IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

SPECIAL JURISDICTION (INCOME TAX)

ORIGINAL SIDE

RESERVED ON: 12.05.2022
DELIVERED ON: 14.06.2022

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

IA NO. GA/2/2022

IN ITAT/6/2022

PRINCIPAL COMMISSIONER OF INCOME TAX FIVE, KOLKATA

VERSUS

SWATI BAJAJ

IA NO. GA/2/2020 (OLD NO: GA/1044/2020)

IN ITAT/31/2020

PRINCIPAL COMMISSIONER OF INCOME TAX-15, KOLKATA

VERSUS

DINESH KUMAR BANSAL (HUF)

IA NO. GA/2/2020

IN ITAT/41/2020

PRINCIPAL COMMISSIONER OF INCOME TAX CENTRAL -1, KOLKATA

VERSUS

SURAJ SAHANA

ITAT/42/2020

IA NO. GA/2/2020

PRINCIPAL COMMISSIONER OF INCOME TAX, CENTRAL-I, KOLKATA

VERSUS

TAPATI SAHANA

IA NO. GA/2/2020

IN ITAT/43/2020

PRINCIPAL COMMISSIONER OF INCOME TAX, CENTRAL-1, KOLKATA

VERSUS

SOUVIK SAHANA

IA NO. GA/2/2020

IN ITAT/44/2020

PRINCIPAL COMMISSIONER OF INCOME TAX-12, KOLKATA

VERSUS

MUKTA AGARWAL

ITAT/64/2020

IA NO: GA/2/2020

PRINCIPAL COMMISSIONER OF INCOME TAX-15, KOLKATA

VERSUS

SMT. BABITA AGARWAL

IA NO. GA/2/2021

IN ITAT/3/2021

PRINCIPAL COMMISSIONER OF INCOME TAX SILIGURI

VERSUS

NEETU AGARWAL

IA NO. GA/2/2021

IN ITAT/22/2021

PRINCIPAL COMMISSIONER OF INCOME TAX

VERSUS

NAND KISHORE AGARWALA

IA NO. GA/2/2021

IN ITAT/26/2021

PRINCIPAL COMMISSIONER OF INCOME TAX ASANSOL, KOLKATA

VERSUS

RAJESH JHUNJHUNWALA

IA NO. GA/2/2021

IN ITAT/27/2021

PRINCIPAL COMMISSIONER OF INCOME TAX ASANSOL, KOLKATA

VERSUS

RAKESH JHUNJHUNWALA

ITAT/28/2021

IA NO: GA/2/2021

PR CIT SILIGURI

VERSUS

MANGILAL JAIN

IA NO. GA/2/2021

IN ITAT/34/2021

PRINCIPAL COMMISSIONER OF INCOME TAX 13, KOLKATA

VERSUS

SMT GANAPATI DEVI AGARWAL

IA NO. GA/2/2021

IN ITAT/36/2021

PRINCIPAL COMMISSIONER OF INCOME TAX, SILIGURI

VERSUS

NITIN KUMAR AGARWAL

ITAT/57/2021

IA NO: GA/2/2021

PRINCIPAL COMMISSIONER OF INCOME TAX-5, KOLKATA

VERSUS

JEMISH SHAH

IA NO. GA/2/2021

IN ITAT/58/2021

PRINCIPAL COMMISSIONER OF INCOME TAX-5, KOLKATA

VERSUS

SONAL SARAF

IA NO. GA/2/2021

IN ITAT/60/2021

PRINCIPAL COMMISSIONER OF INCOME TAX-5, KOLKATA

VERSUS

RAMAKANT BERIWALA

IA NO. GA/2/2021

IN ITAT/76/2021

PRINCIPAL COMMISSIONER OF INCOME TAX

VERSUS

MUKESH SARAOGI (HUF)

