

IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCHES : SMC:
KOLKATA

[BEFORE SHRI S.S.GODARA, JM]

ITA No.1263/Kol/2018 Assessment Year:2014-15		
Shri Jignesh Desai 71, Canning Street, AL-6, Bagree Market, Kolkata-700001. Rep. by Shri Miraj D.Shah, AR Date of hearing : 17.09.2018. PAN : AFEPD 5066 Q	Vs.	I.T.O., Ward-35(2) 110, Shantipally, 7 th Floor. Purba, E.M.Bypass, Kolkata-700107. Rep. by Shri Kapil Mondal, JCIT
ITA No.1270/Kol/2018 Assessment Year:2014-15		
Shri Gopal Kalanauria, 135, Canning Street, Gr. Floor, Kolkata-700001. Rep. by Shri Hemant Kejriwal, ACA Date of hearing : 13.09.2018. PAN : AGFPK 9235 L	Vs.	I.T.O., Ward-34(4), 110, Shantipally, 7 th Floor. Purba, E.M.Bypass, Kolkata-700107. Rep. by Md. Ghyas Uddin, Addl. CIT
ITA No.1267//Kol/2018 Assessment Year:2014-15		
Shri Raj Kumar Goenka, Marshal House, 25, Strand Road, 3 rd Floor, Kolkata-1. Rep. by Shri Miraj D.Shah, AR Date of hearing : 12.09.2018. PAN : ADZPG 3205 D	Vs.	I.T.O., Ward-36(1), 110, Shantipally, 7 th Floor. Purba, E.M.Bypass, Kolkata-700107. Rep. by Shri Robin Choudhury, Addl. CIT
ITA No.844//Kol/2018 Assessment Year:2014-15		
Smt. Neelam Agarwal, C/o Subash Agarwal, & Associates, Siddha Gibson, Gibson Lane, Suite- 213, 2 nd Floor, Kolkata-700069. Rep. by Shri Siddharth Agarwal, Advocate Date of hearing : 18.09.2018. PAN : ACQPA 7648 Q	Vs.	I.T.O., Ward-2 (4),Siliguri, Central Revenue Building, Matigara, Dist. Darjeeling. Rep. by Shri Kapil Mondal, JCIT

ITA No.519//Kol/2018 Assessment Year:2014-15		
Shri Amit Shah, C/o M/s Shah and Shah; 70 Canning Street, Kolkata-700001. Rep. by Shri Subash Agarwal, Advocate Date of hearing : 10.09.2018. PAN : AMBPS 0013 L	Vs.	I.T.O., Ward-34(2), Aaykar Bhawan, 110, Shantipally, 7 th Floor. Purba, E.M.Bypass, Kolkata- 700107. Rep. by Shri Sanjoy Mukherjee, Addl. CIT
ITA No.1266//Kol/2018 Assessment Year:2013-14		
Shri Kishore Kumar Jain, C/o N.K.Sethi & Co., Chartered Accountant, 5 Clive Row, 6 th Floor, No.-6A, Dalhousie, Kolkata-700001. Rep. by Shri Miraj D.Shah, AR Date of hearing : 17.09.2018. PAN : ACKPJ 1801 E	Vs.	I.T.O., Ward-22(4), 110, Shantipally, 9 th Floor. Purba, E.M.Bypass, Kolkata-700107. Rep. by Shri Kapil Mondal, JCIT
ITA No.1307//Kol/2018 Assessment Year:2014-15		
Smt. Ritu Mittal, 204, AJC Bose Rod, 5 th Floor, Kolkata-700017. Rep. by Shri Miraj D.Shah, AR Date of hearing : 17.09.2018. PAN : AKEPM 1804 E	Vs.	I.T.O., Ward-36(1), 110, Shantipally, 8 th Floor. Purba, E.M.Bypass, Kolkata-700107. Rep. by Shri Kapil Mondal, JCIT
ITA No.518//Kol/2018 Assessment Year:2014-15		
Shri Nikhil Agarwal, 7C, Kiran Shankar Roy Road, Kolkata-700001. Rep. by Shri Miraj D.Shah, AR Date of hearing : 10.09.2018. PAN : ADGPA 6050 M	Vs.	I.T.O., Ward-35 (2), 110, Shantipally, 7 th Floor. Purba, E.M.Bypass, Kolkata-700107. Rep. by Shri Sanjoy Mukherjee, Addl. CIT
ITA No.1051//Kol/2018 Assessment Year: 2015-16		
Shri Vikash Jhavar, 14/2, Old China Bazar Street,	Vs.	I.T.O., Ward-36(4), 110, Shantipally, 7 th Floor. Purba,

Kolkata-700001. Rep. by Shri Sunil Surana, CA Date of hearing : 19.09.2018. PAN : AEWPJ 9016 R		E.M.Bypass, Kolkata-700107. Rep. by Shri Dilip Kumar Mitra, Addl. CIT
(Appellants)		(Respondents)

Date of Pronouncement	:	26/09/2018
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ORDER

Per S.S.GODARA, JM

The instant nine assesseees have filed their impugned appeals against CIT(A)'s separate orders passed upholding the Assessing Officer's identical action treating their Long term capital gain claimed u/s 10(38) of the Income Tax Act, 1961 (Act) to be bogus, involving proceedings u/s 143(3) of the Act. Relevant details (appeal-wise) are as follows :-

CIT(A)	Appeal No.	Date of order
CIT(A)-10, Kolkata	523/CIT(A)/10/W-35(2)/2014-15/2016-17	26.03.2018
CIT(A)-10, Kolkata	561/CIT(A)-10/W-34(4)/2014-15/2016-17/Kol	28.03.2018
CIT(A)-10, Kolkata	572/CIT(A)-10/W-36(1)/2014-15/2016-17/Kol	01.03.2018
CIT(A)-Siliguri	51/CIT(A)/SLG/2016-17	22.03.2018
CIT(A)-10, Kolkata	132/CIT(A)-10/W-34(2)/2014-15/2016-17/Kol	12.01.2018
CIT(A)-6, Kolkata	CIT(A), Kolkata-6/10287/2016-17	08.03.2018
CIT(A)-10, Kolkata	469/CIT(A)-10/W-36(1)/2014-15/2016-17/Kol	20.04.2018
CIT(A)-10, Kolkata	568/CIT(A)-10/W-35(2)/2014-15/2016-17/Kol	29.12.2018
CIT(A)-10, Kolkata	855/CIT(A)-10/Wd-36(4)/15-16/2017-18/Kol	12.04.2018

Relevant assessment year involved in all cases is 2014-15 except ITA No.1266/Kol/2018 relating to A.Y.2013-14.

2. I have heard all learned counsel(s) representing these assesseees as well as the Revenue reiterating their respective stands against and in support of the lower authorities' impugned action treating their respective capital gains amounts to be bogus. I also condone 17 days delay in ITA No.1266/Kol/2018 as the Revenue is fair enough in not disputing the sole issue averments citing reasons thereof. I take up ITA No.1263/Kol/2018 in case of Shri Jignesh Desai to be the lead case as it has come on record that the issue involved is same in all these cases.

3. I now advert to the relevant fact in the above lead case. There is no dispute that the assessee claimed to have derived long term capital gain under issue of Rs.23,92,464/- from sale of Shri Shaleen Textiles and Grandma Trading Agencies Ltd involving purchase price(s) of Rs.20,400/-and Rs.94,500, sold for Rs.12,77,746/- and Rs.12,29,618/- resulting in long term capital gain of Rs.12,57,346/- and Rs.11,35,118; respectively totalling to Rs.23,92,464/-.

