आयकर अपीलीय अधिकरण, सूरत न्यायपीठ, सूरत

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
SHRI BIJAYANANDA PRUSETH, ACCOUNTANT MEMBER
आयकर अपील सं./**ITA No. 552/SRT/2024** (AY 2011-12)
(*Physical court hearing)*

Rambilash Rajaram Jajoo 429-432, Golden Point, Falsawadi, Ring Road, Surat City, Surat-395 002 [**PAN : AAMPJ 0040 K**]	बनाम Vs	Income Tax Officer, Ward-2(2)(4), Aaykar Bhawan, Majura Gate, Opp. New Civil Hospital, Surat-395 001
अपीलार्थी/Appellant		प्रत्यर्थी /Respondent

आयकर अपील सं./**ITA No. 882/SRT/2024** (AY 2011-12)

Sunita Jajoo 429-432, Golden Point, Near BSNL Office, Falsawadi, Ring Road, Surat-395 002 [**PAN : AAMPJ 0040 K**]	बनाम Vs	Income Tax Officer, Ward-2(2)(4), Aaykar Bhawan, Majura Gate, Opp. New Civil Hospital, Surat-395 001
अपीलार्थी/Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से **/**Assessee by	Ms. Richa Toshniwal. CA
राजस्व की ओर से **/**Revenue by	Shri Minal Kamble, Sr. DR
सुनवाई की तारीख/Date of hearing	23.01.2025
उद्घोषणा की तारीख/Date of pronouncement	10.02.2025

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. These two appeals by separate assessee are directed against the separate orders of Addl/JCIT(A)-7, Kolkata/National Faceless Appeal Centre, Delhi [for short to as "NFAC/Ld.CIT(A)] dated 21.03.2024 and 21.04.2023 for same assessment year i.e., (AY) 2011-12, which in turn arises out of separate assessment orders passed by Assessing Officer under section 143(3) r.w.s. 147

of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') both on 26.12.2018. In both the appeal the assessees have raised certain common grounds of appeal, certain facts are also similar, thus, with the consent of the parties, both the appeals were clubbed, heard together and are decided by common order to avoid conflicting decision. For appreciation of facts, appeal in **ITA No.552/SRT/2024** is treated as lead case. The assessee has raised following grounds of appeal:

> *"1. On the facts and circumstances of the case as well as the law on the subject, the learned Commissioner of the Income Tax Appeal ADDL/JCIT(A)-7, Kolkata was not justified in dismissing the order without considering the facts of the case defying natural justice to the appellant.*
> *2. On the facts and circumstances of the case as well as the law on the subject, the learned Commissioner of the Income Tax Appeal ADDL/JCIT(A)-7, Kolkata has erred in confirming the action of Income Tax Officer in re-opening the assessment u/s 147 of the Act and issuing notice u/s 148 of the I.T. Act, 1961.*
> *3. On the facts and in the circumstances of the case as well as the law on the subject, the learned Commissioner of the Income Tax Appeal ADDL/JCIT(A)-7, Kolkata has erred in upholding the addition of Rs.6,81,214/- on account of long term capital gain treating such exempt LTCG as unexplained cash credit u/s 68 of the I.T. Act,1961 without acknowledging the submission of the assessee.*
> *4. On the facts and circumstances of the case as well as law on the subject, the learned CIT(A) has erred in confirming action of Assessing Office in making addition of Rs.3,406/- as unexplained expenditure u/s 69C of the I.T. Act, 1961.*
> *5. It is therefore prayed that addition made by the Assessing Officer and confirmed by CIT(A) may please be deleted.*
> *6. Appellant craves leave to add, alter or delete any ground(s) either before or in the course of the hearing of the appeal."*

2. Rival submissions of both the parties have been heard and record perused. The Ld. Authorized Representative (Ld.AR) of the assessee submits that grounds of appeal raised by assessee is squarely covered in favour of assessee by the decision of this Tribunal in assessee's family members in case of Damodar Jajoo and Jasodadevi Rajaram Jajoo in ITA Nos. 183-184/Srt/2021 and 185/Srt/2021 dated 09.12.2022, The Ld.AR of the assessee submits that on similar set of fact, similar long-term capital gains (LTCG in short) were disallowed by the lower authorities in case of Damodar Jajoo and Jasodadevi Raja ram Jajoo, on first appeal, the additions/ disallowances were upheld, however on further appeal before this Tribunal, those assessee was allowed full relief vide order dated 09.12.2022 in ITA No. 183 to 185/Srt/2022. Against the decision of this Tribunal dated 09.12.2022 (supra), Revenue filed appeal before Hon'ble jurisdictional High Court and the same has been dismissed in a detailed order vide Tax Appeal Nos. 793, 794 & 795 of 2023 dated 07.12.2023. Copy of decision of Tribunal and judgment of Hon'ble jurisdictional High Court are already placed on record.
3. The Ld. AR of the assessee submits that assessee had purchased 9600 shares of scrip code 530263 of Global Capital Markets Ltd. on 27.03.2003 in financial year 2003-04 through Shcil Services Ltd. a broker registered with Security and Exchange Board of India ('SEBI' in short), registered broker having registration No. INBO11253839. the assessee acquired shares at an average price of Rs.5.33 approximately. At that relevant point of time, Security Transaction Tax ("STT" in short) was not introduced and demat account was not common. However, assessee submitted holding statement as on 31.03.2004 and

31.03.2010, the assessee sold shares of three instalments on 10.07.2010, 10.08.2010 and 13.08.2010. The holding period is more than seven years and the assessee claimed only Rs.6,81,214/- as LTCG. The complete details with acquisition of sales of purchase through banking channel and was sold through recognized Stock Exchange after payment of STT. The assessee sold shares much prior to splitting the shares of Global Capital Market Ltd. in ratio of 1:10 in the month of November, 2010 and is not beneficiary of any same transactions. The price of shares was raised upto Rs. 224/- per share i.e., even after splitting, the same fact remains the same assessee being a *bona fide* holder of shares sold such shares at an average price of Rs.77.91/-, Rs.74.44/- and Rs. 75.93/- per share. The assesse furnished complete details to prove the genuineness of the transactions. The transactions of Global Capital Market Ltd., is still being conducted in Bombay Stock Exchange. The Ld. AR of the assessee submits though assessee has already furnished complete details in the form of contract note of purchase, bank statement, holding statement from the year ending on 31.03.2004 and 31.03.2010. The Ld. AR of the assessee further stated that though her case is squarely covered by the decision of this Tribunal in favour of family members of assessee, yet Ld. AR of the assessee also relied on various other cases, which she has referred in her short written submission. The Ld. AR of the assessee submits that Assessing Officer also made addition of commission income @ 0.5% on LTCG for making against unexplained expenditure, which is also liable to be deleted.

4. On the other hand, Ld. Senior Departmental Representative (Ld. CIT-DR) for the Revenue supported the order of lower authorities. When the decision of this Tribunal and judgment of Hon'ble jurisdictional High Court in assessee's family members case was confronted, Ld. Sr-DR for the Revenue would submit that it may be possible that certain fact about the penny stock company of Global Capital Markets Ltd. may not have been brought in the notice of Tribunal or Hon'ble jurisdictional High Court.

5. We have considered the rival submissions of both the parties and have gone through order of lower authorities carefully. We have also deliberated on various case law relied by Ld. AR of the assessee including family members case of assessee in ITA Nos. 183-184/Srt/2021 and 185/Srt/2021 (supra). On careful comparison of facts, we find that grounds of appeal raised by assessee is covered in favour of assessee in family members case in Damodar Jajoo and Jasodadevi Rajaram Jajoo (supra) relevant part of decision of this Tribunal on validity of reopening as well as on merit is reproduced below:

> *16. We have heard the rival parties and have gone through the material placed on record. We have considered the request of the assessee for admission of **additional ground,** which is purely of legal nature. On the basis of material available on record it is certain that additional ground raised by the assessee is challenging the very jurisdiction of the AO to pass reassessment order under section 147 of the Act. It is well settled that an assessee can raise a legal ground at any stage of proceedings as held by the Apex Court in the case of **CIT v/s. Varas International** reported in **284 ITR 80(SC)** and **National Thermal Power Co Ltd. v/s CIT** reported in **229 ITR 383 (SC).** Keeping in view the facts and circumstances of the present case, we are of the view that the issue raised in 'additional ground' regarding validity of reassessment proceedings, which goes to the root of the matter needs to be admitted. Hence, we hereby allow the assessee to raise additional ground of appeal. Since this ground raises question about the assumption of jurisdiction and validity of reassessment order itself, therefore we thought it appropriate to take up and decide this additional ground first.*
>
> *17. We have gone through the facts of the case, the reasons recorded for reopening u/s 147 of the Act, the submission and the various decisions of the*

Courts including those relied upon by the ld Counsel for the assessee. Before we proceed to adjudicate the issue relating to validity of reassessment proceedings, we would like to examine the reasons recorded by the assessing officer, which is reproduced below:

ANNEXURE-1

1	Name of the assessee (with complete address)	:	Damodar Prasad Jajoo 429-432 Golden Point, Ring Road, Falsawadi, Begampura, Surat.
2	PAN	:	AAWPJ4341H
3	A.Y.	:	2011-12
4	Status	:	Individual

Recording of reason U/s.147 for escapement of income

The assessee filed his return of income for A.Y. 2011-12 on 04.02.2012 declaring total income of Rs.7,14,500/-. The same was processed u/s 143(1) of the Income Tax Act. This office has received an information from the DDIT(Investigation) Unit 3(2) Kolkatta in respect of the following BSE Listed Penny stock, which have been used for generating bogus LTCG/STCL and business loss.