IA NO. GA/2/2021

IN ITAT/78/2021

PRINCIPAL COMMISSIONER OF INCOME TAX-5, KOLKATA

VERSUS

SUNITA GOYAL

IA NO. GA/2/2021

IN ITAT/80/2021

PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-5

VERSUS

RANJIKA GUPTA

ITAT/85/2021

IA NO: GA/2/2021

PRINCIPAL COMMISSIONER OF INCOME TAX-18, KOLKATA

VERSUS

SRI VIKASH GOEL

ITAT/87/2021

IA NO: GA/2/2021

PRINCIPAL COMMISSIONER OF INCOME TAX-5, KOLKATA

VERSUS

POOJA JHUNJHUNWALA

IA NO. GA/2/2021

IN ITAT/88/2021

PRINCIPAL COMMISSIONER OF INCOME TAX-5, KOLKATA

VERSUS

AAYUSH JHUNJHUNWALA

IA NO. GA/2/2021

IN ITAT/89/2021

PRINCIPAL COMMISSIONER OF INCOME TAX-5, KOLKATA

Vs

AAYUSH JHUNJHUNWALA HUF

IA NO. GA/2/2021

IN ITAT/101/2021

PRINCIPAL COMMISSIONER OF INCOME TAX-5, KOLKATA

VERSUS

SMT. SHILPA DAULAT

IA NO. GA/2/2021

IN ITAT/103/2021

PRINCIPAL COMMISSIONER OF INCOME TAX-18, KOLKATA

VERSUS

M/S.PREM BALA PUROHIT

IA NO. GA/2/2021

IN ITAT/122/2021

PRINCIPAL COMMISSIONER OF INCOME TAX, BURDWAN

VERSUS

BIJAYA TAH

IA NO. GA/2/2021

IN ITAT/128/2021

PRINCIPAL COMMISSIONER OF INCOME TAX-5, KOLKATA

VERSUS

SUMAN KUMAR

IA NO. GA/2/2021

IN ITAT/129/2021

PRINCIPAL COMMISSIONER OF INCOME TAX-5, KOLKATA

VERSUS

SAJJADBHAI NURUDDIN NANDARBARWAL

IA NO. GA/2/2021

IN ITAT/130/2021

PRINCIPAL COMMISSIONER OF INCOME TAX, CENTRAL-1, KOLKATA

VERSUS

KRISHNA KUMAR PARSURAMKA

IA NO. GA/2/2021

IN ITAT/136/2021

PRINCIPAL COMMISSIONER OF INCOME TAX-5, KOLKATA

VERSUS

SHRI MAHENDRA KUMAR PERIWAL

IA NO. GA/2/2021

IN ITAT/138/2021

PRINCIPAL COMMISSIONER OF INCOME TAX, SILIGURI

Vs

PRAKASHO DEVI SARIA

IA NO. GA/2/2021

IN ITAT/139/2021

PRINCIPAL COMMISSIONER OF INCOME TAX-SILIGURI

VERSUS

SHEKHAR AGARWAL

IA NO. GA/2/2021

IN ITAT/150/2021

PRINCIPAL COMMISSIONER OF INCOME TAX 9, KOLKATA

VERSUS

PUSPA DEVI TIKMANI

IA NO. GA/2/2021

IN ITAT/151/2021

PRINCIPAL COMMISSIONER OF INCOME TAX-9, KOLKATA

VERSUS

GOPAL PRASAD TIKMANI

IA NO. GA/2/2021

IN ITAT/152/2021

PRINCIPAL COMMISSIONER OF INCOME TAX-9, KOLKATA

VERSUS

M/S GITESH TIKMANI HUF

IA NO. GA/2/2021

IN ITAT/153/2021

PRINCIPAL COMMISSIONER OF INCOME TAX-9, KOLKATA

VERSUS

M/S. GOPAL PRASAD TIKMANI HUF

IA NO. GA/2/2021

IN ITAT/154/2021

PRINCIPAL COMMISSIONER OF INCOME TAX-9, KOLKATA

VERSUS

GITESH TIKMANI

IA NO. GA/2/2021

IN ITAT/155/2021

PR CIT 9, KOLKATA

VERSUS

MANISHA TIKMANI

IA NO. GA/2/2021

IN ITAT/156/2021

PR CIT 9, KOLKATA

VERSUS

GIRISH TIKMANI

IA NO. GA/2/2021

IN ITAT/157/2021

PRINCIPAL COMMISSIONER OF INCOME TAX 9, KOLKATA

VERSUS

M/S GIRISH TIKMANI HUF

IA NO. GA/2/2021

IN ITAT/168/2021

PRINCIPAL COMMISSIONER OF INCOME TAX, SILIGURI

Vs

SRI SATYA NARAYAN SARIA

Appearance:-
Mr. Vipul Kundalia, Adv.
Mr. Smarajit Roychowdhury, Adv.
Mr. Aryak Dutta, Adv.
Mr. Tilak Mitra, Adv.
Mr. Om Narayan Rai, Adv.
Mr. Prithu Dhudhoria, Adv.
Mr. Amit Sharma, Adv.
Mr. Soumen Bhattacharya, Adv.

.....For the Appellant.

Mr. S.M. Surana, Sr. Adv.
Mr. Saurabh Bagaria, Adv.
Mr. Avra Mazumdar, Adv.
Mr. Subash Agarwal, Adv.
Mr. Soumya Kejriwal, Adv.
Mr. Pratyush Jhunjhunwala, Adv.
Mr. Varun Kedia, Adv.
Mr. Brijesh Kumar Singh, Adv.
Mr. G.S. Gupta, Adv.
Mr. Bhaskar Sengupta, Adv.
Mr. Binayak Gupta, Adv.
Sk. Md. Bilwal Hossain, Adv.
Mr. K. Roy, Adv.
Mr. Arif Ali, Adv.

.....For the Respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. These appeals filed by the revenue under Section 260 A of the Income Tax Act 1961 (the Act of brevity) are directed against the common order dated 26.06.2019 passed by the Income Tax Appellate Tribunal (Single Member Bench), Kolkata in a batch of 90 appeals. The respondents in these appeals are the assessees. The assessments were completed by the respective assessing officers by passing individual orders in respect of each of the assessees, and the assessees had filed individual appeals before the Commissioner of Income Tax (Appeals), [CIT(A)], who has also passed individual orders in each of the assessee's case affirming the order passed by the respective assessing officers disallowing the claim of the Long Term Capital Gains (LTCG), the assessees have filed appeals before the Tribunal which have been allowed by common order dated 26.06.2019 which is impugned in these appeals. The Learned Tribunal has not discussed the

merits of each and every case of the assessee but though fit to follow its earlier decision in the case of ***Swati Bajaj Versus ITO*** for the assessment year 2014-2015 in ITA NO.2623/Kol/2018. In certain other cases the Tribunal has followed other earlier orders of Coordinate Bench of the Tribunal which was also decided broadly on the same lines of *Swati Bajaj*. The revenue has preferred appeals against the common order passed by the Tribunal and the grounds raised are all identical and as against the lead case, the revenue has preferred ITAT No. 06 of 2022 .Thus, in absence of any separate findings rendered by the Tribunal in respect of each of the assessee's case, which is not disputed by the Learned Advocates appearing for the assessees, by consent of the Learned Advocates on either side ITAT No. 06 of 2022 is taken as the lead case where the assessee is *Mrs. Swati Bajaj*. Therefore, we propose to note the facts in the lead case and then proceed to discuss the issues canvassed before us and take a common decision in all the appeals.