4. The assessee explained before the Assessing Officer that these scrips had been purchased through "off market" on 24.04.2012 and 18.01.2013. The Assessing Officer did not agree to assessee's above narrated details. He was of the view that the above alleged abnormality in assessee deriving profits @6163% and 1201% defied the stock market's established conventions as per human probabilities. He observed in assessment order dated 27.12.2016 that all this suggested a very well planned price rigging of these two scrips.

5. Case file suggests that the Assessing Officer examined both the above two scrips past history, face value of shares, alleged dubious nature of other business, balance sheet and financials including equities and liabilities, dividends declared in the intervening period etc to opine that their astronomical rise in shares had reasons attributable to something suspicious rather than flowing from normal market trends. He

analysed share price mentioned of the two scrips from April 2012 to the date of rising their maximum value in the holding period. He was of the opinion that the said share price movement witnessed a pre-arranged trading pattern revealing an artificial price rigging in these two scrips as per relevant details right from the date of acquisition to 31st March, 2015. He therefore treated assessee to have engaged in bogus long term capital gain arrangements as per the relevant case records in collusion with entry operators in these facts and circumstances. He also referred to D.I.T.'s investigation report to this effect alleging such long term capital gains to be an arrangement between assessee and their entry operators involving wider scheme of things. All these made him to add the assessee's long term capital gain of Rs.25,21,600/- as unexplained cash credits and commission disallowance/addition @2.5% amounting to Rs.60,041/- as unexplained expenditure.

6. The CIT(A) upholds the Assessing Officer's action with the following detail discussion :

"1. I have carefully considered the action of the Ld. AO In making an addition of Rs.25,21,600/- as unexplained credit u/s 68 of the Income Tax Act, 1961. After an exhaustive discussion and elaborating the factual and legal matrix, I find that the Ld. AO has held that the claim of Long Term Capital Gain u/s 10(38) was to be denied to the assessee-individual, and was to be assessed as unexplained cash credit u/s 68 of the I T Act. The Ld. AO has placed on record the entire gamut of findings, and there is, In my considered view no further requirement for elaboration from this forum. In my view of the facts there are elaborate and direct evidence to clearly Indicate that that the entire transactions undertaken by the appellant were merely accommodation entries taken for the purpose of such bogus Long Term Capital Gain made by the assessee during the previous year .. It is apparent that, in the grab of alleged LTCG, the assessee "earned" exempt income of Rs.25,21,600/- and huge amount brought into the books without paying a single rupee of tax. The Ld. AO has very carefully analyzed the Information received from the Investigation Wing, and has recorded the noteworthy features of the Company whose shares were purchased / sold by the assessee-Individual. The economic parameters of the said company over the Impugned period has also been brought on record, in the analysis. The rise and fall of the prices as recorded had been brought out by the Ld. AO to be artificial and not commensurate with the normal market, as the Company had no business at all. The Ld. AO has also brought forth information that the Regulatory Authority SEBI has also after

investigating such abnormal price Increases of certain stocks Investigated the matter and suspended trading in certain scripts. It Is very clear that the prices of these scripts fell sharply after the off loading of these scripts by pre-arranged and manipulated transactions. The entire transactions were carried out on the Stock Exchange to give It a color of real transactions.

2. I also find that all the submissions made by the appellant during the course of the appeal point towards the elaborate documentation, meaning thereby that the appellant has produced papers relating to application for the shares, the allotment of the shares, the share certificates, payments by cheque and the necessary papers filed before the Registrar of companies, where the name of the assessee has been reflected as a shareholder. The appellant has also filed proof of amalgamation of the companies wherein the shareholding has changed hands. It is also the contention of the appellant that it has provided copies of the bank statement, bank contract notes and delivery instructions to the broker by way of proof that all these transactions were genuine. However, in my considered view of the matter, it is precisely this elaborate paperwork that strengthens the matter relating to the bogus benefit of the LTCG, which clearly has been schemed, preplanned and executed with malafide intelligence and precision. Therefore all these papers are mere documents and not any evidence. The whole gamut of transactions are unnatural and highly suspicious, and therefore the rules of SUSPICIOUS TRANSACTIONS ought to apply in the instant case. There are grave doubts in the story propounded by the assessee before the authorities below. None of the material produced before the Ld. AO by the assessee-appellant are enough to justify the humongous gains accruing to the assessee by way of Capital Gains. In my considered view the banking documents are mere self serving recitals. The law in the matter of self-serving recitals has been long established by the Hon'ble apex Court. In the case of CIT vs P.Mohankala 291 ITR 278, the Hon'ble Supreme Court held that "the money came by way of bank cheque and was paid through the process of banking transactions was not by itself of any consequences." The burden of proof is on the assessee in the matter of justification of receipts which are of suspicious and dubious nature. In the case of CIT vs. Durga Prasad More (1971)82 ITR 540 (SC), their Lordships laying down the significance of human probabilities held as under: "in a case where a party relied on self serving recitals in documents, it was for that party to establish the truth of those recitals: the taxing authorities were entitled to look into the surrounding circumstances to find out the reality of such recitals." Similarly in the case of Sumati Dayal vs. CIT (1995) 214 ITR 801 (SC), their Lordships held as under: "In view of section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income tax as the Income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such a case, there is prima

facie, evidence against the assessee viz. the receipt of money, and if he fails -to rebut, the said evidence being un-rebutted, can be used against him by holding that it was a receipt of an income nature. " In the case of Sajjan Das & Sons vs. CIT (2003) 264 ITR 435 (Delhi), their Lordships of the High Court of Delhi, while considering a case in which gifts were received by the assessee through banking channels laid Importance on the capacity of the donor for making the gift and his identity as well as Importance of relationship between the donor and donee In determination of genuineness of gift held as under: "That a mere identification of the donor and showing the movement of the gift amount through banking channels was not sufficient to prove the genuineness of the gift. Since the claim of the gift was made by the assessee, the onus lay on him not only to establish the identity of the person making the gift but a/so his capacity to make a gift and that it had actually been received as a gift from the donor. "In my considered view wherever documents are relied upon they should pass the test of normal behavior of the assessee In the course of business viz., human conduct, preponderance of probability and surrounding circumstances. In my considered view, even if documentary evidence is produced, the same must pass the test of human probabilities and surrounding circumstances if they do not, then addition justified. Reliance on such matters is placed on the case of Smt Phoolwati Devi 314 ITR (AT) 1 (Del.)

3. It must also be stated here that in Commissioner of Income Tax vs NR Portfolio Pvt Ltd on 22 November, 2013, the Hon'ble Delhi High court has held

"The Assessing Officer is both an Investigator and an adjudicator. When a fact is alleged and stated before the Assessing Officer by an assessee, he must and should examine and verify, when in doubt or when the assertion is debatable. Normally a factual assertion made should be accepted by the Assessing Officer unless for justification and reasons the assessing officer feels that he needs/requires a deeper and detailed verification of the facts alleged. The assessee in such circumstances should cooperate and furnish papers, details and particulars. This may entail Issue of notices to third parties to furnish and supply Information or confirm facts or even attend as witnesses. The Assessing Officer can also refer to incriminating material or evidence available with him and call upon the assessee to file their response. We cannot lay down or state a general or universal procedure or method which should be adopted by the assessing officer when verification of facts is required. The manner and mode of conducting assessment proceedings has to be left to the discretion of the assessing officer, and the same should be just, fair and should not cause any harassment to the assessee or third persons from whom confirmation or verification is required. The verification and investigation should be one with the least amount of intrusion, Inconvenience or harassment especially to third parties, who may have entered into transactions with the assessee. The

ultimate finding of the assessing officer should reflect due application of mind on the relevant facts and the decision should take into consideration the entire material, which is germane and which should not be Ignored and exclude that which is Irrelevant. Certain facts or aspects may be neutral and should be noted. These should not be ignored but they cannot become the bedrock or substratum of the conclusion. The provisions of Evidence Act are not applicable, but the assessing officer being a quasi judicial authority, must take care and caution. to ensure that the decision Is reasonable and satisfies the canons of equity, fairness and justice. The evidence should be impartially and objectively analyzed to ensure that the adverse findings against the assessee when recorded are adequately and duly supported by material and evidence and can withstand the challenge in appellate proceedings. Principle of preponderance of probabilities applies. What is stated and the said standard, equally apply to the Tribunal and Indeed this Court. The reasoning and the grounds given In any decision or pronouncement while dealing with the contentions and Issues should reflect application of mind on the relevant aspects. When an assessee does not produce evidence or tries to avoid appearance before the Assessing Officer, It necessarily creates difficulties and prevents ascertainment of true and correct facts as the Assessing Officer is denied advantage of the contention or factual assertion by the assessee before him. In case an assessee deliberately and intentionally falls to produce evidence before the Assessing Officer with the desire to prevent inquiry or Investigation, an adverse view should be taken".

