the Appellant and legal positions in case of penny stocks and section 68, I find that additions made by the AO in respect of LTCG claimed by the Appellant are not substantiated with any cogent evidences, I further find that the conclusion of the AO is void of any real evidences. The entire assessment order is based only on analysis of weak financials of M/s JMD Telefilms Ltd. and M/s Splash Media & Infra Ltd. & unusual price variation of its shares and the statements of two share brokers namely Shri Anuj Agrawal & Shri Anil Agrawal. However, the weak financials of the listed Companies and unusual spike of its share price may be enough to show circumstances that might create suspicion and doubt, which may be the starting point of investigation by the AO but can't, at the final stage of the assessment, take the place of credible evidence, particularly when deeming provision is sought to be invoked. The suspicion/doubts may be the reasons to believe for reopening the cases, but once it is reopened, the AO has to substantiate his believe with conclusive enquiries and bringing documents on record that the claim of the Appellant is not correct. Further, Shri Anuj Agrawal has not even stated that he has given any accommodation entries for the Appellant or the Appellant is one of the beneficiaries of the accommodation entries of bogus LTCG. Further, Shri Anil Agrawal, share Broker of the Appellant, also has nowhere stated that M/s JMD Telefilms Ltd. and M/s Splash Media & Infra Ltd. were involved in price rigging or any manipulation have been made in these two scrips. He has also not stated that his broker company has given any accommodation entries of bogus LTCG to the Appellant. Therefore, in the instant case, I find that the statement of shri Anil Agrawal is unsubstantiated and irrelevant to justify the impugned addition of LTCG as far as the Appellant is concerned. Further, the AO has not given any cash trail of sale of shares of M/s JMD Telefilms Ltd. and M/s Splash Media & Infra Ltd. by the Appellant to prove that any unaccounted money has been routed in the garb of LTCG. Though, the AO discussed the findings of SEBI, but the AO has nowhere mentioned that SEBI has found involvement of M/s JMD

*Telefilms Ltd. and M/s Splash Media & Infra Ltd. in price rigging and providing accommodation entries to the beneficiaries.*

*No evidence whatsoever was brought on record by the AO that the alleged entities mentioned in the assessment order were Exit-providers to the sale of shares of M/s JMD Telefilms Ltd. and M/s Splash Media & Infra Ltd. by the Appellant. No link whatsoever between the Appellant and alleged Exit-providers could be established by the AO. The AO has not shown with any shred of evidence that the unaccounted cash of Appellant was moved to the account of so-called Exit-providers. The AO has neither examined any of the Exit-providers nor the share Brokers of the Exit-providers. The AO even has not named who were the Share Brokers of Exit-providers through which funds have flown to the Broker of Appellant. Further, the AO has not examined the bank accounts of Exit-providers for its source of funds for purchase of shares from the Appellant, then how AO concluded that unaccounted money of the Appellant has ploughed back. No enquiry whatsoever was made by the AO as to how the so-called Exit-providers got the required fund to purchase the shares from the Appellant. The AO even has not examined any of the entry operators and also AO had no material to prove that any unaccounted money has been flown to the account of so-called Exit providers.*

*The AO didn't bring any material on record whatsoever that the Appellant had generated huge unaccounted cash, same was given to entry provider/any persons and same was ploughed back to the Appellant. The AO has not shown anywhere in the assessment order as to how, if any, unaccounted cash was introduced in the banking channel. The AO even has not indicated anywhere in the assessment order that the Appellant had any unknown sources of income generating any unaccounted cash.*

*Further, the AO didn't contradict any supporting, documents submitted by the Appellant relating to purchases and sales of shares of M/s JMD Telefilms Ltd. and M/s Splash Media & Infra Ltd. by the Appellant. The Appellant has discharge his primary onus, thereafter, it is AO who had to bring the material on record to disprove the claim of the Appellant. The onus is placed on the AO to disprove the claim of the Appellant and establish with cogent evidence that transactions were non-genuine through which unaccounted money of the Appellant has routed back to the Appellant in the garb of bogus Capital Gain. However, the AO has not discharged his initial and basic onus. In the case of CIT vs. Daulat Ram*

*Rawatmull (1973) 87 ITR 349 (SC) it was held that the onus to prove that apparent is not real is on the person who claims it to be so.*