Sr. No.	Full name of Penny Scrip	Scrip Code	Scrip Name	Total Trade Value (Rs.)
1	Golden Bull Research & Grrowth Limited	538295	Kausambi	44,57,85,325
2	Regency Trust Limited	511585	Regency Inv.	2,04,27,43,038
3	Global Capital Markets Limited	530263	Global Cap M	5,02,78,35,316.99

2. The information revealed that during the year he had sold 5000 share of Rs.3,85,006/- in script name Global Cap M and code No. 530263 during the F.Y. 2010-11 relevant to A.Y.2011-12. On receipt of information, notice u/s 133(6) was issued to the assessee asking him to furnish the details of capital gain for the share transaction. However, no reply has been furnished by the assessee. On verification of the computation of income, it is seen that the assessee has not declared any capital gain and also noticed that claimed exemption of Rs. 3,47,564/- in Schedule E1 as exempt income.

3. In view of the decision of the Hon'ble Gujarat High Court in the case of Aradhan Estate (P) Ltd. vs. Dy. Commissioner of Income-tax wherein it was held that report received from investigation wing has a live link for formation of belief in respect of income escaped assessment.

4. In view of the above, I have reason to believe that an amount of Rs.3,85,006/- had escaped of the assessment within the meaning of sec. 147 of the I.T. Act and I also have reason to believe that such escapement had occurred by reason of failure on the part of the assessee to disclose fully or truly material facts.

In view of the above facts, I am satisfied that this is a fit case for reopening of assessment u/s.147 of the I.T Act 1961.

Place: Surat
Date: 23.03.2018

(C. ABDULRAHIMAN)
Income Tax Officer,
Ward 2(2)(1), Surat

18. **From the reasons recorded,** the following facts and sequence of events are observed:

(a) Credible information was received by the AO from the DDIT Investigation Wing, Kolkata, regarding BSE listed Penny stock.

(b) The AO has noted that the information received from the DDIT Investigation Wing, Kolkata, has revealed that assessee has sold 5000 shares of Rs.3,85,006/- in the scrip Global Capital Market Limited.

(c) The Assessing Officer specified the code number.

(d) The AO noted that assessee has claimed exemption wrongly.

(e) The AO finally recorded the reasons stating that he has reason to believe that an amount of Rs.3,85,006/- has escaped assessment within the meaning of section 147 of the Act.

(f) This information was not available at the time of passing the original assessment; order, if any.

(g) The assessing officer had verified the information with the record available in his office and duly noted the same.

(h) He has thus recorded his prima facie reason to believe that amount of Rs.3,85,006/- has escaped assessment.

19. Having gone through the entire gamut of facts and circumstances, we are of the view that not only ***there existed new information*** *with the AO* ***from the credible sources,*** *but also* ***that he has applied his mind*** *and recorded* ***the conclusion that the assessee is engaged in penny stock transaction.*** *(clearly meaning that* ***what was disclosed in the return of income by the assessee was false and untruthful).***

20. The Hon'ble Supreme Court in the case of Phul Chand Bajrang Lal and another vs. ITO 203 ITR 456, was considering the question of reassessment beyond the period of four years in the case of an assessee firm; and had held that in case of acquiring fresh information specific in nature and reliable, relating to the concluded assessment, which went to falsify the statement made by the assessee at the time of original assessment and, therefore, he would be permitted under the law to draw fresh inference from such facts and material. The Court also went to an extent of saying that there are two distinct and different situations where the transaction itself on the basis of subsequent information is found to be bogus transaction and in such event, mere disclosure of the transaction cannot be said to be true and full disclosure and the Income-tax Officer would have jurisdiction to reopen the concluded assessment The Apex Court in the case of Phul Ghand Bajrang Lal (supra), observed as following:

> *"...one has to look to the purpose and intent of the provisions. One of the purposes of Section 147 appears to be to ensure that a party cannot get away by willfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice to turn around and say 'you accepted my lie, now your hands are tied and you can do nothing'. It would, be travesty of justice to allow the assessee that latitude."*

21. The Hon'ble Gujarat High Court in the case of Dishman Pharmaceuticals and Chemicals Ltd. vs. DCIT (OSD), Ahmedabad (2012) 346 ITR 228 (Guj) has summed up the requirements of the law, in such circumstances and has held as following:

"There is no set format in which such reasons must be recorded. It is not the language but the contents of such recorded reasons which assumes importance. In other words, a mere statement that the Assessing Officer had reason to believe that certain income has escaped assessment and such escapement of income was on account of non-filing of the return by the assessee or failure on his part to disclose fully and truly all material facts necessary for assessment would not be conclusive. Nor, absence of any such statement would be fatal, if on the basis of reasons recorded, it can be culled out that there were sufficient grounds for the Assessing Officer to hold such beliefs."

22. A three Judges Bench of Hon'ble Gujarat High Court in the case of ***A.L.A. Firm v. CIT, 189 (1991) ITR 285,*** *after an elaborate discussion of the subject opined that the jurisdiction of the Income Tax Officer to reassess income arises if he has in consequence of specific and relevant information coming into his possession subsequent to the previous concluded assessment, reason to believe, that income chargeable to tax and had escaped assessment.* ***It was held that even if the information be such that it could have been obtained by the I.T.O. during the previous assessment proceedings by conducting an investigation or an enquiry but was not in fact so obtained, it would not affect the jurisdiction of the Income Tax Officer to initiate reassessment proceedings, if the twin conditions prescribed under Section 147 of the Act are satisfied.***

23. In fact, in three recent judgments; the Hon'ble Gujarat High Court has upheld the reopening on similar facts. The case is squarely covered against the assessee by these judgments which are:

- Yogendrakumar Gupta vs. ITO 366 ITR 186 (Guj)
- Peass Industrial Engineers (P) Ltd. 73 taxmann.com 185 (2016)
- Order dated March 25, 2014 in the case of Lalita Ashwin Jain vs. ITO, Special Civil Application No. 1626 and 1627 of 2014.

24. As observed earlier not only ***there existed new information*** *with the AO* ***from the credible sources,*** *but also* ***he had applied his mind*** *and recorded* ***the conclusion that assessee entered into penny stock transaction.*** *(Clearly meaning that* ***what was disclosed was false and untruthful).*** *The requirements of section 147 r.w.s. 148 have clearly been met; and the reopening is held justified and legal.*

25. From the above reasons recorded by the assessing officer, it is vivid that there is merit in the arguments advanced by ld DR for the Revenue. We note that assessing officer had received the information from the DDIT (Investigation) unit-3(2) Kolkata in respect of the BSE listed Penny stock companies. After getting such information, assessing officer has applied his mind and then framed the reasons for reopening the assessment, therefore it is not a borrowed satisfaction. The assessing officer has also mentioned in the reasons recorded the quantity of shares sold, name of the scrip, and amount received on sale of such shares etc. Thus, we note that reasons recorded by the assessing officer are in accordance with the provisions of law. Therefore, based on these facts and applicable precedents to these facts, we dismiss the additional grounds raised by the assessee.

26. In the result, additional ground nos.1 and 2 raised by the assessee are ***dismissed****.*

27. Now coming on merits of the case. Though facts have been discussed in detail in the foregoing paragraphs, however in the succinct manner, the relevant facts and background are reiterated in order to appreciate the controversy and the issue for adjudication. The assessee has submitted before us, chart showing purchases and sale of shares and the period of holding and numbers of shares, appeal- wise, which are reproduced below:

(i) In respect of **ITA No. 183/SRT/2021** for AY.2011-12, the assessee has submitted the following chart:

CHART DEPICTING PURCHASE AND SALE DETAILS

Purchase Date	31.03.2003	Holding Statement as Proof of Purchase at Page No. 5 of Paper Book Index
Number of shares purchased	12000	Purchased from I.C. Baid & Co. off market. SEBI registration No. IBN030669417
Purchase Consideration	82,975/-	Bank Statement showing Purchase payment on 02.04.2003 at Page No. 8 of Paper Book Index
Average Purchase Price	6.91	-
Holding Period	7 years	31.03.2003 to 29.07.2010
Sale Date	29.07.2010	Sales Contract Note at Page No. 1-3 of Paper Book Index
Number of shares Sold	5000	Sold through SHCIL Services Limited on recognised Stock Exchange- SEBI registration No. IBN011253839.
Sale Consideration (Net of STT)	3,82,137/-	Bank Statement showing Sale proceeds received on 05.08.2010- vide cheque no. 794833 at Page No. 4 of Paper Book Index
Average Sale Price (Net of STT)	76.42	-
Average Sale Price (Total Sales Consideration)	77	