2. The revenue in ITAT No. 6/2022 has raised the following substantial questions of law for consideration:-

(i) Whether on the facts and circumstances of the case and in law the Learned Income Tax Appellate Tribunal erred in ignoring the direct and circumstantial evidence brought on record by the Assessing Officer to establish that the assessee had indulged in manipulation of the share prices of Surabhi Chemicals and Investment Limited with a view to record fictitious Long Term Capital Gains of Rs. 28,23,500/- claiming these as exempt from taxation.

(ii) Whether on the facts and circumstances of the case and in law the order of the Learned Income Tax Appellate Tribunal suffers from perversity as it ignores the facts brought on record establishing manipulation of share prices Surabhi

Chemicals and Investment Limited as part of colourable device to generate fictitious LTCG with the aim to evade taxes due.

(iii) Whether on the facts and circumstances of the case and in law the Learned Income Tax Appellate Tribunal erred in deleting the disallowance of Long Term Capital Gains of Rs. 28,23,500/- overlooking the fact that the entire transactions were stage managed with the object to facilitate the assessee to plough back its unaccounted income in the form of fictitious Long Term Capital Gains of Rs. 28,23,500/- and claim bogus exemption.

(iv) Whether on the facts and circumstances of the case the Learned Income Tax Appellate Tribunal erred in deleting the disallowance of commission of Rs. 14,118/- purportedly incurred by the assessee towards payment to brokers who allegedly entered into the share transactions at the behest of the assessee overlooking the fact that the entire transaction were stage managed with the object to facilitate the assessee to plough back its unaccounted income in the form of fictitious Long Term Capital Gains of Rs.28,23,500/- and claim bogus exemption, thereby giving rise to the vice of flaw in the decision making process.

3. The assessee in the lead case, *Mrs. Swati Bajaj* filed the return of income for the assessment year 2014-2015 declaring a total income of Rs. 6,57,300/-.The return was selected for scrutiny and notice under Section 143 (2) of the Act and under Section 142 (1) of the Act were issued to the assessee. The assessee was represented by her advocate before the assessing officer who had submitted documents in compliance with the notice issued under Section 142 (1) of the Act. The assessee is stated to have produced the copy of the income tax returns, profit and loss account,

balance sheet, computation of total income, statement of STCG/LTCG, D-Mat account, contract notes, bank statements and other details. The assessing officer after scrutiny of the documents produced, directed the assessee to submit the details of shares purchased and sold during the year under consideration and immediate three preceding years in respect of STT paid in LTCG/STCG and was directed to explain with evidence that the transactions were genuine as the assessee had earned LTCG. On verification of the computation of income the assessing officer noted that the assessee had shown long term capital gain of Rs. 28,23,500/- and claimed the same as exempt. The assessee was directed to file complete details as well as the evidence with respect to such claim of exempt income. The assessee filed copy of contract notes in support of purchase and sale of shares of *Surabhi Chemicals* on which the long-term capital gains was claimed. From the details furnished by the assessee, it was seen that the assessee had purchased 50,000 shares of the company for Rs. 1,00,000/- on 16.03.2012 and 14.08.2012. Soon after the expiry of the period to become eligible for long term capital gains, the assessee sold those shares for Rs. 29,23,500/- and such sales were effected during the period from 04.12.2013 to 07.12.2013 and the long term capital gains (LTCG) was computed for the Rs. 28,23,500/-. The assessing officer noted that within a short span to time of 17 to 21 months, the assessee managed to sell the shares with increased value of about 2823% that to when the general market trend was recessive. It appears that there were several such transactions which led to an investigation being commenced by the Directorate of Income Tax Investigation, Kolkata. A report in this regard was submitted by the Deputy

Director of Income Tax Investigation, Unit – II (3), Kolkata dated 27.04.2015 which report was furnished to the Director General of Income Tax Investigation in Mumbai, Delhi, Ahmedabad, Bengaluru, Bhopal, Chandigarh, Chennai, Delhi, Hyderabad, Jaipur, Kochi, Kolkata, Lucknow, Patna, Pune and Director General (International Taxation) Mumbai. The investigation report dated 27.04.2015, which is available in the public domain narrates the modus operandi adopted for the purpose of claiming bogus LTCG. The stocks which were the subject matter of transaction were referred to as "*penny stocks*" and the companies whose shares were traded in the various stocks exchanges and it is reported that the figure of total transaction of the brokers is little more than Rs. 15,970 crores as against the total trade in the scripts which is more than Rs. 38,000 crores. The report further states that the cash trail has been established from the cash deposit accounts to the account of the beneficiary for a sum of more than Rs. 1,575 crores. The broker wise split up have been furnished. The modus operandi has been set out in the report, the types of penny stocks companies, the entities involved in the transactions, the different stages of the transactions, the merger method which was adopted and also mentioning about that large number of non-resident Indians and many well known foreign investors are buying or selling these penny stocks and it appears to be a case of black money cash stashed abroad coming back to India (purchase) or money be sent out of the country (sale). Further the report states that while little over Rs. 27.57 crores has gone out of the country while the amount which has come in is more than Rs. 114.97 crores. The report further states that in the whole project total 84 BSE listed