4. In this connection, I would also wish to refer to the decision of the Hon'ble ITAT Bombay Bench 'B' (ITA No.614/Bom/87 A.V. 1983-84) In the case of M/s. Mont Blane Properties and Industries Pvt. Ltd., which was upheld by the Hon'ble Supreme Court. The Hon'ble Tribunal held that the word 'evidence' as used In sec. 143(3) covered circumstantial evidence also. The word 'evidence' as used in sec.143 (3) obviously could not be confined to direct evidence. The word 'evidence' was comprehensive enough to cover the circumstantial evidence also. Under the tax jurisprudence, the word 'evidence' had much wider connotations. While the word 'evidence' might recall, the oral and documentary evidence as may be admissible under the Indian Evidence Act the use of word 'material' in Sec.143(3) showed that the assessing officer, not being a court could rely upon material, which might not strictly be evidence admissible under the Indian Evidence Act for the purpose of making an order of assessment. Court often took judicial

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principal fact. It is evidence of various facts, other than the fact in Issue which are so associated with the fact in issue, that taken together, they form a chain of circumstances leading to an Inference or presumption of the existence of the principal fact. In the appreciation of circumstantial evidence, the relevant aspects, as laid down from time to time are -

- (1.) the circumstances alleged must be established by such evidence, as In the case of other evidence
- (2) the circumstances proved, must be of a conclusive nature and not totally Inconsistent with the circumstances or contradictory to other evidence.
- (3) although there should be no missing links In the case, yet It is not essential that every one of the links must appear on the surface of the evidence adduced ; some of these links may have to be inferred from the proved facts ;
- (4) in drawing those inferences or presumptions, the Authorities must have regard to the common course of natural events, to human conduct and their relation to the facts of the particular case.
- (5)The circumstantial evidence can, with equal facility, be resorted to in proof of a fact in issue which arises in proceedings for the assessment of taxes both direct and Indirect, circumstantial evidence can be made use of In order to prove or disprove a fact alleged or In Issue. In fact, In whatever proceedings or context Inferences are required to be drawn from the evidence or materials available or lacking, circumstantial evidence has its place to assist the process of arriving at the truth. "

6.14. It will also be worthwhile to consider the nature of burden of proof on the AO for proving a fact or circumstance In the Income tax proceedings. The questions raised about the tax liability by the AO are to be answered by the assessee by furnishing reasonable and plausible explanations. If assessee Is not forthcoming with proper or complete facts or his statement or explanation Is contradictory, drawing of suitable Inferences and estimation of facts Is Inevitable. Courts generally will not interfere with such estimate of facts, unless the Inferences or estimates are perverse or capricious.

6.15. The Assessee s technical contentions about admissibility and reliance on material available on the AO's record are In the nature of contentions challenging criminal or civil liabilities In a court of law. We are dealing with a process of adjudication of assesses tax liability i.e. assessment under Income Tax Act rather than conducting criminal or civil court proceedings. As held by the Hon'ble Supreme Court In the case of S.S. Gadgil (supra) no 'lis' is involved in adjudication of tax liability. The Assessee's contention that there was no new material before the AO after the CIT(A)'s setting aside order cannot be accepted. New Information and material did indeed come on record. In our view, In a sensitive matter like this, even a single clue or revelation can be of great Importance. To reverse the order of the AO on this technical plea will amount to taking a lopsided view of the proceedings. Besides, the JPC has underlined the importance of Reports of Investigation agencies like CBI, DRI, ED whose were in the offing, as the relevant Investigations were in process. In view of these observations, we do not accede to the assessee's pleas in this behalf. The Assessee's contentions and objections In this behalf that the material available on record was not admissible as evidence and that

It cannot be relied on by the AO, are devoid of any merit and are rejected outright..... "

8. When the impossible is projected as possible through a plethora of well arranged documents, it would be very reasonable to reject the documents outright as make believe and self serving. In the Case of *Us ha Chandresh Shah Vs ITO, Ward-19(1)(2), Mumbai*, the Hon'ble ITAT – “F “ Bench Mumbai by their Order for A.Y.2006-07 26th September, 2014 have, in the operational portion adjudicated as under :

[Quote]

9. We have heard the rival contentions and perused the record. The pertinent points

are that the assessee has claimed to have purchased the Impugned shares through Off market transaction. The purchase price was not paid by cheque, but it was claimed to have been adjusted against the speculation profit claimed to have been made by the assessee. The small difference of Rs.324/- was claimed to have been paid by way of cash. It is also pertinent to note that the alleged Speculation transaction carried out earlier to the purchase of shares of Prime Capital Markets Ltd was also claimed to have been carried in off market transaction. Another Important point is that the assessee did not possess copies of Share certificates or copies of Share transfer forms. The broker M/s Khandelwal & Co., has expressed Its Inability to furnish copies of contract notes available with It and also failed to furnish Its books of account to substantiate the transactions of purchase of shares by the assessee. Since the impugned transaction was an off market transaction, the purchase transaction could not be confirmed by the Kolkata Stock exchange. The said shares were earlier held by M/s Brightsun Merchants (P) Ltd and the assessee had purchased the shares from them. The notice Issued to M/s Brightsun Merchants (P) Ltd was returned unserved by the postal authorities with, the remark "unknown". In this regard, the assessee had replied that the name of the company was wrongly mentioned by the AO as M/s Brightsuns (P) Ltd and hence the notice got returned. But there is not comment about the address, meaning thereby, the AO had issued notice to the correct address only and hence the slight variation in the name of the company would not normally make any difference. Hence the fact that the notice was returned back only shows that the seller of the shares could not be identified. All these discussions would show that the purchase transaction could not be cross verified by the assessing officer.

10. One more point to be noted here is that the speculation transactions can be entered only on payment of margin money. But the details of said payment are not available. With regard to the query raised by the AO relating to Margin money, the broker M/s D.K. Khandelwal & Co has replied In the context of purchase of shares

of M/s Prime Capital markets Ltd and not In the context of speculation transactions. Thus, It is seen that the question of keeping margin money for speculation transactions remains unanswered both by the assessee as well as by the Share broker cited above. Further the speculation transaction Is also claimed to be an off market transaction, which further casts shadow of doubt over the claim put forth by the assessee.

11. Though the assessee has claimed to have purchased the shares in physical format in May, 2004, she chose to D-Mat the same only In June 2005, just two months prior to its sale. The shares were sold through a share broker named Sanju Kabra, who is indicted by SEBI for rigging the prices of penny stock shares. It is pertinent to note that the share prices of MIs Prime Capital Markets Ltd went from Rs.5.17 (May, 2004) to Rs.279.50 (Sep., 2005). The assessee could not furnish any reasons or at-least stock market news to support the abnormal Increase in the prices of the above said shares. The financial statements of the above said company were also not produced. Though M/s Prime Capital Markets Ltd has confirmed the entries in its books of account with regard to the purchases made by the assessee, It could not identify the name of purchaser to whom the shares were sold by the assessee.