(ii) In respect of assessee's appeal in ITA No.184/SRT/2021 for AY.2011-12, assessee submitted the following chart:

CHART DEPICTING PURCHASE AND SALE DETAILS

Assessee's Appeal No. – 184/SRT/2021

Purchase Date	31.03.2003	Holding Statement as Proof of Purchase at Page No. 5 of Paper Book Index
Purchase Consideration	82,975/-	Bank Statement showing Purchase payment on 02.04.2003 at Page No. 8 of Paper Book Index
Average Purchase Price	6.91	-
Number of shares purchased	12000	Purchased from I.C. Baid & Co. off market. SEBI registration No. IBN030669417
Shares Sold in AY 2011-12	5000	-
Opening Shares in AY 2012-13	70000	Shares split 1:10 ratio, Opening 7000 converted into 70000. Face Value reduced from Rs.10 to Rs.1
Holding Period	8 years	31.03.2003 to 25.04.2011
Sale Date	25.04.2011	Sales Contract Note at Page No. 1-3 of Paper Book Index
Number of shares Sold	70000	Sold through SHCIL Services Limited on recognised Stock Exchange- SEBI registration No. IBN011253839. Demat Statement at Page 10 and Ledger from Broker at Page 12 of Paper book
Sale Consideration (Net of STT)	16,91,834/-	Bank Statement showing Sale proceeds received on 29.04.2011- vide cheque no. 616351 at Page No. 4 of Paper Book Index
Average Sale Price (Net of STT)	24.16	-
Average Sale Price (Total Sales Consideration)	24.35	-

(iii) In respect of assessee's appeal in ITA No.185/SRT/2021 for AY.2012-13, assessee submitted the following chart:

CHART DEPICTING PURCHASE AND SALE DETAILS

Purchase Date	31.03.2003	Purchase Bill at Page No. 5 of Paper Book Index
Number of shares purchased	5600	Purchased from I.C. Baid & Co. off market. SEBI registration No. IBN030669417
Purchase Consideration	31,221/-	Bank Statement showing Purchase payment on 02.04.2003 at Page No. 7 of Paper Book Index (Two script purchased of Rs.31,221 and Rs.8,099, Total-Rs.39,320/-)
Average Purchase Price	5.58	-
Holding Period	7 years	31.03.2003 to 15.07.2010, Transaction Statement at Page 8-10 of Paper Book Index
Sale Date	07.07.2010 and 15.07.2010	Sales Contract Note at Page No. 1-2 of Paper Book Index
Number of shares Sold	3000 and 2600	Sold through SHCIL Services Limited on recognised Stock Exchange- SEBI registration No. IBN011253839.
Sale Consideration (Net of STT)	2,28,682.98/- and 2,01,804.94/-	Bank Statement showing Sale proceeds received on 18.07.2010 and 21.07.2010- vide cheque no. 95551 and 794024 at Page No. 3 of Paper Book Index
Average Sale Price (Net of STT)	76.20 and 77.62	-
Average Sale Price (Total Sales Consideration)	76.8 and 78.2	

28. The assessee had purchased 12,000 shares of M/s Global Capital Markets Limited on 31.03.2003 from I C Baid & Co. at a price of Rs. 6.91 approximately when the concept of STT was not even introduced and DEMAT was not even popular. As at March 2006, there were only a total of 538 depository participants registered with the Securities and Exchange Board of India. The notification about the new regulation made by SEBI for Mandatory Dematerialization of physical shares held by an investor stated that from April 1, 2019, from this date an investor was not be able to transfer the shares held in physical form using a transfer deed. Hence it is clear that there was no requirement of DEMAT during the period when the assessee purchased the shares i.e back in the year 2003. However, the assessee has submitted the holding Statement as on 31.03.2004 which reflects that the assessee had the shares of Global Capital Market in possession and was held in its demat account with SHCIL Limited. Copy of the same is filed by assessee in the Paper Book at Page No 5 and 6. Further the entire payment for purchase of shares was made through banking channels which can be duly verified from the bank statement for the period of Purchase i.e Year 2003. The payment was cleared within less than 3 days from the date of purchase ie. Date of purchase- 31.03.2003 and Date of payment- 02.04.2003. Copy of the same is attached at Page No. 7 and 8 of the Paper Book. Further the assessee had sold shares of M/s Global Capital Markets Limited during FY 2010-11 on 29.07.2010 after holding the shares for more than 7 years and claimed just INR 3,47,564/- as LTCG. The sale contract note is filed at Page No. 1 to 3 of Paper Book. The assessee sold the shares through SHCIL SERVICES LIMITED (Broker: Bombay Stock Exchange: SEBI Reg No. INB011253839) not only through proper banking channels but also the trading was conducted through recognized stock exchange through approved brokers in the normal course of share investment on which the STT was duly paid.

29. The above narrated facts prove that assessee is just an investor and chose to invest in Year 2003 and had taken a calculated risk and had received a nominal gained when he sold 5000 shares out of 12000 shares in Year 2010 and that he is not party to any alleged scam or illegal trades etc. It is important to note that the inflation rate rose from 3.81% in Year 2003 to 11.99% in Year 2011, in such a scenario a nominal gain of Rs.3,47,564/- is minuscule.

*30. The ld Counsel submits that shares of Global Capital was split in the ratio of 1:10 in the month of November 2010 and the price rose up after such split of shares and the assessee had sold its shares before such split in August 2010 itself. Hence this clearly implies that assessee was not involved into any bogus transactions. Had the assessee been involved, he would have known the activity of split to be carried out and why would he sell shares before such split of shares after which the price increased to Rs.225 almost. This further implies that assessee had done a bona fide transaction and had sold 5,000 shares at a price of Rs.77 per share and even when the price rose upto Rs.224 per share after split (**i.e almost Rs.2,240/- per share before split**). In such a scenario any person involved in sham transactions and wanting to earn huge profits would never miss such an opportunity, however the assessee being a bona fide taxpayer was in no knowledge of such series of activities and sold shares in normal course and earns a miniscule profit of Rs.3,47,564/- only.*

31. We note that assessee had sold shares of M/s Global Capital Markets Limited during FY 2010-11 on 29.07.2010 after holding the shares for more than 7 years and claimed just Rs.3,47,564/- as Long Term Capital Gain (LTCG). This fact clearly shows that assessee is genuine investor as he was holding shares for more than seven years, and does not involve in taking penny stock accommodation entry.

32. It is well settled position of law that, an assessee receiving a credit has to testify its case through the 'triple marker test' of Identity, Creditworthiness and Genuineness of Transactions. It is imperative, therefore, that the case be analysed in light of these three well-settled canons of adjudication, as embedded in the statute as also promulgated by various judicial pronouncements. The onus of proof requires the assessee to furnish the proof of identity, creditworthiness and genuineness of the transaction. We note that in assessee`s case under consideration, the assessee has submitted the copy of Contract note. 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 stock exchange platform. These documents have been accepted by the assessing officer. The transactions are done through proper banking channel and the sale is done at prevailing price quoted on the BSE. Hence, by submitting these documents, the assessee has proved identity, creditworthiness and genuineness of the transactions.

33. Thus, it is submitted by ld Counsel that with the purchase and sale transactions of shares of GLOBAL CAPITAL MARKET LIMITED 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 assessing officer under section 68 of the Act, by treating the sale consideration as unexplained, sham, non-genuine is without any corroborative evidences. The addition under section 68 of the Act made merely on the basis of suspicion, presumptions and probability of preponderance without any direct evidence to prove the transactions as non-genuine or sham or demonstrating assessee's involvement in any kind of manipulation, cannot be made. Thus, 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 shares are sold by assessee's broker on BSE platform hence source is BSE's clearing system. 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.