penny stocks have been identified after which several search and survey operations were conducted in office premises of more than 32 share broking entities who have accepted that they were actively involved in bogus LTCL/STCL scam. Surveys were also conducted in the office premises of many accommodation entry providers and their statements were recorded in which they have admitted their role in the scam. The beneficiaries of more than Rs. 38,000 crores have been identified and segregated, totally 60,000 Pan Nos. of the beneficiaries have been identified which is in the process of being reported to the assessment wings through the DGITs. Further the report states that in numbers more than 5000 paper/shell companies are involved in providing bogus accommodation of various kinds. Statements from most of the Directors of the Companies have been recorded and were appended to the Report. The report also states that the massive cash trail of Rs. 1,570 crores has been traced from the point it is being deposited to an undisclosed proprietorship bank accounts to the accounts of share brokers. This led to recording statements from the share brokers who have accepted that the said cash has been used for providing accommodation entries of bogus LTCG. The report further states that it is not full and final as they intend to update the data base on regular basis with new actions against entry operators. In Chapter 2 of the report, a detailed comment on the modus operandi has been set out. In Chapter 3, there is a brief discussion on all listed penny stocks scripts used in bogus LTCG scam. Chapter 4 furnishes the details of share brokers involved in the syndicate and their modus operandi. Chapter 5 furnishes the details of entry operators involved in the syndicate and their modus operandi. Chapter 6 furnishes the details

of the penny stock companies/bogus clients used for purchasing shares of listed penny stocks for providing LTCG to beneficiaries. Chapter 7 sets out a sample cash trail of Rs. 1,500 crores and Chapter 8 deals with the action initiated by the Securities and Stock Exchange Board of India (SEBI) and the beneficiaries who are covered under the search and survey operations.

4. The report dated 27.04.2015 appears to have triggered action throughout the country and the appellant would state that the Directorate of Investigation vide a letter dated 03.07.2015 reported that prices of shares of penny stocks were artificially rigged to benefit of assessees through bogus claims of LTCG. It is further stated that the report submitted by the Directorate of Investigation mentions about the prices of shares of various companies which includes *Surabhi Chemicals* and the prices were artificially rigged to provide bogus LTCG. It is submitted that the trade pattern of the shares follows a "bell" shape, the company which has hardly any business activity, splitting of shares takes place after which price of the shares on the exchange goes down automatically in proportion with the ratio of split and one does not see anything adverse happening in the scripts. Further the shares of the company were very thinly traded and gradually the value is jacked up to a desired level in a period of about one year so as to provide desired amount to selected beneficiaries. The companies which are involved has neither made any announcement nor does it have any history of dividend rights from financial year 2009-2010 up to 2013-2014 and it is rather peculiar to note that from December, 2011 to August 2013, the share market were almost flat and even the investments in peers have not resulted into any

gain but the shares of *Surabhi Chemicals* had risen to such a level without any fundamentals which is beyond anyone's imagination.

5. In the background of all these investigations, the case of the assessee was discussed by the assessing officer pursuant to the show cause notice dated 29.11.2016. The assessee sent reply through her advocate stating that she fails to understand the nature of investigation carried out by DIT against *Surabhi Chemicals* and the nature of specific information which is received so as to contemplate a genuine transaction as a sham transaction. The assessee further stated that there is no mention of any specific information against or the company and the letter is general in nature. Therefore, the assessee requested to give specific details of manipulations or connivance carried out by either of the concerned persons directly related to the equity shares of the company in which the assessee had traded. Thus, the assessee's case was, based on suspicion the transaction cannot be termed as in-genuine. The assessee further stated LTCG arising from transfer of penny stocks cannot be treated as bogus merely because SEBI has initiated an enquiry with regard to the company as well as the brokers as the shares have been purchased by her from the stock exchange and payment was made by cheque and delivery of shares have also been taken. Further it was stated that merely because a small amount was invested in penny stocks and it gave rise to huge capital gains in a short period does not mean that the transaction is bogus. Further it was stated that the assessee's share broker is *M/s Horizon Financial Consultant Private Limited* who are a very reputed equity brokerage house and by making a general allegation the transaction done by the assessee cannot be termed to be a sham transaction. Further the assessee stated that in case

there was any specific incident of any admission by any such person which points out to the assessee, request was made to produce the said person for cross examination. The assessee has also placed reliance on the annual report of *Surabhi Chemicals* to justify her stand that the company was very much in business in the year of purchase, in the year of sale and also in the succeeding years. Further it was stated that the company has earned a profit before tax of Rs. 117.06 lakhs and paid tax of Rs. 34.24 lakhs in the year 2012-2013 when the assessee purchased the shares and in the year of sale the company reported profit before tax of Rs. 118.47 lakhs and paid tax of Rs. 38.44 lakhs. Therefore, it was submitted that the company has sufficient business and financial assets and the allegations made by the department is unfounded. Further it was stated that the assessee is a regular investor in mutual funds and equity shares of various quoted companies listed on BSE and NSE and she has been earning capital gains both short term and long term and they have been accordingly taxed as per provisions of the Act. Further the assessee stated that she fails to understand as to on what basis the department has classified the share as a penny stock though the assessee received bonus from the said company, dividend from the said company and prominent share analyst and research company *M/s. Abrams Consultancy Services Private Limited* made a "buy" call on shares of the said company and since the assessee is a regular investor in equity shares she made investment in the shares of the company based on the reports. The assessee stated that she bought 500 equity shares of *Surabhi Chemicals* which was quoted on the BSE on 16.03.2012 at Rs. 200/- per equity share and such cost price came to Rs. 1,00,000/- and the payment was made through account payee cheque.