12. We have already seen that the tax authorities have applied the test of human probabilities explained by the Hon'ble Supreme Court In the cases of Sumati Dayal and Durga Prasad More (supra) to disbelieve the claim of Long term Capital gains put forth by the assessee. We notice that the test of human probabilities was not applied by the co-ordinate benches of-Tribunal in the case of Shrl Avlnash Kantilal Jain (supra) and Mr. Shyam R Pawar (supra). Hence, in our view,' the assessee cannot take support from the above said decisions. We further notice that the Id CIT(A) has placed reliance on the decision dated 04.1.2011 rendered by ITAT Delhi In the case of Haresh Win Chaddha Vs. DDIT, wherein the Tribunal has expressed the view that there is no presumption In law that the AO Is supposed to discharge an Impossible burden to assess the tax liability by direct evidence only and to establish the evasion beyond doubt as In criminal proceedings. Further it was held that the AO can assess on consideration of material available on record, surrounding circumstances, human conduct, preponderance of probabilities and nature of Incriminating Information /evidence available on record.

13. In the case of Smt. Jamnadevi Agrawal (supra), the Hon'ble Bombay High Court has upheld the order of Tribunal on the reasoning that no fault can be found with the findings recorded by the Tribunal. A perusal of the above said order would show that the revenue In the above said case had contended that the assessee In the group have' purchased- and sold shares of similar companies through the same broker. Further the purchase prices and sale prices were

supported by producing the evidences to show that the said transactions were undertaken at the rates prevailing on the respective dates. Under these set of facts, the High Court held that the findings given by the Tribunal cannot be found fault with and further held that the decision rendered by Hon'ble Supreme Court In the case of Sumati Dayal (supra) was not applicable. In the case of Shrl Mukesh Ratilal Marolla (Supra), the Hon'ble Bombay high Court has observed that the assessee has furnished copies of Share certificates to show that the shares were In fact transferred to the name of the assessee before it. Further there was no allegation that the prices of shares purchased by the assessee in the case before High Court were manipulated.

14. However, In the Instant case, the assessee could not produce the copies of share certificates and copies of share transfer forms. The transaction of purchase of shares could not be cross verified. The shares of M/s Prime Capital Markets Ltd was declared as "Penny Stock" by SEBI and the broker Sanju Kabra, through whom the shares were sold by the assessee was Indicted for manipulating the prices of penny stock shares. Hence, In our view, the tax authorities have rightly applied the test of human probabilities to examine the claim of purchase and sale of shares made by the assessee.

15. We notice that the Mumbai D bench has considered an identical issue In the case of Shrl Ramesh Kumar D Jain In ITA No.3192/Mum/2010 relating to assessment year 2006-07. The Tribunal, vide Its order dated 15-06-2011, rejected the claim of making speculation gains on the reasoning that speculation transactions could not have been entered Into by the assessee therein without paying margin money to the broker. Accordingly, the claim of purchase of shares was rejected by the Tribunal and consequently the claim of sale of shares was also rejected. It is pertinent to note that, in the decisions relied upon by the assessee, the claim of speculation profits was not considered by the Tribunal. In yet another case of Shrl Araving M Kariya considered by "A " bench of Mumbai ITAT, the test of human probabilities was applied to reject the aim of profit realized on' sale of penny stocks. There should not be any dispute that the onus to produce necessary evidences to convincingly show that the shares were purchased and sold at the prices Claimed always lies upon the assessee. Our view finds support from the decision rendered by Hon 'ble Guwahatl High Court In the case of CIT Vs. Smt. Jasvinder Kaur (357 ITR 638).

16. In view of the foregoing discussions, we are of the view that the decisions relied upon by the assessee cannot be taken support of by the assessee for the reasons discussed supra. Accordingly, we are of the view that the Ld CIT(A) was Justified in confirming the order of the assessing officer by applying the test of human probabilities.

17. *In the result, the appeal filed by the assessee is dismissed.*

[Unquote]

9. Reliance is also placed In the case of Somnath Maini Vs ITO (226) 100 TT] 917 wherein the Hon'ble Chandigarh bench of ITAT held that if facts and circumstances so warrant that It does not accord with the test of human probabilities, transactions have to be held to be non-genuine.

[Quote]

3. The relevant facts briefly stated are that during the course of assessment proceedings, the AO observed that assessee had incurred a long-term capital loss on account of sale of gold jewellery declared under the VDIS, 1997, amounting to Rs. 19,87,705 and also there was a short-term capital gain near to this amount of long-term capital loss amounting to Rs. 20,36,700 resulting into net capital gain of Rs. 48,995. The AO on perusal of record further observed that in the case of a family member of the same assessee Shri D.C. Maini, in the same assessment year, similar exercise has been done by the assessee wherein a long-term capital loss of Rs. 11,59,066 had been Incurred on account of sale of gold jewellery declared under the VDIS and short-term capital gain of Rs. 11,75,100 resulting Into a net gain of Rs. 16,034. On going through the nature of transactions, the AO doubted the genuineness of the short-term capital gain In the case of the assessee and he made further inquiry that during the year assessee had purchased 45,000 shares of w« Ankur International Ltd. At varying rates from Rs. 2.06 to Rs. 3.1 per share and sold them within a short span of six-seven months at the rate varying from Rs. 47.75 to Rs. 55. These shares were purchased through a broker Munish Arora & Co. and sold through another broker M/s S.K. Sharma & Co. The AO took by surprise the astronomical rise In share price of a company from Rs. 3 to Rs. 55 and started further Inquiry. The AO Issued notice under Section 131 to both the brokers from whom shares were purchased and sold and statements were recorded. The AO also analyzed the balance sheet of- M/s Ankur . International Ltd. To justify as to how the share price of a company can go up from a .mere Rs. 3 to Rs. 55 In a short span of six to seven months' time. The. AO made detailed and extraneous exercise of finding the fundamental of the share of the company by different methods and concluded that these shares were not genuine and transactions were so arranged so as to cover up the loss Incurred on account of sale of jewellery only. The AO also recorded the finding that transactions were made at Ludhiana where also the share price of the company is quoted but maximum value of the share are quoted was Rs. 17 but that was only In July, 1997, .i.e. long before the shares were sold by the assessee to M/s S.K. Sharma & Co. in the of months of February and March, 1998. The AO also recorded the finding that although the shares were transferred in the name of the assessee, they were still lying in the name of assessee much after the

sale to M/s S.K. Sharma & Co. The learned CIT(A) deleted the addition on the ground that both the brokers from whom the shares have been purchased and sold were called under Section 131 by the AO. Both have confirmed the sale and purchase of said shares. Other aspect of the facts and circumstances raised by the AO was not discussed by the CIT(A) in his order.