34. We are aware of the recent Judgment of Penny Stock of Hon`ble Calcutta High Court in the case of Swati Bajaj and others in IA No. GA/2/2022, dated 14.06.2022. The important findings of the Hon`ble Court are reproduced below:

> *"**94**. At this juncture, it would be relevant to note the powers executable by this Court under Section 260A of the Act. Sections 103, 107, Order 41 rule 33 read with Section 260A (7) of the Act confers ample powers on this Court to interfere with the orders of the learned Tribunal.*
>
> ***95**. Regarding the burden of proof in a case arising under Section 68 of the Act, it would be beneficial to refer to the decision of the High Court of Delhi in CIT Nippun Builders and Development Private Limited in ITA NO. 120 of 2012 dated 07.01.2013 wherein it was held as follows:- This principle was reiterated by the Supreme Court in Commissioner of Income Tax v. Devi Prasad Vishwanath Prasad, (1969) 72 ITR 194 wherein Shah, J (as His Lordship then was) held as follows: "The question again assumes that it was for the Income-Tax Officer to indicate the source of the income before the income could be held taxable and unless he did so, the assessee was entitled to succeed. That is not, in our judgment, the correct legal position. Where there is an explained*

cash credit, it is open to the Income Tax Officer to hold that it is income of the assessee and no further burden lies on the Income-Tax Officer to show that income is from any particular source. It is for the assessee to prove that even if the cash credit represents income it is income from a source which has already been taxed." The law as stated above has not undergone any change because of the introduction of Section 68 in the Income Tax Act, 1961. As observed by S. Ranganathan J in Yadu Hari Dalmia Vs. Commissioner of Income Tax, Delhi (Central), (1980) 126 ITR 48, a decision of a Division Bench of this Court:- "It is well know that the whole catena of sections starting from s. 68 have been introduced into the taxing enactments step by step in order to plug loopholes and in order to place certain situations beyond doubt even through there were judicial decisions covering some of the aspects. For example, even long prior to the introduction of s. 68 in the statute book, courts had held that where any amounts were found credited in the books of the assessee in the previous year and the assessee offered no explanation about the nature and source thereof or the explanation offered was, in the opinion of the ITO, not satisfactory, the sums so credited could be charged to income-tax as income of the assessee of a relevant previous year. Section 68 was inserted in the I.T. Act 1961 only to provide statutory recognition to a principle which had been clearly adumbrated in judicial decisions". Section 68 thus only codified the law as it existed before 1.4.1962 and did not introduce any new principle or rule. Therefore, the ratio laid down in the three Supreme Court Judgments is equally applicable to the interpretation of Section 68 of the 1961 Act. We may also state that the learned counsel for the assessee vaguely referred to some decision taking the view that it was necessary for the AO, before making the addition under Section 68, to prove that the share application monies actually emanated from the assessee and represented undisclosed income of the assessee. He, however, did not cite any of those decisions. In any case the law having been laid down by the Supreme Court in the judgments cited above, we do not think that there is any merit in his submission. A perusal of the order of the Tribunal shows that it has gone on the basis of the documents submitted by the assessee before the AO and has held that in the light of those documents, it can be said that the assessee has established the identity of the parties. It has further been observed that the report of the investigation wing cannot conclusively prove that the assessee's own monies were brought back in the form of share application money. As noted in the earlier paragraph, it is not the burden of the AO to prove that connection. There has been no examination by the tribunal of the assessment proceedings in any detail in order to demonstrate that the assessee has discharged its onus to prove not only the identity of the share applicants, but also their creditworthiness and the genuineness of the transactions. No attempt was made by the tribunal to scratch the surface and probe the documentary evidence in some depth, in the light of the conduct of the assessee and other surrounding circumstances in order to see whether the assessee has discharged its onus under Section 68. With respect, it appears to us that there has only been a mechanical reference to the case-law on the subject without any serious appraisal of the facts and circumstances of the case.

***96**. Mr. Roy Chowdhury had pointed out to the findings recorded by the assessing officer in the case of Dinesh Kumar Bansal which is the subject matter of ITAT NO. 31 of 2020 wherein the assessee had invested in Kailash*

Auto Finance. In his submission, the order of the assessing officer is a well written order and he had elaborately referred to the findings recorded by the assessing officer. On going through the said order, we find the assessing officer has cogently brought out the factual scenario to establish machinations of fraudulent, manipulative and deceptive dealings and how the stock exchanges system was misused to generate bogus LTCG. On going through the order, we agree with Mr. Roy Chowdhury that the order of the said assessing officer is a well- reasoned order. Further we note that there is also discussion on the various decisions by the assessing officer after recordings findings on facts which in our opinion is an appropriate method of referring to and relying upon the legal precedence.

***97**. The revenue relied upon the order passed by the Hon'ble Supreme Court in Daniel Merchant Private Limited Versus ITO and others Special Leave to Appeal No. 23976 of 2017 dated 10.04.2017 wherein the judgment of this Court was confirmed wherein the CIT had passed orders under Section 263 of the Act. It is submitted that in cases where the order impugned before the tribunal where orders passed by the Commissioner under Section 263, independent reasons have been given by the Commissioner as to how the order passed by the assessing officer was erroneous in so far as it is prejudicial to the interest of revenue. In this regard, Mr. Prithu Dhudhoria learned standing counsel has taken us through the order passed by the Commissioner which are subject matter of ITAT No. 122 of 2021 and ITAT No. 156 of 2021.*

***98**. In a few appeals, the order of the Tribunal has been passed in appeals filed by the assessees against the orders passed by the Commissioner invoking the power under Section 263 of the Act. The Learned Senior Counsel for the assessee submitted that the assumption of jurisdiction by the Commissioner under Section 263 is thoroughly flawed that there has been violation of principles of natural justice in as much as the Commissioner has pre-decided the issue even at the stage of issuance of show cause notice.*

***99**. While proposing to invoke the power under Section 263 of the Act, the question as to whether the Commissioner was justified in invoking the power under Section 263 has to be decided based on facts of each case. The assessee cannot be allowed to contend that the language employed in the orders passed by the Commissioner under Section 263 does not mention about how the assessments order was erroneous in so far as it is prejudicial to the interest of revenue. These words or phrases are contained in Section 263 of the Act. Merely because the Commissioner has not used these words or phrases occurring in Section 263 will not vitiate the assumption of jurisdiction. What is required to be seen is the content of the order and the discussion and findings rendered by the Commissioner. This is because the cardinal principle is that substance over form has to be preferred. The Commissioner while issuing the show cause notice had come to the prima facie conclusion that the assessing officer did not conduct an enquiry as required to justify such prima facie opinion. The Commissioner was required to set out as to why in his opinion the enquiry by the assessing officer was not proper or insufficient. On reading of the orders passed by the Commissioner under Section 263 which are the subject matter in ITAT No. 156 of 2021 and other similar matters, it is seen that the Commissioner has disclosed to the assessee as to why in his case the power under Section 263 has to be invoked. On reading of the orders passed*

*by the Commissioner, we find that the order to be a reasoned order and there is nothing to conclude. The issue was pre-decided. The assessments orders which are subject matter of Section 263 action shows that an enquiry has not been conducted by the assessing officer in the manner it ought to have been conducted. We say so because, the officers of the income tax department were fully aware of the investigation which was done and the report been circulated and therefore at that stage that the officer had to take note of such report to put the assessee on notice and commenced an enquiry by calling upon the assessee to justify the genuineness of the claim of LTCG/STCL. The assessing officer turned a blind eye to the project investigation which was carried out by the department. The assessing officer lost sight of the fact that the enquiry did not commence from that of the assessee and more particularly the name of the assessee did not feature in the investigation report. Therefore the assessing officer was bound to cause an enquiry by calling upon the assessee to explain and justify the genuineness of the claim for exemption made by them. If the assesses has not established the genuinity at the "other end" the assessing officer would have no other operation except making the addition under Section 68 of the Act. We find that in these cases the assessing officers missed an important point as to what is the nature of enquiry which he is required to do. The assessing officer merely went by the submission that the stock broker is a public sector company. Unfortunately this is not the manner in which the enquiry should have been conducted. The entire case before the department was the genuinity of the claim for LTCG/STCL and the basis was unhealthy and steep rise of the price of the shares of mostly the paper companies though listed before the stock exchanges their shares were very rarely traded and in the background of these facts the enquiry should have been conducted by the assessing officer. Therefore we are of the clear view that the assumption of jurisdiction under Section 263 of the Act by the respective Commissioners was fully justified and are shown to be proper exercise of power. The tribunal while interfering with the orders of the Commissioner once again posed a wrong question to itself and failed to approach the matter in the proper perspective considering the backgrounds in which the power was invoked. The tribunal brushed aside the surrounding circumstances which have led to such assessments or orders under Section 263. The manipulative practice adopted by the stock brokers and entry operators was not even adverted to by the tribunal and the entire matter was dealt with in a very superficial manner without dwelling deep into the core of the issue. The tribunal being the last fact finding authority was required to go deeper into the issue as the matter have manifested large scale scam. Thus, the orders of the tribunal are not only perfunctory but perverse as well. The exercise that was required to be done by the tribunal is to consider the totality of the circumstances because the transactions are shown to be very complex, the meeting of minds of the "**players**" can never be established by direct evidence and therefore the surrounding circumstances was required to be taken note of by the tribunal which exercise has not been done. We have considered as to whether in such an event, should the matter be remanded to the tribunal for fresh consideration. We have held that there is no such requirement and that is the Court is empowered to examine the findings recorded by the assessing officer, or the CIT (A) to arrive at a conclusion. The assessees have been harping upon the opinion rendered by the financial experts, professionals in the said field the information which were available in the media etc. All these opinions are at best suggestions to an investor. The*