The assessee to show that she is a regular trader and investor in equity share for several years, produced the details of the investment made by her. Further, it was stated that the 500 equity shares were transferred in the name of the assessee on 18.07.2012 and were sent for D-Mat on 14.12.2012 and dematerialised on 29.12.2012. The assessee is stated to have allotted bonus share from the company on 14.08.2012 in the ratio of 9 shares for every 1 share held and since she had purchased 500 equity shares she received 4500 further equity shares as bonus which were also transferred to D-Mat account. Further it was stated that the equity shares of the company were sub-divided i.e for every one share having nominal value of Rs. 10, the equity holders got 10 shares of Rs. 1 and the assessee got 45,000 equity shares thus, totally holding 50,000 equity shares in the said company. The assessee placed reliance on the various decisions of the tribunal as well as the High Courts for the proposition that when purchase of shares was found to be genuine and were sold through proper banking channel no adverse inference can be drawn against the assessee and the addition made under Section 68 of the Act was to be deleted. With the above submissions, the assessee stated that since there is no specific or material findings against her so as to alleged the gain as an unexplained cash credit and that the assessee has fully and truly disclosed all facts with all supporting evidence and the entire transaction having been done through proper banking channel and supported by proper bills and contract notes, it stand fully explained and the entire transaction is verifiable with agencies to prove that assessee has transacted and therefore the question of invoking Section 68 of the Act does not arise.

6. The assessing officer after taking into consideration the submissions made by the assessee and the documents produced by the assessee noted that from the contract notes, it was seen that the assessee purchased 50,000 shares in *Surabhi Chemicals* of Rs. 1,00,000/- on 16.03.2012 and 14.08.2012 and just after completion of one year and few months, when the investment in shares become eligible for LTCG, it was sold for Rs. 29,23,500/- and total LTCG was computed for Rs. 28,23,500/- and in that process, the assessee has managed an increase of almost 2823 % in a short span of 17 to 21 months. The assessing officer then referred to the communication received from the Directorate of Investigation and took note of the fact that in the list of companies which have been mentioned in the report of the Directorate of Investigation includes *M/s. Surabhi Chemicals* and it has been ascertained that the share prices have been artificially rigged to provide bogus LTCG. The assessing officer also noted the trade pattern of the shares which followed a "bell" shape. After noting the above, the assessing officer points out that the facts and circumstances leading to the transactions done by the assessee seen in a larger frame reveals accommodation entry scam as reported by the Directorate of Investigation more particularly when the investment by the assessee was in a company having no financial worth and such investment does not confirm to normal behaviour of an investor. The assessing officer relied on the decision of the Hon'ble Supreme Court in ***CIT Versus Durga Prasad More*** [1] wherein the Hon'ble Supreme Court pointed out that the taxing authorities are entitled to look into the surrounding

[1] (1971) 82 ITR 540

circumstances to find out the reality and the matter has to be considered by applying the test of human probability.

7. For the same proposition, the Assessing Officer also referred to the decision of the Hon'ble Supreme Court in ***Sumati Dayal Versus CIT*** [2]**.** Taking note of the said legal principle, the Assessing Officer points out that considering the surrounding circumstances and applying the test of human probabilities coupled with the report of the Directorate of Investigation which was discussed in the assessment order, it was held that the assessee had been a party to a pre-designed mode of transaction and invested in the shares of *M/s. Surabhi Chemicals* to convert unaccounted cash under the guise of LTCG amounting to Rs. 28,23,500/- and therefore, the said amount is considered as income from undisclosed sources denying the claim of exemption as LTCG. Further, the assessing Officer stated that the share brokers/ entry operators charged Rs. 10/- to Rs. 540/- per Rs. 100/- of cheque amount and calculated the unexplained expenditure trade commission charged by the operators and worked out the sum of Rs. 14,118/- and the total addition was computed at Rs. 28,37,618/-. The assessee was informed that penalty proceedings under Section 271(1)(c) of the Act is to be initiated separately. With the above finding, the assessment was completed by Order dated 22.12.2016.

8. The assessee preferred appeal before the CIT(A) reiterating the stand taken before the Assessing Officer. Before the CIT(A) it was contended that the Assessing Officer never pointed out any discrepancy in any of the documents submitted and nothing adverse was mentioned about the

[2] (1995) 214 ITR 801 (SC)

assessee. Further, it was contended that the assessee has discharged the burden of proving the genuinity of the transaction and the burden of proving the contrary stand shifted to the department which has completely failed to discharge such burden and the assessment having been based on suspicion and surmises is illegal. Further in spite of the assessee having demanded for copy of any specific information pertaining to the assessee covered in the report of the Directorate of Investigation and to make available the share broker/ Director of the company for cross-examination, the Assessing Officer did not reply to such request made by the assessee which goes to show that there is no specific information or material adverse to the assessee. It was submitted that the assessee having proved the identity, genuineness of the transaction cannot be denied the claim for the LTCG. The assessee relied on various decisions of the Tribunals and the High Courts most of which were also placed before the Assessing Officer.