4. In appeal before us, the learned Departmental Representative contended that it is highly improbable that shares of a company go up so high in few months' time. The learned Departmental Representative took us through various pages of the assessment order and the paper book wherein sale bill of the shares with the said M/s S.K. Sharma & Co. were also filed. The learned Departmental Representative pointed out that shares have been sold at Ludhiana when actually stock exchange was not functional - a fact which is also recorded by the AO. The learned Departmental Representative also pointed out that shares have been sold to M/s S.K. Sharma & Co. on 9th Feb., 1998 and 23rd March, 1998, whereas from the statement of account of M/s S.K. Sharma & Co., payments have been received by the assessee from 31st March, 1998 to 27th July, 1998, meaning thereby that had the transactions been genuine, payment could have been received in one go by S.K. Sharma & Co. The learned Departmental Representative pointed out that any such type of transactions relating to these types of company operating on stock exchanges payments are received in piecemeal whereas in normal market share transactions, contract notes are issued by the broker and payments are received in one go. The learned Departmental Representative also argued that as per the statement of S.K. Sharma & Co. recorded at the time of Inquiry, he did not produce any books of account and identity of persons to whom the shares have been sold. Ordinarily, when brokers are enquired about share transactions, they keep proper books of account from whom shares have been purchased and sold. However, in this case, S.K. Sharma & Co. failed to provide the names of purchasers of the shares and identity of the purchasers.

5. On the other hand, the learned Authorised Representative contended that in the share market, share price does not move according to the fundamentals of a company. They go up and down as per sentiments prevailing at that time. To controvert, the argument of the learned Departmental Representative, he argued that share prices are quoted at Jaipur Stock Exchange and were quoted on the relevant date of sale at the same price on which shares were sold to M/s S.K. Sharma & Co. However, the learned Departmental Representative controverted his argument by saying that volume of transactions on the relevant dates is only 600 shares on 9th Feb., 1998 and 1000 shares on 23rd March, 1998 whereas number of shares involved in the transactions with S.K. Sharma & Co. are 45000 shares.

6. After hearing the rival submissions, going through the orders of authorities below and paper book, we find that M/s Ankur International Ltd., although It Is a quoted company, its shares were not being transacted at Ludhiana Stock Exchange at, the relevant time. Shares have been purchased and sold through the brokers and payments have been received cheque on different dates as per the statement of account of M/s S.K. Sharma & Co, Factual matrix of the case from start of the purchase of shares at the rate of Rs. 3 to the sale of shares at Rs. 55 in a short span of time and shares being not, quoted at Ludhiana Stock Exchange and the way in which different, instalment payments have been received from the brokers and non-availability of the records of the brokers and the shares remaining In the name of assessee even long after the sale of the shares does not stand the test of probabilities. As rightly pointed out by the learned Departmental Representative, these types of companies function In the capital market whose sale price is manipulated to astronomical height only to create the artificial transaction in the form of capital gain. Surrounding circumstances differ from the normal share market transactions in which they are ordinarily carried out. Taking all the steps together, final conclusion does not accord with the human probabilities. The Hon'ble Supreme Court in the case of CUT v. Durga Prasad More held as under:

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

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

7. The learned CIT(A) only got swayed by the Issuance of notice by the AO under Section 131 to both the brokers from whom shares were purchased and sold and came to the conclusion that share transactions were genuine overlooking the material gathered by the AO from the statements recorded of broker M/s S.K. Sharma & Co. and the other facts and circumstances that volume of transactions of Jaipur Stock Exchange Is only 600 shares and 1000 shares. Payments have been received from the brokers only In Instalments over a period of 6-7 months. It Is true that when transactions are through cheques, it looks like real transaction but authorities are permitted to look behind the transactions and find -out the motive behind transactions. Generally, it is expected that apparent is real but it is not

sacrosanct. If facts and circumstances so warrant that it does not accord with the test of human probabilities, transactions have been held to be non-genuine, It is highly improbable that share price of a worthless company can go from Rs. 3 to Rs. 55 In a short span of time. Mere payment by cheque and receipt by cheque does not. Render a transaction genuine. Capital gain tax was created to operate in a real world and not that of make belief. Facts of the case only lead to the inference that these transactions are not genuine and make believe only to offset the loss incurred on the sale of jewellery declared under VDIS. In the totality of facts and circumstances of this case and material on record, we are of the considered view that the CIT(A) was not justified In deleting the impugned addition. We, accordingly set aside the order of the CITCA) and restore that of the AO.

8. In the result, the appeal of the Revenue is allowed.

Moreover on the judgments relied upon by the appellant fall flat in the face of the facts of the case and the preponderance of probability against the assessee. In a decision of the Hon'ble Bombay High Court in the case of Sanjay Bimalchand Jain Vs Pr.CIT by the order dated 10th April, 2017 have upheld the orders of the .Hon'ble ITAT, Nagpur Bench dated 18.07.2016 in ITA No. 61/Nag/2013 In Sanjay Bimalchand Jain Vs ITO, Ward-4(2), Nagpur, wherein it was held that on the facts emergent In the case, and the preponderance of probabilities, entire Capital Gains claims were to be treated as fictitious and bogus.

Bogus L TCG from Penny stocks: The assessee has not tendered cogent evidence to explain how the shares in an unknown company worth Rs.5 had jumped to Rs.485 in no time. The fantastic sale price was not at all possible as there was no economic or financial basis to justify the price rise. the assessee had Indulged in a dubious share transaction meant to account for the undisclosed income in the garb of long term capital gain. The gain has accordingly to be assessed as undisclosed credit u/s 68.

In view of the above discussion, I find no infirmity in the orders of the Ld. AO, and I confirm the same, holding the claim of LTCG of Rs.25,21,600/- to be bogus. As a natural corollary, I also hold that the Ld. AO was also correct in adding back an amount of Rs.60,041/- under Sec 69C of the Income Tax act. The same also stands confirmed.

Therefore these grounds are dismissed.”

7. I have given my thoughtful consideration to rival contentions. Learned Departmental Representative's sole contention as per the relevant facts and circumstances narrated in the preceding paragraphs is that the assessee has derived his long term capital gain under issue from a dubious route of rigging in value of his shares in the two scrips. He refers to the relevant paper book as well as to this effect filed on record at assessee's behest showing computation of income, financial statement disclosing long term capital gains, investment details, purchase of shares, details of consideration receipt on gross and net basis, purchase bills, proof of payment, demat statements, contract note(s), transactions and balance confirmation, share progress ledger account etc. He vehemently contends therefore that all this arrangement has been taken recourse by the assessee in order to defraud the revenue. It is emphasized that both the lower authorities have rightly invoked section 68 in the given facts and circumstances of this case to treat the impugned long term capital gain as assessee's unexplained cash credits. My attention is invited time and again to the fact that DIT(Investigation) has found some entry operators spread throughout the country to be indulged in such kind of business by rigging scrips' prices. I find no merit in all these contentions raised at the Revenue's behest. The fact remains that there is not even a single evidence or material against the assessee apart from mere assumptions and presumptions hereinabove. This tribunal coordinate bench's decision in case of Navneet Agarwal vs ITO ITA No.2281/Kol/2017 dated 20.07.2018 has decided the very issue in assessee's favour with the following elaborate discussion :-

“10. After careful consideration of the rival submissions, perusal of the papers on record and order of the lower authorities below, as well as case law cited, we hold as follows.

11. The assessee in this case has stated the following facts and produced the following documents as evidences:

- 1. The assessee had made an application for allotment of 50000 equity shares of “Smart champs IT and Infra Ltd.” and she was allotted the share on 3rd December*

2011 (copy of Application form, intimation of allotment and share certificate Paper Book at page 8 to 10).