*assessees cannot state that merely because an expert had issued a buy call or there was news in the media that a particular shares shows an upwards trend and it is good time for buying those shares. They jumped into the fray the assessees are to be reminded of the doctrine of "**caveat emptor**". The assessees cannot take shelter under the opinion given by the experts as it is not the expert who has indulged in the transaction but it is the assessee. Therefore by following such experts advice if the assessee gets into an "**web**" it is for him to extricate himself from the tangle and he cannot reach out to the expert to bail him out. The assessees cannot be heard to say that they had blindly followed advice of a third party and made the investment. Selection of shares to be purchased is a very complex issue, it requires personal knowledge and expertise as the investment is not in a mutual fund. None of the assessees before us have shown to have to made any risk analysis before making their investment in a "**penny stock**". If according to them they have blindly taken a decision to invest in insignificant companies they having done so at their own peril have to face the consequences. Thus, the conduct of the assessees before us probabilities the stand taken by the revenue, rightly the mind of the assessee as an investor was taken note to deny the claim for exemption. It is in this background that the human probabilities would assume significance. As observed earlier the doctrine of preponderance of probabilities could very well be applied in cases like the present one. We say human probabilities to be the relevant factor as on account of the fact that the assessees are of individuals or Hindu Undivided Families and the trading has been done in the name of the individual assessee or by the Karta of the HUF. None of the assessee before us have been shown to big time investor. This is evident from the income details of the assessee which has been culled out by the respective assessing officers. Assuming that the assessee is a regular investor as was submitted to us by the learned advocates for the assessees that in any manner cannot improve the situation as the claim for LTCG has been only restricted to the shares which were purchased and sold by the assessees in penny stocks companies. Therefore merely because the assessee had invested in other blue chit companies had earned profit or incurred loss cannot validate the tainted transactions. It has been established by the department that the rise of the prices of the shares was artificially done by the adopting manipulative practices. Consequently whatever resultant benefits which accrue from out of such manipulative practices are also to be treated as tainted. However, the assessee had opportunity to prove that there was no manipulation at the other end and whatever gains the assessee has reaped was not tainted. This has not been proved or established by any of the assessee before us. Therefore, the assessing officers were well justified in coming to a conclusion that the so called explanation offered by the assessee was not to their satisfaction. Thus, the assessee having not proved the genuineness of the claim, the creditworthiness of the companies in which they had invested and the identity of the persons to whom the transactions were done, have to necessarily fail. In such factual scenario, the Assessing Officers as well as the CIT(A) have adopted an inferential process which we find to be a process which would be followed by a reasonable and prudent person. The Assessing Officers and the CIT(A) have culled out proximate facts in each of the cases, took into consideration the surrounding circumstances which came to light after the investigation, assessed the conduct of the assessee, took note of the proximity of the time between the buy and sale operations and also the sudden and steep rise of the price of the shares of the companies*

*when the general market trend was admittedly recessive and thereafter arrived at a conclusion which in our opinion is a proper conclusion and in the absence of any satisfactory explanation by the assessee, the Assessing Officers were bound to make addition under Section 68 of the Act. It was argued by the learned Advocates for the assessees that their clients are ordinary people who have made meagre investments and they cannot be branded as scamsters when big players in the market have been left scot free and in certain other cases, the big players who were also branded as scammers were allowed to avail the benefit of the Vivad Se Viswas Scheme. In fact, similar argument was advanced when we heard the applications filed by the revenue to condone the delay in filing in some of the present appeals. The argument on behalf of the assessee was that on account of not filing the appeals by the revenue within the period of limitation, their vested right to avail the benefit of the Vivad Se Viswas Scheme was taken away. We have rejected such an argument firstly by holding that there is no vested right for an assessee to come under the Scheme and this finding was rendered by us after examining the provisions of the V.S.V. Act, secondly we have held that cases cannot be decided based on hypothesis nor can the Court read the mind of the assessee that in the event, the revenue had filed appeal on time, the assessee may have availed the benefit under the V.S.V. Scheme. In fact, we find that the Comptroller and Auditor General has also severely commented upon the action taken by the Income Tax Department on such issues and that no uniform procedure had been followed by the various Income Tax Officers and in certain cases the assessments were not even reopened. Therefore, merely because in certain cases, appeals were preferred within the relevant time enabling, those assessees to avail the benefit of the V.S.V. Scheme can in no manner advance the case of the assessees before us. As has been argued before us by the learned Senior Standing Counsels, in the chain of events, there are three main person who are involved, the first of which is the entry operator who is said to have managed the overall scam as the entry operator controls several paper companies which have been utilized for routing the cash. The operator is also in control of some penny stock companies whose shares are listed on recognized stock exchanges. It is true that "**penny stock**" is not an offensive word or comes with a stigma. Penny stock is a stock which trades at a relatively low prices and market capitals. These stocks are highly speculative and they are categorized as high risk stocks largely due to lack of liquidity. Furthermore, the shares of the penny stock are closely held as the general public is not interested in these stocks due to the poor financials of the listed companies. It is for such reasons the entry operators are said to have chosen these penny stocks. In certain cases before us it has been established that the promoters/ Directors of the penny stock companies are also involved and they allowed the entry operators to manage the affairs of the company in return of a commission paid to them. The third set of persons involved, are the share brokers. As submitted by Mr. S.N. Surana, learned Senior Counsel, the brokers are required to comply with very stringent KYC norms before registering any entity as their client. The SEBI Regulations cast very onerous responsibilities on the share brokers. However, the trend appears that the penny stock companies have no business or very little business got involved with the stock brokers and it is stated that the share brokers receive commission for allowing the paper entities to trade through their terminal and some of the brokers have also stated to be performing the trading activity themselves on behalf of the paper companies. The report states as to why the*

department has taken an investigation as a project, largely due to huge syndicate of the entry operators, share brokers and money launderers. The report states that Kolkata is a very distinctive place among the cities of India, so far as the accommodation entry is concerned and action has been initiated against more than thirty share broking entities and more than twenty entry operators working in Kolkata. The report states that almost everyone has accepted its activity, participation in providing accommodation entry of LTCG. The investigation has also indicated as to how the scheme of merger is being misused. Though the scheme of merger is approved by the Company Court, in the event it is found that such merger was done/ obtained by playing fraud, the Company Court is empowered to revoke the order and it appears that the Income Tax Department has not taken any steps in this regard to approach the Company Court or the Tribunal with such a prayer. Thus, we have no hesitation to hold that the orders passed by the CIT(A) affirming the orders passed by the Assessing Officers as well as the orders passed by CIT under Section 263 of the Act were proper and legal and the Tribunal committed a serious error in reversing such decisions. Mr. Arif Ali, learned Advocate appearing for the appellant in ITAT No. 44 of 2020 (Assessee-Gupta Agarwal) submitted that the facts which have been set out in the memorandum of appeal, is wholly incorrect and does not pertain to the assessee- Gupta Agarwal. We have gone through the memorandum of appeal as well as the substantial questions of law suggested by the revenue and find the same to be not relatable to the assessee. This is on account of non-application of mind both by the Income Tax Department as well as the Officers of the Ministry of Law and Justice. More often we have stated that due care and caution has to be taken when appeals are drafted and filed before this Court and this is not the first case which has come up before us where the pleadings were irrelevant to the facts of the case. However, the substantial questions of law suggested by the revenue is with regard to the correctness of the order of the Tribunal in interfering with the order of the CIT(A) who affirmed the order of the Assessing Officer making the addition under Section 68 of the Act. Furthermore, we have to note that more than 90 appeals were allowed by the Tribunal in a single order and the facts of the 89 assessees were not noted by the Tribunal. In any event, the assessee, Mr.Gupta was quite happy with the result and he made no attempt to request the Tribunal to note his facts which according to him may have been unique as was submitted before us. If the assessees could take shelter under an order passed by the Tribunal which has not discussed even the basic facts of the assessees' case, we are not inclined to non-suit the revenue on the ground that some of the questions suggested in ITAT No. 44 of 2020 may not be relatable to the assessee- Gupta Agarwal. Therefore, though the grounds are not relatable to the assessee, this will not vitiate the appeal in its entirety as the core is the substantial questions of law which is required to be decided.

***101**. For all the above reasons, we hold that the Tribunal committed a serious error in setting aside the orders of the CIT(A) who had affirmed the orders of the Assessing Officer and equally the Tribunal committed a serious error both on law and fact in interfering with the assumption of jurisdiction by the Commissioner under Section 263 of the Act. In the result, these appeals are allowed and the substantial questions of law framed/suggested are answered in favour of the revenue and against the assessee restoring the orders passed*

by the respective Assessing Orders as affirmed by the CIT(A) as well as the orders passed by the CIT under Section 263 of the Act. No costs."

35. We have gone through the above findings of Hon`ble Calcutta High Court in the case of Swati Bajaj and others (supra) and noted that assessee`s facts are different, therefore, above judgment is distinguishable on the basis of following facts:

(i) Observation of Hon`ble Calcutta High Court:
"…The assessees cannot be heard to say that they had blindly followed advice of a third party and made the investment. Selection of shares to be purchased is a very complex issue, it requires personal knowledge and expertise as the investment is not in a mutual fund. None of the assessees before us have shown to have to made any risk analysis before making their investment in a "penny stock". If according to them they have blindly taken a decision to invest in insignificant companies they having done so at their own peril have to face the consequences. Thus, the conduct of the assessees before us probabilities the stand taken by the revenue, rightly the mind of the assessee as an investor was taken note to deny the claim for exemption. It is in this background that the human probabilities would assume significance. As observed earlier the doctrine of preponderance of probabilities could very well be applied in cases like the present one. We say human probabilities to be the relevant factor as on account of the fact that the assessees are of individuals or Hindu Undivided Families and the trading has been done in the name of the individual assessee or by the Karta of the HUF. ***None of the assessee before us have been shown to big time investor…."***

Our analysis in respect of assessee`s facts:

In the assessee`s case under, the assessee has done risk analysis before making investments. The assessee has not taken blind decision to invest in the shares. After purchasing the shares, the assessee holds these shares for the period of seven years. Hence, assessee under consideration is an Investor. Thus, for such assessee it cannot be said that he has engaged in taking accommodation entry to evade the taxes. **Thus, assessee before us is a big time Investor,** as he was holding the shares for a period of seven years.