*The source of credit received in the bank account could not be held to be unexplained unless it was established that any unaccounted money was routed in his bank account of the Appellant in the garbs of capital gain. Further, not a shred of evidence was placed on record by the AO regarding involvement of Appellant in getting accommodation entries of LTCG. Unless, the evidences, whatever, in the possession of the AO directly or indirectly linked to the Appellant, it is difficult to implicate the appellant in the alleged scam. This is because, suspicion however strong, cannot take place of evidence as held by the Hon'ble Supreme Court in the case of Umacharan Shaw & Bros vs, CIT(1959) 37 ITR 271(SC).*

*Therefore, in view of the above factual matrix and circumstances in respect of purchases Splash Media & and sales of shares of M/s JMD Telefilms Ltd. and M/s Infra Ltd. by the Appellant and also in view of the decisions of Hon'ble Supreme Courts and various High Courts including binding decisions of the jurisdictional High Courts and a plethora of decisions of various benches of ITATs including binding decision of jurisdictional ITAT, as discussed in foregoing paragraphs, I find that the addition of Rs. 25,14,62,940/- in respect of LTCG claimed on sale of shares of M/s. JMD Telefilms Ltd. and Rs. 1,55,70.963/- in respect of LTCG claimed on sale shares of M/s Splash Media & Infra Ltd. u/s 68 of the IT Act made by the AO is unsustainable and unjustified and therefore, the said additions of LTCG made by the AO are hereby deleted and is directed the AO to accept the LTCG income shown as exempt u/s 10(38) of the Income Tax Act. Accordingly, the Appellant gets relief and thus, ground nos. 3, 4, 5 & 6 of appeal are allowed.*

*23. The AO has also made addition of Rs. 15,813/- in respect of LTCG from sale of shares of Adani Power, however AO has not discussed anywhere in the assessment order as to how this amount is unexplained u/s 68 of the IT Act. I don't find any reason to sustain this addition of Rs. 15,813/- u/s 68 of the IT Act. Therefore, this addition is also deleted.”*

4. During the course of appellate proceedings before us, the ld. Counsel has filed application under Rule 27 of the ITAT Rule, the content of the application is reproduced as under:

*“We refer to the aforesaid appeal in the case of our above named client for income-tax assessment year 2011-12 fixed for hearing on 22<sup>nd</sup> August, 2024.*

*In this connection and in view of Rule 27 of the Income Tax Appellate Tribunal Rules, 1963 we on behalf of our client submit that we are supporting the order of the CIT(A) on the following propositions which it is submitted are legal propositions that is, no new facts are to be brought on record –*

*1. The Assessing Officer erred in issuing notice under section 148 of the Act.*

*It is contended that on the facts and in the circumstances of the case and in law, the issue of notice under section 148 is bad in law, being without jurisdiction and hence, the consequent assessment order needs to be quashed.*

*It is further contended that the reasons recorded are insufficient, vague and without application of mind and hence, the notice issued under section 148 is bad in law and consequently, the assessment order needs to be quashed.”*

Application under Rule 27 of the ITAT Rules:-

5. Before us, the Id. Counsel has discussed the application filed under Rule 27 of the ITAT Rules under which the respondent though he may not have appealed, may support the order appealed against on any of the grounds decided against him. During the course of appellate proceedings before us in respect of application filed under Rule 27 the Id. Counsel referred his letter dated 12.08.2024 along with copies of reasons recorded for reopening of the assessment and form of recording the reasons for initiating proceedings u/s 147 of the Act and for obtaining approval were filed. In the copy of form for recording the reasons for initiating the proceedings u/s 147 of the Act the Id. Counsel referred the column no. 6 regarding the quantum of income which has escaped

assessment. In this regard, the ld. Counsel contended that the AO has not specified the amount of income which has escaped assessment but only mentioned more than Rs.1 lakh against the said column No.6 which is not tenable as per law. The ld. Counsel also referred column no.8 of the Form requiring to provide information on the "Column 8." The AO is required to record whether the assessment proposed to be made for the first time if the reply is in affirmative then the AO has to state against the said column. The AO had shown in affirmation by saying "yes". The ld. Counsel stated that AO had acted on the basis of wrong facts by saying 'yes' as in the case of the assessee, the assessment was already framed u/s 143(3) of the Act on 30.03.2014 therefore the AO has acted on the basis of incorrect facts that the assessment in the case of the assessee is proposed for the first time which is not valid. The ld. Counsel also referred clause no. 9 of the Form for recording the reasons in case the AO had shown negative remarks against the above referred column No.8 The AO had not specified income originally assessed which substantiated the fact that AO had considered that no assessment was made earlier u/s 143(3) in the case of the assessee. The ld. Counsel also referred the copy of reasons recorded for reopening the case wherein also the assessing officer has stated that return of income for the A.Y. 2011-12 was processed u/s 143(1) of the Act on 08.09.2011 and nowhere he has mentioned that assessment in the case of the assessee was already completed u/s 143(3) of the Act. The ld. Counsel vehemently contended that the reasons recorded and information recorded in the Form for recording