- 2. The payment for the allotment of shares was made through an account payee cheque (copy of the bank statement evidencing the source of money and payment made to "Smart Champs IT & Infra Ltd." for such shares allotted is placed in the Paper Book at page no. 11).*
- 3. Annual return no. 20B was filed with Registrar of companies by "Smart Champs IT & Infra Ltd" showing the assessee's name as shareholder (copy of annual return no. 20B filed with Registrar of companies by "Smart Champs IT & Infra Ltd. "is placed in the Paper Book at page no. 12 to 18.)*
- 4. The assessee lodged the said shares with the Depository M/s. Eureka Stock & Share Broking Services Ltd. with a Demat request on 11th February, 2012. The said shares were dematerialized on 31st March, 2012 (copy of demat request slip along with the transaction statement is placed in the paper book at page no. 19 to 21).*
- 5. On 24.01.2013, the Hon'ble Bombay High Court approved the scheme of amalgamation of "Smart Champs IT and Infra Ltd." with "Cressanda Solutions Ltd." In accordance with the said scheme of amalgamation, the assessee was allotted 50000 equity shares of "M/s. Cressanda Solutions Ltd." The demat shares are reflected in the transaction statement of the period from 1st November 2011 to 31st December, 2013 (A copy of the scheme of amalgamation alongwith copy of order of the Hon'ble Bombay High Court and a copy of the letter to this effect submitted by "Cressanda Solutions Ltd". to Bombay Stock Exchange is placed in the Paper Book at page no 22 to 43.)*
- 6. The assessee sold 50000 shares costing Rs. 500000/- through her broker "SKP Stock Broking Pvt. Ltd" which was a SEBI registered broker and earned a Long Term Capital Gain of Rs. 2,18,13,072/-. (Copy of the bank statement, brokers contract note together with the delivery instructions given to the DP and broker's confirmation is also placed in the paper book at page no 44 to 65).*
- 7. Copy of Form No. 10DB issued by the broker, in support of charging of S.T.T. in respect of the transactions appearing in the ledger is placed in the paper book at page no. 66.*
- 8. The holding period of the said scrip is more than one year (above 500 days) through in order to get the benefit of claim of Long Term Capital Gain the holding period is required to be 365 days.*

12. The assessing officer as well as the Ld. CIT(A) have rejected these evidences filed by the assessee by referring to “Modus Operandi” of persons for earning long term capital gains which is exempt from income tax. All these observations are general in nature and are applied across the board to all the 60,000 or more assesseees who fall in this category. Specific evidences produced by the assessee are not controverted by the revenue authorities. No evidence collected from third parties is confronted to the assessee. No opportunity of cross-examination of persons, on whose statements the revenue relies to make the addition, is provided to the assessee. The addition is made based on a report from the investigation wing.

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

14. It is well settled that evidence collected from third parties cannot be used against an assessee unless this evidence is put before him and he is given an opportunity to controvert the evidence. In this case, the AO relies only on a report as the basis for the addition. The evidence based on which the DDIT report is prepared is not brought on record by the AO nor is it put before the assessee. The submission of the assessee that she is just an investor and as she received some tips

and she chose to invest based on these market tips and had taken a calculated risk and had gained in the process and that she is not party to the scam etc., has to be controverted by the revenue with evidence. When a person claims that she has done these transactions in a bona fide and genuine manner and was benefitted, one cannot reject this submission based on surmises and conjectures. As the report of investigation wing suggests, there are more than 60,000 beneficiaries of LTCG. Each case has to be assessed based on legal principles of legal import laid down by the Courts of law.

15. In our view, just the modus operandi, generalisation, preponderance of human probabilities cannot be the only basis for rejecting the claim of the assessee. Unless specific evidence is brought on record to controvert the validity and correctness of the documentary evidences produced, the same cannot be rejected by the assessee. The Hon'ble Supreme Court in the case of Omar Salav Mohamed Sait reported in (1959) 37 ITR 151 (S C) had held that no addition can be made on the basis of surmises, suspicion and conjectures. In the case of CIT(Central), Kolkata vs. Daulat Ram Rawatmull reported in 87 ITR 349, the Hon'ble Supreme Court held that, the onus to prove that the apparent is not the real is on the party who claims it to be so. The burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidences, which would directly prove the fact of bogusness or establish circumstance unerringly and reasonably raising an interference to that effect. The Hon'ble Supreme Court in the case of Umacharan Shah & Bros. Vs. CIT 37 ITR 271 held that suspicion however strong, cannot take the place of evidence. In this connection we refer to the general view on the topic of conveyance of immovable properties. The rates/sale price are at variance with the circle rates fixed by the Registration authorities of the Government in most cases and the general impression is that cash would have changed hands. The courts have laid down that judicial notice of such notorious facts cannot be taken based on generalisations. Courts of law are bound to go by evidence.

16. We find that the assessing officer as well as the Ld. CIT(A) has been guided by the report of the investigation wing prepared with respect to bogus capital gains transactions. However, we do not find that the assessing officer as well as the Ld. CIT(A), have brought out any part of the investigation wing report in which the assessee has been investigated and /or found to be a part of any arrangement for the purpose of generating bogus long term capital gains. Nothing has been brought on record to show that the persons investigated, including entry operators or stock brokers, have named that the assessee was in collusion with them. In absence of such finding how is it possible to link their wrong doings with the assessee. In fact, the investigation wing is a separate department which has not been assigned

assessment work and has been delegated the work of only making investigation. The Act has vested widest powers on this wing. It is the duty of the investigation wing to conduct proper and detailed inquiry in any matter where there is allegation of tax evasion and after making proper inquiry and collecting proper evidences the matter should be sent to the assessment wing to assess the income as per law. We find no such action executed by investigation wing against the assessee. In absence of any finding specifically against the assessee in the investigation wing report, the assessee cannot be held to be guilty or linked to the wrong acts of the persons investigated. In this case, in our view, the Assessing Officer at best could have considered the investigation report as a starting point of investigation. The report only informed the assessing officer that some persons may have misused the script for the purpose of collusive transaction. The Assessing Officer was duty bound to make inquiry from all concerned parties relating to the transaction and then to collect evidences that the transaction entered into by the assessee was also a collusive transaction. We, however, find that the Assessing Officer has not brought on record any evidence to prove that the transactions entered by the assessee which are otherwise supported by proper third party documents are collusive transactions.

17. The Hon'ble Supreme Court way back in the case of Lalchand Bhagat Ambica Ram vs. CIT [1959] 37 ITR 288 (SC) held that assessment could not be based on background of suspicion and in absence of any evidence to support the same. The Hon'ble Court held:

"Adverting to the various probabilities which weighed with the Income-tax Officer we may observe that the notoriety for smuggling food grains and other commodities to Bengal by country boats acquired by Sahibgunj and the notoriety achieved by Dhulian as a great receiving centre for such commodities were merely a background of suspicion and the appellant could not be tarred with the same brush as every arhatdar and grain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf. The cancellation of the food grain licence at Nawgachia and the prosecution of the appellant under the Defence of India Rules was also of no consequence inasmuch as the appellant was acquitted of the offence with which it had been charged and its licence also was restored. The mere possibility of the appellant earning considerable amounts in the year under consideration was a pure conjecture on the part of the Income-tax Officer and the fact that the appellant indulged in speculation (in Kalai account) could not legitimately lead to the inference that the profit in a single transaction or in a chain of transactions could exceed the amounts, involved in the high denomination notes,---this also was a pure conjecture or surmise on the part of the Income-tax Officer. As regards the disclosed volume of business in the year under consideration in the head office and in branches the Income-tax Officer indulged in speculation when he talked of the possibility of the appellant earning a considerable sum as against which it showed a net loss of

about Rs. 45,000. The Income-tax Officer indicated the probable source or sources from which the appellant could have earned a large amount in the sum of Rs. 2,91,000 but the conclusion which he arrived at in regard to the appellant having earned this large amount during the year and which according to him represented the secreted profits of the appellant in its business was the result of pure conjectures and surmises on his part and had no foundation in fact and was not proved against the appellant on the record of the proceedings. If the conclusion of the Income-tax Officer was thus either perverse or vitiated by suspicions, conjectures or surmises, the finding of the Tribunal was equally perverse or vitiated if the Tribunal took count of all these probabilities and without any rhyme or reason and merely by a rule of thumb, as it were, came to the conclusion that the possession of 150 high denomination notes of Rs. 1,000 each was satisfactorily explained by the appellant but not that of the balance of 141 high denomination notes of Rs. 1,000 each”.