(ii) Observation of Hon`ble Calcutta High Court:

"……It has been established by the department that the rise of the prices of the shares was artificially done by the adopting manipulative practices. ***Consequently whatever resultant benefits which accrue from out of such manipulative practices are also to be treated as tainted.*** *However, the assessee had opportunity to prove that there was no manipulation at the other end and whatever gains the assessee has reaped was not tainted. This has not been proved or established by any of the assessee before us……"*

Our analysis in respect of assessee`s facts:

In the assessee`s case under consideration, the assessee had not involved in manipulative practices. Neither the assessing officer nor ld CIT(A) have pointed out

with cogent evidence that assessee was involved in manipulative practices. The assessee under consideration kept the shares for a period of seven years and within this period of seven years, the lower authorities did not point out any instance that assessee was involved in manipulative practices. After a period of seven years the assessee has sold the shares in the open market on which STT has been paid. The assessing officer failed to point out that assessee had deposited cash in his bank account before the date of purchase of such shares.

(iii) Observation of Hon`ble Calcutta High Court:

> *".....The Assessing Officers and the CIT(A) have culled out proximate facts in each of the cases, took into consideration the surrounding circumstances which came to light after the investigation, assessed the conduct of the assessee, took note of* ***the proximity of the time between the buy and sale operations and also the sudden and steep rise of the price of the shares of the companies*** *when the general market trend was admittedly recessive and thereafter arrived at a conclusion which in our opinion is a proper conclusion and in the absence of any satisfactory explanation by the assessee, the Assessing Officers were bound to make addition under Section 68 of the Act...."*

Our analysis in respect of assessee`s facts:

In the assessee`s case under consideration, the assessee`s proximity ***of the time between the buy and sale*** **of shares are as follows:**

(i) In case of assessee`s appeal in **ITA No.183/SRT/2021**: Assessee sold the shares after seven years.

(ii) In case of assessee`s appeal in ITA No.184/SRT/2021: Assessee sold the shares after eight years.

(iii) In case of assessee`s appeal in ITA No.185/SRT/2021: Assessee sold the shares after seven years.

Hence the proximity of the time between the buy and sale of shares in case of these assessees ranges between 7 Years to 8 Years. It is not the case that assessee took the accommodation entry in penny stock, within a period of two or three months to book bogus LTCG or loss, to defraud the Revenue. The assessee, as on Investor, held the share for long time. Hence the assessee is an Investor and therefore should not be treated to engage in fraudulent activities/manipulation activities. We note that assessee had sold shares of M/s Global Capital Markets Limited during FY 2010-11 on 29.07.2010 after holding the shares for more than 7 years and claimed just Rs. 3,47,564/- as Long Term Capital Gain(LTCG). We also note that the amount of Rs.3,47,564/- is not a significant amount. Therefore considering these facts, we are of the view that assessee under consideration, has not taken accommodation entry.

Therefore, we note that findings of Hon`ble Calcutta High Court in the case of Swati Bajaj and others(supra) is not entirely applicable to the assessee`s facts under consideration. By way of this above analysis, we are not stating that entire findings of Hon`ble Calcutta High Court in the case of Swati Bajaj and others(supra) are distinguishable on facts, of Course some of the findings are applicable to the

assessee`s facts. In our above analysis, we have pointed out that some of the major facts of the assessee under consideration is different, hence findings of Hon`ble Calcutta High Court in the case of Swati Bajaj and others(supra) are not squarely applicable to the assessee`s facts.

36. We note that Hon`ble Jurisdictional High Court of Gujarat in the case of Jagat Pravinbhai Sarabhai, [2022] 142 taxmann.com 247, held that where Assessing Officer noted that assessee had indulged in scrip of shell company and had claimed long term capital gain on sale of shares and made addition under section 68 holding that entire transaction was bogus and in the nature of penny stock, however, since genuineness of investment in shares by assessee was substantiated by him by producing copy of transaction statement for period from 1-6-2001 to 1-10-2010 and shares were retained for more than ten years and were sold after such long time, hence investment was not bogus therefore it cannot be treated that investment was made in penny stock. The findings of the Hon`ble Court is reproduced below:

> *"**2**. As submitted by learned senior advocate Mr. M.R. Bhatt for M.R.Bhatt and Co., the appellant revenue proposes the following substantial questions of law, which according to the submission requires examination.*
>
> > *"Whether on the facts and circumstances of the case and in law, the decision of Appellate Tribunal is ex facie perverse because the Appellate tribunal deleted the addition of Rs. 2,10,474/- made on account of bogus long term capital gain, without appreciating the entire gamut of fact that the assessee transacted in penny stock namely M/s. Devika Proteins Ltd. thus earning bogus Long term Capital Gain and claiming it to be exempt under section 10(38) of the Income-tax Act?"*
>
> ***3**. The assessee filed the return of income for the assessment year 2011-12 on 29-3-2012 declaring his total income Rs.3,11,490/-. Subsequently the assessment was reopened as information was received that assessee has indulged into script of shell company and had claimed long term capital gain on sale of shares of Devika Proteins Limited to the tune of Rs. 2,10,474/- and that the amount was claimed as exemption under section 10(38) of the Income-tax Act, 1961 (hereafter referred to as 'the Act')*
>
> ***3.1** The Assessing Officer made addition of the said amount. The entire transaction was treated as bogus and in the nature of penny stock. By adding Rs. 2,10,474/- under section 68 of the Act, total income was assessed at Rs. 5,21,964/-.*
>
> ***3.2** In appeal by the assessee before the Commissioner of Income-tax (Appeals), the issue was re-examined. According to the appellate authority the appellant assessee had furnished evidence to show that the shares were brought as genuine investment which was long back in the year 2000-01. As the shares were in the nature of old investment, they could not be treated as penny stock by any stretch of imagination.*
>
> ***4**. The Income-tax Appellate Tribunal further examined the question in appeal preferred by the revenue and confirmed the view of the appellate authority noticing that the shares were purchased in the year 2001 and they were sold after long time in the year 2010-11.*

> ***5****. The genuineness of investment in the shares by the assessee was substantiated by him by producing copy of transaction statement for the period from 1-6-2001 to 1-10-2010. The investment was made in the year 2000-01. The shares were retained for more than ten years and were sold after such long time. These circumstances suggested that the investment was not bogus or investment made in penny stock. The shares were purchased in order to invest and not for the purpose of earning exempted income by frequent trading in short span.*
> ***6****. The finding recorded by the appellate authority and confirmed by the appellate tribunal is based on material before them. They are in the realm of findings of fact. No error could be noticed in the findings and conclusion that the investment was longstanding and genuine and was not penny stock on the basis of which the capital gain was wrongly claimed.*
>
> ***6.1*** *On the facts of case, no question of law much less substantial question of law arises.*
>
> *7. Resultantly, appeal is* ***dismissed****".*

37. We note that findings of the Hon`ble Jurisdictional High Court of Gujarat in the case of Jagat Pravinbhai Sarabhai (supra) is squarely applicable to the assessee`s facts under consideration. The genuineness of investment in the shares by the assessee was substantiated by him by producing contract note, Transaction was through recognised Broker, transaction was done through banking channel on which STT was paid. The shares were held by assessee, as an Investor for a period of seven/ eight years. The investment was made in the year 2003 and sold in 2010-11. The shares were retained for more than seven years and were sold after such long time. These circumstances suggest that the investment was not bogus. The shares were purchased in order to invest and not for the purpose of earning exempted income by frequent trading in short time.

38. We note that above judgment of Hon'ble Gujarat High Court in the case of Jagat Pravinbhai Sarabhai (supra) is binding judgment, on the Tribunal situated in Gujarat, as it is the judgment of Hon'ble jurisdictional High Court. At this juncture, it is useful to refer to the judgment of Hon'ble High Court of Bombay in the case of CIT v. Thana Electricity Supply Ltd. (1994) 206 ITR 727 (Bom.) wherein after considering various judgments of Supreme Court laid down the following propositions with regard to binding precedent. The findings of the Hon`ble Court are reproduced below:

> *" **6.** On a careful consideration of the submissions of the learned counsel for the assessee, we find that before taking up the issue involved in the question of law referred to us in this case for consideration, it is necessary to first decide the last submission of the learned counsel that this Court, while interpreting an All India Statute like IT Act, is bound to follow the decision of any other High Court and to decide accordingly even if its own view is contrary thereto, in view of the practice followed by this Court in such matters. Because, if we are to accept this submission, it will be an exercise in futility to examine the real controversy before us with a view to decide the issue, as in that case, in view of the Calcutta decision, whatever may be our decision on the question of law referred to us, we would be bound to follow the decision of the Calcutta High Court and answer the question accordingly. This submission, in our opinion, is not tenable as it goes counter not only to the powers of this Court to hear the reference and decide the questions of law raised therein and to*

deliver its judgment thereon but also to the doctrine binding precedent known as stare decisis. We shall deal with the reasons for the same at some length a little later.