9. The CIT(A) after considering the entire facts and the papers and documents produced by the assessee holds that they are merely papers and documents and not evidence of genuine transaction and the whole gamut of the transactions are unnatural and suspicious transaction and therefore, the rules of suspicious transaction shall apply in the assessee's case. Further, the CIT(A) holds that there is grave doubt on the story proposed by the assessee before the Assessing Officer are enough to justify the humongous accruing to the assessee by way of capital gains. Further, with regard to the bank documents, the CIT(A) states that they are mere self-certifying recitals and cannot save the assessee. To support of such contention, reliance was

placed on the decision of Hon'ble Supreme Court in ***P. Mohanakala***[3] as well as the decision in ***Durga Prasad More*** and ***Sumati Dayal***. The CIT(A) referred to the decision of the High Court of Delhi in ***Sajan Dass & Sons Versus CIT*** [4]**,** wherein it was held that a mere identification of the donor and showing the memo of the gift amount through bank channel was not sufficient to prove the genuineness of the gift and the claim of gift having been made by the assessee the onus is placed on the assessee to establish the identity of the persons making the gift and also his capacity to make a gift and that it has actually be received as gift from the donor. The CIT(A) referred to a decision of the Bombay Bench of the ITAT in the case of ***M/s. Mont Blane Properties and Industries Pvt. Ltd., ITA No. 614/Bom/87 A.Y. 1983-84*** wherein the Tribunal held that the word "evidence" as used under Section 143(3) covered circumstantial evidence also and cannot be confined to direct evidence and in tax jurisprudence the word "evidence" had much wider connotations. Further, the use of the word "material" in Section 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. Further, the CIT(A) held that the payment through bank, performance through the stock exchange and other features are apparent features and the real features are the manipulated and abnormal price of offload and a sudden peak thereafter and therefore, the CIT(A) concludes that the transactions fall in the realm of suspicious and dubious transactions. The CIT(A) referred to the decision of

[3] 291 ITR278 (SC)
[4] 264 ITR 435 (Del.)

the High Court of Bombay in ***Sanjay Bimalchand Jain Versus Pr.CIT dated 10th April, 2017*** upholding the order of Nagpur Bench of the Tribunal holding that on the facts emergent in the case and the preponderance of probabilities, the entire capital gains claim were to be treated as fictitious and bogus. Finally, the CIT(A) concludes by observing that 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 guise of LTCG. With the above finding, the appeal filed by the assessee was dismissed.

10. The assessee preferred appeal before the learned Tribunal. The learned Tribunal commences its order stating that the sole and identical issue raised in the batch of appeals (90), is the genuineness of the assessee's claim of LTCG/LTCI of the capital loss derived from sale of shares and since the issues are identical, the case pertaining to the assessee *Swati Bajaj* is taken as the lead case. In Paragraph 3 of the impugned order, the learned Tribunal extracts the order passed by the CIT(A) in its entirety, after which in paragraph 4 the Tribunal holds that there is no merit in the argument of the revenue as the assessee has placed on record the relevant contract notes proper documentary evidence undertaking purchase/ sale of the shares through registered brokers by banking channels, D-Mat statement etc. and there is nothing to pinpoint anything against the assessees. The learned Tribunal referred to decision of the Coordinate Bench in ***Mahavir Jhanwar, Kolkata Versus I.T.O., ITA N0. 2474/Kol/2018*** dated 01.02.2019, where the Tribunal allowed the assessee's appeal on the ground that decision in all cases should be based on evidence and not on generalization, human

probabilities, suspicion, conjectures and surmises. Reference was made to the decision of this Court in ***CIT Versus Carbo Industrial Holdings Ltd.***[5]***,*** ***CIT Versus Emerald Commercial Ltd.*** [6] and the decision of the High Court of Bombay in ***CIT Versus Shri Mukesh Ratilal Marolia***[7]***.*** Ultimately, the learned Tribunal concludes by stating that it adopts the reasoning given by the Coordinate Bench of the Tribunal and allows the appeal in the lead case namely, that of the assessee *Mrs. Swati Bajaj.* With regard to remaining 89 appeals the learned Tribunal states that the same order will apply to the remaining 89 appeals in the absence of any distinction pointed out by the revenue. Aggrieved by such order, the revenue has preferred this appeal before this Court.

11. Mr. Aryak Dutta, learned Senior Standing Counsel appearing for the revenue in the lead case submitted that the learned Tribunal ignored the direct and circumstantial evidence brought on record by the Assessing Officer to establish that the share price of *Surabhi Chemicals* have been manipulated leading to fictitious LTCG of Rs. 28,23,500/- which the assessee has claimed to be exempt from taxation. It is submitted that the order passed by the learned Tribunal suffers from perversity as it ignored the facts brought on record establishing manipulation of share prices of *Surabhi Chemicals* as part of device to generate fictitious LTCG. Further, the learned Tribunal overlooked the fact that the entire transaction was stage-managed with the object to facilitate the assessee to plough back its unaccounted income in the form of fictitious LTCG. The learned Standing Counsel has referred to the