The observations of the Hon’ble Apex Court are equally applicable to the case of the assessee. In our view, the assessing officer having failed to bring on record any material to prove that the transaction of the assessee was a collusive transaction could not have rejected the evidences submitted by the assessee. In fact, in this case nothing has been found against the assessee with aid of any direct evidences or material against the assessee despite the matter being investigated by various wings of the Income Tax Department hence in our view under these circumstances nothing can be implicated against the assessee.

18. We now consider the various propositions of law laid down by the Courts of law. That cross-examination is one part of the principles of natural justice has been laid down in the following judgments:

a) Ayaubkhan Noorkhan Pathan vs. The State of Maharashtra and Ors.

“23. A Constitution Bench of this Court in State of M.P .v. Chintaman Sadashiva Vaishampayan AIR 1961 SC1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice. (See also: Union of India v. T.R. Varma, AIR 1957 SC 882; Meenglas Tea Estate v. Workmen, AIR 1963 SC 1719; M/s. Kesoram Cotton Mills Ltd. v. Gangadhar and Ors. ,AIR 1964 SC708; New India Assurance Co. Ltd. v. Nusli Neville Wadia and Anr. AIR 2008 SC 876; Rachpal Singh and Ors. v. Gurmit Singh and Ors. AIR 2009 SC 2448; Biecco Lawrie and Anr. v. State of West Bengal and Anr. AIR 2010 SC 142; and State of Uttar Pradesh v. Saroj Kumar Sinha AIR 2010 SC 3131).

24. In *Lakshman Exports Ltd. v. Collector of Central Excise* (2005) 10 SCC 634, this Court, while dealing with a case under the Central Excise Act, 1944, considered a similar issue i.e. permission with respect to the cross-examination of a witness. In the said case, the Assessee had specifically asked to be allowed to cross-examine the representatives of the firms concern, to establish that the goods in question had been accounted for in their books of accounts, and that excise duty had been paid. The Court held that such a request could not be turned down, as the denial of the right to cross-examine, would amount to a denial of the right to be heard i.e. *audi alteram partem*.

28. The meaning of providing a reasonable opportunity to show cause against an action proposed to be taken by the government, is that the government servant is afforded a reasonable opportunity to defend himself against the charges, on the basis of which an inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so only when he is told what the charges against him are. He can therefore, do so by cross-examining the witnesses produced against him. The object of supplying statements is that, the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against him. Unless the said statements are provided to the government servant, he will not be able to conduct an effective and useful cross-examination.

29. In *Rajiv Arora v. Union of India and Ors.* AIR 2009SC 1100, this Court held: Effective cross-examination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Indian Evidence Act as also the principles of natural justice demand that the maker of the report should be examined, save and except in cases where the facts are admitted or the witnesses are not available for cross-examination or similar situation. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the Appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review.

30. The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examinations an integral part and parcel of the principles of natural justice."

b) *Andaman Timber Industries vs. Commissioner of C. Ex., Kolkata-II* wherein it was held that:

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

5. According to us, not allowing the Assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of

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

6. As mentioned above, the Appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17-3-2005[2005 (187) E.L.T. A33 (S.C.)] was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

7. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the afore said two witnesses was the only basis of issuing the show cause notice.”

19. On similar facts where the revenue has alleged that the assessee has declared bogus LTCG, it was held as follows:

a) The CALCUTTA HIGH COURT in the case of BLBCABLES & CONDUCTORS[ITA No. 78 of 2017] dated 19.06.2018. The High Court held vide Para 4.1:

“.....we find that all the transactions through the broker were duly recorded in the books of the assessee. The broker has also declared in its books of accounts and offered for taxation. In our view to hold a transaction as bogus, there has to be some concrete

evidence where the transactions cannot be proved with the supportive evidence. Here in the case the transactions of the commodity exchanged have not only been explained but also substantiated from the confirmation of the party. Both the parties are confirming the transactions which have been duly supported with the books of accounts and bank transactions. The ld. AR has also submitted the board resolution for the trading of commodity transaction. The broker was expelled from the commodity exchange cannot be the criteria to hold the transaction as bogus. In view of above, we reverse the order of the lower authorities and allow the common grounds of assessee's appeal." [quoted verbatim]

This is essentially a finding of the Tribunal on fact. No material has been shown to us who would negate the Tribunal's finding that off market transactions are not prohibited. As regards veracity of the transactions, the Tribunal has come to its conclusion on analysis of relevant materials. That being the position, Tribunal having analyzed the set of facts in coming to its finding, we do not think there is any scope of interference with the order of the Tribunal in exercise of our jurisdiction under Section 260A of the Income Tax Act, 1961. No substantial question of law is involved in this appeal. The appeal and the stay petition, accordingly, shall stand dismissed."

b) The JAIPURITAT in the case of VIVEKAGARWAL[ITA No.292/JP/2017]order dated 06.04.2018 held as under vide Page 9 Para 3:

"We hold that the addition made by the AO is merely based on suspicion and surmises without any cogent material to controvert the evidence filed by the assessee in support of the claim. Further, the AO has also failed to establish that the assessee has brought back his unaccounted income in the shape of long term capital gain. Hence we delete the addition made by the AO on this account."

c)The Hon'ble Punjab and Haryana High Court in the case of PREMPAL GANDHI[ITA-95-2017(O&M)] dated18.01.2018 at vide Page 3 Para 4 held as under:

"..... The Assessing Officer in both the cases added the appreciation to the assessee's' income on the suspicion that these were fictitious transactions and that the appreciation actually represented the assessee's' income from undisclosed sources. In ITA-18-2017 also the CIT (Appeals) and the Tribunal held that the Assessing Officer had not produced any evidence whatsoever in support of the suspicion. On the other hand, although the appreciation is very high, the shares were traded on the National Stock Exchange and the payments and receipts were routed through the bank. There was no evidence to indicate for instance that this was a closely held company and that the trading on the National Stock Exchange was manipulated in any manner."

The Court also held the following vide Page 3 Para 5 the following:

“Question (iv) has been dealt with in detail by the CIT (Appeals) and the Tribunal. Firstly, the documents on which the Assessing Officer relied upon in the appeal were not put to the assessee during the assessment proceedings. The CIT (Appeals) nevertheless considered them in detail and found that there was no co-relation between the amounts sought to be added and the entries in those documents. This was on an appreciation of facts. There is nothing to indicate that the same was perverse or irrational. Accordingly, no question of law arises.”

d) The BENCH “D” OF KOLKATA ITAT in the case of GAUTAMPINCHA [ITA No.569/Kol/2017] order dated 15.11.2017 held as under vide Page 12 Para 8.1:

“In the light of the documents stated i.e. (I to xiv) in Para 6(supra) we find that there is absolutely no adverse material to implicate the assessee to have entered 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 the ld. DR could not controvert the facts supported with material evidences which are on record and could only rely on the orders of the AO/CIT (A). We note that in the absence of material/evidence the allegations that the assessee/brokers got involved in price rigging/manipulation of shares must therefore also fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence 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. These evidences were neither found by the AO nor by the ld. CIT (A) to be false or fictitious or bogus. The facts of the case and the evidence in support of the evidence 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 that income from LTCG is exempted u/s 10(38) of the Act.”