7. *We have also carefully gone through the decisions of this Court referred to by the counsel for the assessee in support of his above contention. In our opinion, the observations in those decisions have not been properly appreciated. They have been too widely interpreted. There appears to be a misconception about the nature thereof and their binding effect. We shall also refer to those decisions and the relevant observations therein and discuss their nature. Before doing that, it may be expedient to briefly state the doctrine of binding precedent, commonly known as stare decisis. At the outset, it may be appropriate to point out the well-settled legal position that what is binding on the Courts is the ratio of a decision. There is a clear distinction between ratio of a decision, obiter dicta and observations from the point of view of precedent value or their binding effect. It will be necessary in this case to explain this distinction. But before we do so, we may discuss the principle of binding precedent. This will take us to the question whose decision binds whom.*

8. *For deciding whose decision is binding on whom, it is necessary to know the hierarchy of the Courts. In India, the Supreme Court is the highest Court of the country. That being so, so far as the decisions of the Supreme Court are concerned, it has been stated in Art. 141 of the Constitution itself that :*

"The law declared by the Supreme Court shall be binding on all Courts within the territory of India."

In that view of the matter, all Courts in India are bound to follow the decisions of the Supreme Court.

9. *Though there is no provision like Art. 141 which specifically lays down the binding nature of the decision of the High Courts, it is well accepted legal position that a Single Judge of a High Court is ordinarily bound to accept as correct, judgments of Courts of co-ordinate jurisdiction and of Division Benches and of the Full Benches of his Court and of the Supreme Court. Equally well settled is the position that when a Division Bench of the High Court gives a decision on a question of law, it should generally be followed by a co-ordinate Bench of the same High Court. If the co-ordinate Bench in the subsequent case wants the earlier decision to be reconsidered it should refer the question at issue to a larger Bench.*

10. *It is equally well settled that decision of one High Court is not a binding precedent on another High Court. The Supreme Court, in Valliamma Champaka Pillai vs. Sivathanu Pillai AIR 1979 SC 1937 dealing with the controversy whether a decision of erstwhile Travancore High Court can be made a binding precedent on the Madras High Court on the basis of principle of stare decisis, clearly held that such decision at best have a persuasive effect and not the force of binding precedent on the Madras High Court. Referring to the States Reorganisation Act, it was observed that there was nothing in the said Act or any other law which exhalts the ratio of those decisions to the status of a binding law nor could the ratio decidendi of those decisions be*

perpetuated by invoking the doctrine of stare decisis. The doctrine of stare decisis cannot be stretched that far to make the decision of one High Court a binding precedent for the other. This doctrine is applicable only to the different Benches of the same High Court.

11. *It is also well settled that though there is no specific provision, making the law declared by the High Court binding on subordinate Courts, it is implicit in the power of supervision conferred on a superior Tribunal that the Tribunals subject to its supervision would confirm to the law laid down by it. It is in that view of the matter that the Supreme Court in East India Commercial Co. vs. Collector of Customs AIR 1962 (SC) 1893 (at 1905) declared :*

> *"We, therefore, hold that the law declared by the Highest Court in the State is binding on authorities or Tribunals under its superintendence, and they cannot ignore it....."*

12. *This position has been very aptly summed up by the Supreme Court in the Mahadeolal Kanodia vs. The Administrator General of West Bengal AIR 1960 SC 936 (at 941) as follows :*

> *"Judicial decorum no less than legal propriety forms the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if judges of co-ordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view the result would be utter confusion. The position would be equally bad where a Judge sitting singly in the High Court is of opinion that the previous decision of another Single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench."*

13. *The above decision was followed by the Supreme Court in Baradakanta Mishra vs. B. Dixit AIR 1972 SC 2466 wherein the legal position was reiterated in the following words (at 2469) :*

> *"It would be anomalous to suggest that a Tribunal over which the High Court has superintendence can ignore the law declared by that Court and start proceedings in direct violation of it. If a Tribunal can do so, all the subordinate Courts can equally do so, for there is no specific provisions, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate Courts. It is implicit in the power of supervision conferred on a superior Tribunal that all the Tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working; otherwise there would be confusion in the administration of law and respect for law would irretrivably suffer."*

14. *Having decided whose decision binds whom, we may next examine what is binding. It is well settled that it is only the ratio decidendi that has a*

precedent value. As observed by the Supreme Court in S.P. Gupta & Ors. vs. President of India & Ors. AIR 1982 SC 149 (at 231), "It is elementary that what is binding on the Court in a subsequent case is not the conclusion arrived at in a previous decision but the ratio of that decision, for it is the ratio which binds as a precedent and not the conclusion". A case is only an authority for what it actually decides and not what may come to follow logically from it. Judgments of Courts are not to be construed as statutes [see Amarnath Omprakash vs. State of Punjab (1985) 1 SCC 345]. While following precedents, the Court should keep in mind the following observations in Mumbai Kamgar Sabha vs. Abdulbhai AIR 1976 SC 1455 (at 1467-68) :

> *"It is trite, going by Anglophonic principles, that a ruling of a superior Court is binding law. It is not of scriptural sanctity but is of ratio wise luminosity within the edifice of facts where the judicial lamp plays the legal flame. Beyond those walls and de hors the milieu we cannot impart eternal vernal value to the decision, exalting the doctrine of precedents into a prison house of bigotry, regardless of varying circumstances and myriad developments. Realism dictates that a judgment has to be read, subject to the facts directly presented for consideration and not affecting those matters which may lurk in the record. Whatever be the position of subordinate Courts casual observations, generalisations and sub-silentio determinations must be judiciously read by Courts of co-ordinate jurisdiction."*

15. *Decision on a point not necessary for the purpose of the decision or which does not fall to be determined in that decision becomes an obiter dictum. So also, opinions on questions which are not necessary for determining or resolving the actual controversy arising in the case partakes the character of obiter. Obiter observations, as said by Bhagwati, J. (as his Lordship then was) in A.D.M. Jabalpur vs. Shiv Kant Shukla AIR 1976 SC 1207, would undoubtedly be entitled to great weight, but `an obiter cannot take the place of the ratio. Judges are not oracles'. Such observations do not have any binding effect and they cannot be regarded as conclusive. As observed by the Privy Council in Baker vs. R. (1975) 3 All ER 55 (at 64), the Courts authoritative opinion must be distinguished from propositions assumed by the Court to be correct for the purpose of disposing of the particular case. This position has been made further clear by the Supreme Court in a recent decision in CIT vs. Sun Engineering Works Pvt Ltd. (1992) 107 CTR (SC) 209 : (1992) 198 ITR 297 (SC) at 320 where it was observed :*

> *"It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete "**law**" declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and, while applying the decision to a later case, the Courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings.*

16. *In the above decision, the Supreme Court, also quoted with approval the following note of caution given by it earlier in Madhav Rao Jiwaji Rao Scindia Bahadur vs. Union of India AIR 1971 SC 530 (at 578) :*

> *"It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment."*

It is thus clear that it is only the ratio decidendi of a case which can be binding—not obiter dictum. Obiter, at best, may have some persuasive efficacy.

17. *From the foregoing discussion, the following propositions emerge :*

(a) The law declared by the Supreme Court being binding on all Courts in India, the decisions of the Supreme Court are binding on all Courts, except, however, the Supreme Court itself which is free to review the same and depart from its earlier opinion if the situation so warrants. What is binding is, of course, the ratio of the decision and not every expression found therein.

(b) The decisions of the High Court are binding on the subordinate Courts and authorities or Tribunals under its superintendence throughout the territories in relation to which it exercises jurisdiction. It does not extent beyond its territorial jurisdiction.

(c) The position in regard to binding nature of the decisions of a High Court on different Benches of the same Court, may be summed up as follows:

> *(i) A Single Judge of a High Court is bound by the decision of another Single Judge or a Division Bench of the same High Court. It would be judicial impropriety to ignore that decision. Judicial comity demands that a binding decision to which his attention had been drawn should neither be ignored nor overlooked. If he does not find himself in agreement with the same, the proper procedure is to refer the binding decision and direct the papers to be placed before the Chief Justice to enable him to constitute a larger Bench to examine the question [see Food Corporation of India vs. Yadav Engineer & Contractor AIR 1982 SC 1302].*
>
> *(ii) A Division Bench of a High Court should follow the decision of another Division Bench of equal strength or a Full Bench of the same High Court. If one Division Bench differs with another Division Bench of the same High Court, it should refer the case to a larger Bench.*

Where there are conflicting decisions of Courts of co-ordinate jurisdiction, the later decision is to be preferred if reached after full consideration of the earlier decisions.