[5] 214 ITR 244 Calcutta High Court
[6] (2001) 250 ITR 539
[7] ITA No. 456 of 2007 Bombay High Court

findings recorded by the Assessing Officer, CIT(A) and pointed out that the learned Tribunal without even noting the intricate factual details allowed the appeal filed by the assessee. The learned Tribunal has not rendered any finding on the modus operandi adopted in the entire transaction. It is further submitted that the learned Tribunal ought to have seen that the investigation is directed against penny stock companies and it has been established that the share prices were rigging and therefore, the question of conduct of investigation on the assessee is not necessary. More particularly, owing to the admitted fact *Surabhi Chemicals* is a penny stock company. Learned Standing counsel has referred to the relevant portions of the investigation report submitted by the DIT. In support of his contention the learned Senior Standing Counsel referred to decisions in ***Durga Prasad More*** and ***Sumati Dayal*** rendered by the Hon'ble Supreme Court, where under it was held that the Court and the Tribunals have to judge the evidence before it by applying the test of human probabilities, the surrounding circumstances which exercise had been done by the Assessing Officer and affirmed by the CIT(A). Reliance was placed on the decision of the High Court of Madras in ***CIT Versus Manish D. Jain*** [8]and it is submitted that in the said decision all the decisions rendered have been referred to and the modus operandi which has been adopted was also examined and the appeal filed by the revenue was allowed, and the decision was followed in ***PCIT Versus Prabha Jain*** [9]**.** Reliance was placed on the decision in ***Tharakumari Versus ITO*** [10] in which case the Court noting the nature of transaction of Shell Company as sham,

[8] (2020) SCC Online Mad 5876
[9] (2021) 439 ITR 304 (Mad.)(HC)
[10] (2019) SCC Online Mad 9523

dismissed the appeal filed by the assessee. Reference was made in the decision of the Tribunal in ***Abhinav Agarwal Versus DCIT, Meerut*** [11] wherein the facts were considered by the Tribunal and the transaction done by the assessee therein was held to be not genuine. Reliance was placed on the decision in ***CIT Versus N.R. Portfolio Pvt. Ltd.***[12] which decision was approved by the Hon'ble Supreme Court as reported in ***(2019) 15 SCC 529.*** This decision is pressed into service to explain as to the manner and mode of conducting assessment proceedings, the application of the principle of preponderance of probabilities as to how the entire material would be germane for completing the assessment and that certificate of incorporation of a company, payment by banking channels etc. cannot in all cases tantamount to satisfactory discharge of the onus on the assessee to prove the genuineness of the transaction. To explain as to how the expression "when the assessee offers no explanation" occurring in Section 68 has to be interpreted, reliance was placed on the decision in ***CIT Versus P. Mohanakala***[13] With regard to the burden of proof/ onus of proof reliance was placed and decision of the Hon'ble Supreme Court in ***Roshan Di Hatti Versus CIT*** [14]**.** For the same proposition reliance was placed on the decision of the Hon'ble Supreme Court in ***Kale Khan Mohammad Hanif Versus Commissioner of Income Tax***[15]**.** Reliance was placed on the decision of the High Court at Bombay in ***Sanjay Bimalchand Jain L/H/Shantidevi Bimalchand Jain Versus the Principal Commissioner of Income Tax,***

[11] 2022 SCC Online ITAT 28
[12] (2012) SCC Online (Del.) 6466
[13] 2007 6 SCC 21
[14] 1977 2 SCC 378
[15] 1963 50 ITR 1 SC

Nagpur & Anr., Income Tax Appeal No. 18 of 2017 dated 10.4.2017 wherein the Court upheld the order passed by the learned Tribunal which had held that the fantastic sale price was not at all possible as there was no economic or financial basis as to how a share worth Rs. 5 of a little known company would jump from Rs. 5 to Rs. 485. The learned Senior Standing Counsel distinguished the decision in ***Carbo Industrial Holdings, Mahavir Jhanwar*** and ***Emerald Commercial Ltd.*** which were referred to by the Tribunal on the ground the facts and circumstances were entirely different.

12. Mr. Vipul Kundalia, learned Senior Standing Counsel appearing for the revenue in the other appeals referred to the decision in ***Principle Commissioner of Income Tax, Delhi Versus NDR Promoters Pvt. Ltd.*** [16] wherein the Court relies on the decision of the Tribunal after noting that the transactions done by the assessee was clearly sham and make believe and the excellent paper work to camouflage the bogus nature. It is submitted by Mr. Vipul Kundalia that the Court has to consider the totality of the circumstances as to how the action was initiated to prevent black-money being converted and the seed was sown by constituting a special investigating team pursuant to the directions of the Hon'ble Supreme Court in ***Ram Jethmalani & Ors. Versus Union of India & Ors.***[17] The learned Standing Counsel has elaborately referred to the various paragraphs of the decision to explain as to how the modus operandi adopted in these cases are very complex and pursuant to the directions issued by the Hon'ble Supreme Court special investigating team was constituted and this exercise was done