reasons for initiating proceedings u/s 147 and for obtaining approval was factually incorrect which establish that reopening of the assessment was not valid. The ld. Counsel also submitted that in the case of the assessee, the notice u/s 148 of the Act was issued after 4 years from the end of the assessment year 2011-12 on 30.03.2017 without any specification by the assessing officer in the reasons recorded that there was any fault on the part of the assessee to disclose fully and truly all material facts necessary for this assessment. The ld. Counsel has also referred para 3 of the assessment order passed u/s 143(3) of the Act on 30.03.2014 wherein the assessing officer has particularly referred the issue on the basis of which the assessment was reopened after 4 years for the A.Y. 2011-12. The ld. Counsel has referred the decision of Hon'ble Bombay High Court in the case of PCIT vs Shodiman Investments (P) Ltd. (2018) 93 taxmann.com 153 (Bombay) and decision of Hon'ble Bombay High Court in the case of Survival Technologies Pvt. Ltd. vs DCIT dated 20.02.2023, decision of Hon'ble Bombay High Court in the case of Tahnee Heights CHS Ltd. vs ITO dated 19.02.2023. The ld. Counsel also referred the decision of ITAT, Mumbai in the case of M/s. Ankur Power Projects Pvt. Ltd. vide ITA No. 3291/M/2019 dated 23.11.2023. The ld. Counsel also submitted that the assessing officer has not applied his mind in recording of reasons. He also stated that the assessing officer has merely relied on the investigation report of the DDI without applying his own mind on the information.

6. On the other hand, ld. DR submitted that information relating to accommodation entries availed by the assessee were not

disclosed in the original assessment proceedings. He also submitted that reopening of the assessment was based on fresh tangible material and there was no change of opinion made by the AO.

7. Arguments of both the sides have been heard at length on the Rule 27 of the ITAT Rules contested by the assessee and perused the material on record. During the course of appellate proceedings before us in support of application filed by the assessee under Rule 27 of the ITAT Rule the ld. Counsel has pointed out various defects in the reasons recorded as discussed supra in this order. We have perused the Form for recording the reasons for initiating proceedings u/s 147 of the Act and for obtaining approval. It is evident from the reasons recorded that assessing officer has categorically mentioned at column no. 8 of the form for reasons recorded that assessment in the case of the assessee is proposed to be made for the first time on 08.09.2011. In the said Form at column No.8 there is specific question that “whether assessment is proposed to be made for first time if the reply is in affirmative please state.” In response to said question, the AO has mentioned “yes” which is factually incorrect because in the case of the assessee assessment proceedings u/s 143(3) of the Act has already been completed on 30.04.2014 assessing total income of the assessee at Rs.8,10,990/- under section 143(3) of the Act. Therefore, material fact in the case of the assessee show that assessment in the case has originally been completed u/s 143(3) of the Act on 30.03.2014 and the AO has formed belief for reopening of the case without application of mind and reopened assessment

proceedings on factually incorrect grounds which make the assessment proceedings void. In the Forms for recording the reasons for initiating proceedings u/s 147 of the Act at Column No.6 it is required to specify the quantum of income escaped assessment. However, without specifying the amount of income escaped, the assessing officer has only mentioned more than Rs. 1 lakh. Therefore, it is evident that the AO has not complied with the mandatory requirement of quantifying the escaped assessment and merely stated that income escaping assessment was more than Rs.1 lakh. Similarly, in the other column i.e. 9 in the Form For recording the Reasons the AO considered that assessment in the case of the assessee to be made for the first time as no prescribed information specified by the AO against the required particulars. It is also evident that noticed u/s 148 of the Act was issued in the case of the assessee on 03.03.2017 pertaining to the A.Y. 2011-12 after the expiry of four years from the end of relevant assessment year. As per section 147 of the Act, no action can be initiated under section 147 of the Act after the expiry of 4 years from the end of the relevant assessment year unless the income chargeable to tax has escaped assessment for the reason of failure on the part of the tax payer to disclose fully all material facts necessary for assessment. Nowhere the assessing officer has brought on record in the reasons recorded the fault of the assessee in not disclosing the true and full facts of the case. During the original assessment order passed u/s 143(3) of the Act, the assessing officer has also made verification on the issue of exemption claimed by the assessee in respect of long term capital

gain. The relevant part of 3 of the assessment order passed u/s 143(3) of the Act on 30.03.2014 is reproduced as under:

*“During the year, assessee has declared income from Short Term Capital Gain of Rs. 35,695/- & Long Term Capital Gain of Rs. 26,70,49,717/- which is claimed as exempted u/s 10(38) of the I.T. Act 1961 and income from other sources of Rs. 1,51,879/-. Assessee’s AR Shri Pradeep Chaudhary filed details of bank accounts, details of investments, details of long term and short term capital gain and exempt income claimed with supporting evidences. All the relevant details have been scrutinized and kept on record.”*

It is evident that the relevant information and detail on the issue was filed before the assessing officer at the time of original assessment proceedings as discussed above.

8. We have also perused the decision of Hon’ble Bombay High Court in the case of *PCIT vs Shodiman Investments Pvt. Ltd.* as referred by the Ld. Counsel wherein it is held that reopening notice has to be issued by assessing officer on his own satisfaction and not on borrowed satisfaction. We have also perused the decision of Hon’ble Bombay High Court in the case of *Survival Technologies Pvt. Ltd.*, relied upon by the Ld. Counsel wherein the Hon’ble High Court held that AO to disclose as to which facts or material was not disclosed by the assessee fully and truly for the purpose of assessment of that assessment order so as to establish a vital links between the reasons and evidences. Similarly, we consider that in the case of the assessee the assessing officer has failed to establish that there was any failure on the part of the assessee to disclose fully and truly any material fact in the case before reopening of the completed assessment after the 4 years from the end of the relevant assessment year. We have also gone through

the decision of Hon'ble Bombay High Court in the case of *Tanhee Heights* referred above wherein the Hon'ble Court held that for reopening of the assessment beyond 4 years from the end of the relevant assessment year, the assessing officer has to additionally satisfied that in a case where assessment u/s 143(3) of the Act had been completed, the assessee had failed to disclose fully and truly of material fact necessary for assessment during the original assessment proceedings.

9. We have also perused the decision of ITAT, Mumbai in the case of *Ankur Power Projects Pvt. Ltd. vs ITO (15)(1)(1)* referred by the Ld. Counsel wherein the reopening of assessment held as bad in law because of various defects in the reasons recorded i.e. the assessment had earlier been completed u/s 143(3) but the AO referred only to the intimation issued u/s 143(1) in the reasons recorded, in the application submitted to JCIT seeking his approval, the AO has stated that assessment was proposed as first assessment etc. In the light of the above facts and findings, we find that in the case of the assessee, it is evident from the material and information as discussed above in this case that there is no application of mind at the level of assessing officer as in the reasons recorded the assessing officer has stated that assessment is proposed for the first time whereas the case of the assessee was already originally assessed u/s 143(3) of the Act. Further the AO has also not specified the amount of escapement of income in the form for recording the reasons as discussed supra in the order. Even the case of the assessee was reopened after end of 4 years from the relevant assessment year however as required in the

provisions of Act, the assessing officer has failed to specify how the assessee has failed to disclose fully and truly the material facts in the original assessment proceedings. In the light of the facts and findings of the various judicial pronouncements as discussed above in this case, we consider that the reopening of assessment is not valid because of various defects and irregularities evident in the reassessment proceedings initiated in the case of the assessee as demonstrated from the material facts discussed supra in this order. As a result, the objection raised by the assessee (Respondent) under Rule 27 of the Income Tax Appellate Tribunal Rules 1963 is allowed. As a consequence thereto, the appeal of the Revenue is dismissed and issues raised on merit are left open.

10. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 25.10.2024.

**Sd/-**  
**(SANDEEP SINGH KARHAIL)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(AMARJIT SINGH)**  
**ACCOUNTANT MEMBER**

Mumbai, Dated: 25.10.2024

Biswajit, Sr. P.S./dk

Copy to:

1. The Appellant:
2. The Respondent:
3. The CIT,
4. The DR

//True Copy//

By Order

Assistant Registrar  
ITAT, Mumbai Benches, Mumbai