(d) ***The decision of one High Court is neither binding precedent for another High Court nor for Courts or Tribunals outside its own***

territorial jurisdiction. It is well settled that the decision of a High Court will have the force of binding precedent only in the State or territories in which the Court has jurisdiction. *In other States or outside the territorial jurisdiction of that High Court it may, at best, have only a persuasive effect. By no amount of stretching of the doctrine of stare dicisis judgments of one High Court can be given the status of a binding precedent so far as other High Courts or Courts or Tribunals within their territorial jurisdiction are concerned. Any such attempt will go counter to the very doctrine of stare decisis and also the various decisions of the Supreme Court which have interpreted the scope and ambit thereof. The fact that there is only one decision of any one High Court on a particular point or that a number of different High Courts have taken identical views in that regard is not at all relevant for that purpose. Whatever may be conclusion, the decisions cannot have the force of binding precedent on other High Courts or on any subordinate Courts or Tribunals within their jurisdiction. That status is reserved only for the decisions of the Supreme Court which are binding on all Courts in the country by virtue of Art. 141 of the Constitution."*

39. Therefore, from the above judgment of Hon'ble High Court of Bombay in the case of Thana Electricity Supply Ltd (supra) it is abundantly clear that decision of a High Court will have the force of binding precedent only in the State or territories in which the Court has jurisdiction. Hence we note that Judgment of Hon`ble Calcutta High Court in the case of Swati Bajaj and others(supra) should not be applicable to the assessee as it is outside the territorial jurisdiction of Gujarat. However, the Judgment of Hon`ble Jurisdictional High Court of Gujarat in the case of Jagat Pravinbhai Sarabhai(supra) should be applicable to the assessee`s case, as it is the judgment of Jurisdictional High Court. Therefore, respectfully following the binding judgment of the Hon`ble Jurisdictional High Court of Gujarat in the case of Jagat Pravinbhai Sarabhai (supra), we allow the appeal of the assessee.

40. In ground no.4, assessee stated that Assessing Officer made addition under section 69C on account of commission paid @ 2% or 3% of bogus long term capital gain. In the assessee`s case AO added Rs.10426 (3% of Rs.3,47,564). Since, we have deleted the alleged addition of Rs.3,47,564/-, hence addition made by AO does not have leg to stand, therefore it is hereby deleted.

41. In the result, appeal filed by the assessee (in ITA No.183/SRT/2021) is allowed.

42. Since the facts and circumstances in the appeal in ITA No.183/SRT/2021 are identical to those considered in the case of appeals in ITA No.184/SRT/2021 and in ITA No.185/SRT/2021, therefore, our decision in the case of appeal in ITA No.183/SRT/2021, shall apply mutatis mutandis in the case of appeals in ITA No.184/SRT/2021 and in ITA No.185/SRT/2021 also. Accordingly, these three appeals are ***allowed****."*

6. We find that the decision of this Tribunal was challenged by Revenue before Hon'ble jurisdictional High Court, wherein after detailed discussion on the question of law dismissed the appeal filed by Revenue vide order dated 07.12.2023. We find that Tribunal allowed the appeals of family members of assessee by following the decision of Hon'ble jurisdictional High Court in the case of PCIT vs. Jagat Pravinbhai Sarabhai (2022) 142 taxmann.com 247 (Guj). We have again independently considered the fact of the case and find that holding period of shares by assessee was more than seven years, as has been in earlier case of assessee's family members. Thus, we do not find any justification and treating the LTCG as unexplained credit. Therefore, we find that grounds of appeal raised by assessee in this appeal is covered in favour of assessee. The grounds of appeal raised by the assessee are allowed.
7. In the result, the appeal of the assessee is allowed.
8. Now coming to assessee's appeal in ITA No.882/SRT/2024 for assessment year 2011-12, wherein assessee has raised following grounds of appeal:

> *"1. On the facts and circumstances of the case as well as law on the subject, the learned Commissioner Income Tax (Appeal), NFAC has erred in confirming the action of Income Tax Officer in re-opening the assessment/s 147 of the Act and issuing notice u/s 148 of the I.T. Act, 1961.*
> *2. On the facts and circumstances of the case as well as law on the subject, the learned Commissioner Income Tax (Appeal), NFAC has erred in upholding the addition of Rs.8,21,091/- on account of long term capital gain treating such exempt LTCG as unexplained cash credit u/s 68 of the I.T. Act, 1961 without acknowledging the submission of the assessee.*
> *3. On the facts and circumstances of the case as well as law on the subject, the learned CIT(A) has erred in confirming action of Assessing Officer in making addition of Rs.4,105/- as unexplained expenditure u/s 69C of the I.T. Act, 1961.*

4. It is therefore prayed that addition made by the Assessing officer and confirmed by CIT(A) may please be deleted.

5. Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal."

9. We find that assessee has raised almost similar grounds of appeal in ITA No.552/Srt/2024, except the fact that in the present case, the appeal of assessee was dismissed in *ex parte* proceedings vide order dated 21.04.2023. however, the assessee filed present appeal before Tribunal on 20.08.2024. Thus, there is delay of 483 days in filing appeal. In support of condonation of delay, assessee has filed her affidavit. The Ld. AR of the assessee submits that order of Ld.CIT(A) was neither communicated by post or by way of online communication through e-mail. Thus, assessee missed time in filing appeal before Tribunal. The assessee came to know about the dismissal of appeal only at the time of filing her return for assessment year 2024-25. The Ld. AR of the assessee furnished copy of screen shot of ITBA portal showing that no notice on the e-mail address mentioned in Form-35 as 'rahulcoa108@yahoo.com'. The delay in filing appeal is neither intentional nor deliberate. The assessee filed appeal before Ld.CIT(A) on 23.01.2019 and also filed written submission in physical form before Ld.CIT(A)-1 Surat in February, 2021, copy of acknowledgement of written submissions is placed on record. No notice of hearing fixing by Ld.CIT(A) was not received by assessee, however, the notice in other related appeals were received by assessee, and same were responded immediately. The Ld. AR of the assessee furnished the details of other appeals of family members of assessee to substantiate the fact that such order was passed on merit after considering the submission of assessee's family

members. The Ld. AR of the assessee submits that delay is neither intentional nor deliberate and may be condoned. The Ld. AR of the assessee submits that delay may be condoned and appeal may be considered on merit and as the case is squarely covered in favour of assessee to substantiate the fact that no notice of hearing of appeal was received.

On merit of the case, Ld. AR of the assessee submits that grounds of appeal raised in this appeal is also covered by the decision of assessee's family members case (supra) as submitted in ITA No.552/Srt/2021.

10. On the other hand, the ld Sr DR for the revenue submits that the assessee has not explained the delay. It is the duty of assessee to keep the track of appeal pending before fist appellate authority. On merit of the additions, the ld Sr DR for the revenue supported the order of Assessing Officer.

We have considered the rival submissions of the parties and perused the orders of order of authorities carefully. first we are considering the plea of condonation of delay. We find that while filing fist appeal, in Form-35 the assessee has furnished e-mail address as 'rahulcoa108@yahoo.com'. Before us Ld. AR of the assessee furnished copy of screen shot of ITBA portal. On perusal of such screen shot, we find that no such notice was sent to such e-mail. Thus, we find that merit in the submission of Ld. AR of the assessee that assessee was not having received any notice of hearing of appeal before Ld.CIT(A). Thus, considering the peculiar facts of the case, the delay in filing appeal is condoned.

11. Now adverting merit of the case. On considering the facts of the present case, we find that ld CIT(A) has dismissed the appeal of assessee without discussing

the facts of the case on merit. Further keeping in view that this appeal relates to AY 2011-12 and in restoring the matter for considering it on merit it may take four to five years in disposal of appeal, thus, we deem it appropriate to consider it on merit. We find that assessee has raised identical grounds of appeal except variation of addition on account of disallowance of LTCG as raised in ITA No.552/Srt/2024, which we have already allowed on detailed discussion as recorded in above para. Therefore, following the principle of consistency, the appeal of assessee is allowed with similar observation.

12. In the result, assessee's appeal is allowed.

13. In combined result, both appeals of assessee are allowed. Registry is directed to place one copy of this order in all appeals folder / case file(s).

Order pronounced in the open court on 10/02/2025.

Sd/-	Sd/-
(BIJAYANANDA PRUSETH)	(PAWAN SINGH)
लेखा सदस्य/Accountant Member	न्यायिक सदस्य/Judicial Member

सूरत / Surat Dated: /01/2025

Dkp Outsourcing Sr.P.S*

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

- अपीलार्थी/ The Appellant
- प्रत्यर्थी/ The Respondent
- आयकर आयुक्त/ CIT
- विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, सूरत/ DR, ITAT, SURAT
- गार्ड फाईल/ Guard File

By order/आदेश से,

// TRUE COPY //

सहायक पंजीकार
आयकर अपीलीय अधिकरण, सूरत