Further in Page 15 Para 8.5 of the judgment, it held:

“We note that the ld. AR cited plethora of the case laws to bolster his claim which are not being repeated again since it has already been incorporated in the submissions of the ld. AR (supra) and have been duly considered by us to arrive at our conclusion. The ld. DR could not bring to our notice any case laws to support the impugned decision of the ld. CIT (A)/AO. In the aforesaid facts and circumstances of the case, we hold that the ld. 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, direct the AO to delete the addition.”

e) The BENCH “D” OF KOLKATA ITAT in the case of KIRAN KOTHARI HUF [ITA No. 443/Kol/2017] order dated 15.11.2017 held vide Para 9.3 held as under:

“..... 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 the ld. DR could not controvert the facts which are supported with material evidences furnished by the assessee which are on record and could only rely on the orders of the AO/CIT(A). 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 evidence 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 ld. CIT(A) to be false or fictitious or bogus. The facts of the case and the evidence in support of the evidence 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.

It further held as follows:

“We note that the ld. AR cited plethora of the case laws to bolster his claim which are not being repeated again since it has already been incorporated in the submissions of the ld. AR (supra) and have been duly considered to arrive at our conclusion. The ld. DR could not bring to our notice any case laws to support the impugned decision of the ld. CIT(A)/AO. In the aforesaid facts and circumstances of the case, we hold that the ld. 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 direct the AO to delete the addition.”

f) The BENCH “A” OF KOLKATA ITAT in the case of SHALEENKHEMANI [ITA No.1945/Kol/2014] order dated 18.10.2017 held as under vide Page 24 Para 9.3:

“We therefore hold that there is absolutely no adverse material to implicate the assessee to the entire gamut of unwarranted allegations leveled by the ld AO against the assessee, which in our considered opinion, has no legs to stand in the eyes of law. We find that the ld DR could not controvert the arguments of the ld AR with contrary material evidences on record and merely relied on the orders of the ld AO. We find that the allegation that the assessee and / or Brokers getting involved in price rigging of SOICL shares fails. It is also a matter of record that the assessee furnished all evidences in the form of bills, contract notes, demat statements and the bank accounts to prove the genuineness of the transactions relating to purchase and sale of shares resulting in LTCG. These evidences were neither found by the ld AO to be false or fabricated. The facts of the case and the evidences in support of the assessee’s case clearly support the claim of the assessee that the transactions of the assessee were bonafide and genuine

and therefore the ld AO was not justified in rejecting the assessee's claim of exemption under section 10(38) of the Act."

g) The BENCH "H" OF MUMBAI ITAT in the case of ARVINDKUMAR JAINHUF [ITA No.4682/Mum/2014] order dated 18.09.2017 held as under vide Page 6 Para 8:

".....We found that as far as initiation of investigation of broker is concerned, the assessee is no way concerned with the activity of the broker. Detailed finding has been recorded by CIT (A) to the effect that assessee has made investment in shares which was purchased on the floor of stock exchange and not from M/s Basant Periwat and Co. Against purchases payment has been made by account payee cheque, delivery of shares were taken, contract of sale was also complete as per the Contract Act, therefore, the assessee is not concerned with any way of the broker. Nowhere the AO has alleged that the transaction by the assessee with these particular broker or share was bogus, merely because the investigation was done by SEBI against broker or his activity, assessee cannot be said to have entered into ingenuine transaction, insofar as assessee is not concerned with the activity of the broker and have no control over the same. We found that M/s Basant Periwat and Co. never stated any of the authority that transactions in M/s Ramkrishna Fincap Pvt. Ltd. On the floor of the stock exchange are ingenuine or mere accommodation entries. The CIT (A) after relying on the various decision of the coordinate bench, wherein on similar facts and circumstances, issue was decided in favour of the assessee, came to the conclusion that transaction entered by the assessee was genuine. Detailed finding recorded by CIT (A) at para 3 to 5 has not been controverted by the department by bringing any positive material on record. Accordingly, we do not find any reason to interfere in the findings of CIT (A)."

h) The Hon'ble Punjab and Haryana High Court in the case of VIVEK MEHTA [ITA No. 894 OF 2010] order dated 14.11.2011 vide Page 2 Para 3 held as under:

"On the basis of the documents produced by the assessee in appeal, the Commissioner of Income Tax (Appeal) recorded a finding of fact that there was a genuine transaction of purchase of shares by the assessee on 16.3.2001 and sale thereof on 21.3.2002. The transactions of sale and purchase were as per the valuation prevalent in the Stocks Exchange. Such finding of fact has been recorded on the basis of evidence produced on record. The Tribunal has affirmed such finding. Such finding of fact is sought to be disputed in the present appeal. We do not find that the finding of fact recorded by the Commissioner of Income Tax in appeal, gives give rise to any question(s) of law as sought to be raised in the present appeal. Hence, the present appeal is dismissed."

i) The Hon'ble Jurisdictional Calcutta High Court in the case of CIT vs. Bhagwati Prasad Agarwal in I.T.A. No. 22/Kol/2009 dated 29.04.2009 at para 2 held as follows:

"The tribunal found that the chain of transaction entered into by the assessee have been proved, accounted for, documented and supported by evidence. The assessee produced before the Commissioner of Income Tax(Appeal) the contract notes, details of his Demat account and, also, produced documents showing that all payments were received by the assessee through bank."

j) The Hon'ble Supreme Court in the case of PCIT vs. Teju Rohit kumar Kapadia order dated 04.05.2018 upheld the following proposition of law laid down by the Hon'ble Gujrat High Court as under:

"It can thus be seen that the appellate authority as well as the Tribunal came to concurrent conclusion that the purchases already made by the assessee from Raj Impex were duly supported by bills and payments were made by Account Payee cheque. Raj Impacts also confirmed the transactions. There was no evidence to show that the amount was recycled back to the assessee. Particularly, when it was found that the assessee the trader had also shown sales out of purchases made from Raj Impex which were also accepted by the Revenue, no question of law arises."

20. Applying the proposition of law as laid down in the above-mentioned judgments to the facts of this case we are bound to consider and rely on the evidence produced by the assessee in support of its claim and base our decision on such evidence and not on suspicion or preponderance of probabilities. No material was brought on record by the AO to controvert the evidence furnished by the assessee. Under these circumstances, we accept the evidence filed by the assessee and allow the claim that the income in question is a bona fide Long Term Capital Gain arising from the sale of shares and hence exempt from income tax.

21. Under the circumstances and in view of the above discussion, we uphold the contentions of the assessee and delete the addition in question.

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

8. I adopt the above extracted detailed reasoning mutatis mutandis in the given facts and circumstance to accept the assessee's pleas raised in the instant appeal ITA

No.1263/Kol/2018. The impugned bogus long term capital gain addition of Rs.25,21,600/- as well as unexplained commission of Rs.60,041/- stands deleted.

9. Same order to follow in all the remaining appeals ITA Nos.1270/Kol/2018, 1267/Kol/2018, 844/Kol/2018, 519/Kol/2018, 1266/Kol/2018, 1307/Kol/2018, 518/Kol/2018 and 1051/Kol/2018 as it has come on record that the lower authorities have added the impugned long term capital gains claimed at these assessee's behest. Learned Departmental Representative sought to carve out some exceptions therein that these assessee's could not establish acquisition of the corresponding scrips in some instances. I reiterate that the relevant evidence comprising of payments, involvement of registered stock brokers as well as all similar documents as in the lead case sufficiently rebut these doubts in issue raised at Revenue's behest. Remaining issues regarding interest etc are treated as mere consequential in nature. A copy of this order be placed in respective case files.

10. All these assessee's appeals are partly accepted in above terms.

Sd/-
[S.S.Godara]
Judicial Member

Dated : 26.09.2018

[RG Sr.PS]

Copy of the order forwarded to:

1. Appellants
2. Respondents
3. CIT(A)-10, Kolkata 4. C.I.T.-10, Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head Of Office/ D.D.O., ITAT Kolkata Benches