[16] 2019 SCC Online (Del.) 6599
[17] (2011) 8 SCC 1

by various departments and the present investigation done by the Income Tax department is a follow up of the investigation which had commenced in the country since 2011. Therefore, it is submitted that the Assessing Officer and the CIT(A) rightly construed the surrounding circumstances and denied the claim of LTCG as being bogus. The learned standing Counsel has taken us through relevant portions of the investigation report to explain the machinery which was adopted, how the beneficiaries were identified as to how companies like *Surabhi Chemicals* have been found to be penny stock companies and their names find place in the investigation report. Specific reference was made to the pictorial representation to explain the nature of transaction as to be "bell" shaped and how the share prices steeply fall after the expiry of the eligibility period for claiming LTCG. Therefore, it is submitted that the profit earned is clearly due to manipulation done in the stock market and the onus is on the assessees to prove the transactions to be genuine which has not been discharged by them and the Tribunal erroneously reversed the order passed by the Assessing Officer as confirmed by the CIT(A). Reliance was placed on the decision in ***Sanjay Kaul Versus Principal Commissioner of Income Tax, Delhi-8***[18] wherein an identical test was considered, a view taken by the Assessing Officer while referring to the surrounding circumstances, the human conduct and preponderance probabilities and lack of financial logic coupled with the modus operandi was approved by the Court by dismissing the appeal filed by the assessee. In the said decision, the decision of the Hon'ble Supreme Court in ***Suman***

[18] MANU/DE/1506/2020

Poddar Versus ITO[19] has been extensively relied upon. Reliance was placed on the decision in the ***Udit Kalra Versus ITO*** [20] where the Court affirmed the order passed by the learned Tribunal which rejected the case of the assessee in more or less similar factual circumstances after noting the decision of the Hon'ble Supreme Court in ***McDowell and Co. Ltd. Versus CTO*** [21] wherein it was held that the tax planning should be legitimate, provided, it is within the framework of law and any colourable device cannot be part of tax planning and it is linked to encourage or entertain the people that it is honourable to avoid the payment of tax by dubious methods.

13. Mr. Samarjit Roy Chowdhury, learned Senior Standing Counsel appearing for the Revenue in other appeals referred to an office memorandum issued by the Central Board dated 16th September, 2009 by which exemption was withdrawn in respect of appeals to be filed in penny stock cases, regardless of the monetary limit fixed in the earlier circular. It is submitted that this office memorandum carves out an exception from the applicability of the circular issued by the Board fixing monetary limits for filing appeals before the Courts. The learned Standing Counsel explained as to what is "penny stock" in the American concept and submitted that when the share price is less than one dollar it is referred to as a penny stock. So far as the Indian concept, "penny stocks" are shares which are traded at very low prices such as less than Rs. 100 per share. The learned Standing Counsel has drawn our attention to the assessment order passed in the case of the assessee, Dinesh Kumar Banshal which is the subject matter of ITAT

[19] (2019) 112 Taxmann.com 330 (SC)
[20] MANU/DE/1507/2019
[21] (1985) 154 ITR 148

No. 31 of 2020 and submitted that it is one of the well-drafted assessment orders dealing with all issues elaborately. The learned Standing Counsel has drawn our attention to the relevant paragraphs in the assessment order to emphasize this submission that the Assessing Officer has clearly brought out the machinations of fraudulent, manipulative and deceptive dealings by misusing the stock exchange system to generate bogus LTCG. It is pointed out that the stock brokers as well as the Director of M/s. Kailash Auto Finance Limited were examined on oath and they have accepted that rigging of prices of the shares have been done. Further, our attention has been drawn to the report of the special investigating team which has been extensively referred by the Assessing Officer. Further, the Assessing Officer has listed out the companies in which the stock brokers have made manipulative and deceptive dealings and Kailash Auto Finance Limited is one such company. The Assessing Officer has also elaborately discussed the various decisions and ultimately, completed the assessment and denied the claim for LTCG. The said order was affirmed by the CIT(A). However, the Tribunal by a common order in 9 appeals, allowed the appeals following the decision in ***Mahavir Jhanwar***, the correctness of which decision has been canvassed in the other appeals before this Court. It is further submitted that none of the findings recorded by the Assessing Officer or the CIT(A) had been controverted by the learned Tribunal. In support of this contention, the learned Standing Counsel referred to the decision of the High Court of Delhi in ***CIT Versus Nipun Buliders & Developers Pvt. Ltd.***[22] dated 07.01.2013**.** This decision was pressed into service to explain the concept of burden of

[22] ITA NO. 120 of 2012

proof and upon whom the burden lay qua Section 68 of the Act. In the cases on hand, the assessee has not discharged the burden which has been cast upon them which was rightly noted by the Assessing Officer as well as the CIT(A) but erroneously reversed by the Tribunal. Reliance was placed on the decision of the Hon'ble Supreme Court in ***CIT, Bihar Versus S.P. Jain*** [23] for the proposition that if no cogent reasons has been given by the Tribunal, for rejecting the findings of the Assessing Officer and if the Tribunal failed to take into account the relevant materials on record and has based its findings on mere conjecture and surmises, the order of the Tribunal has to be interfered.

14. Mr. Soumen Bhattacharya, learned Junior Standing Counsel appearing for the Revenue referred to the budget speech of the Hon'ble Minister of Finance on February 1, 2018 wherein it was pointed out that the total amount of exempted capital gains from listed share and units is around Rs. 3,67,000 crores as per the returns filed for the assessment year 2017-18 and major part of this gain has accrued to corporates and LLPs and this has also created a bias against manufacturing, leading to more business surpluses being invested in financial assets. Further, the return on investment in equity is already called attractive even without exemption and there is therefore a strong case for bringing long terms capital gains from listed equities in the tax net. Reference was made to the speech of the Hon'ble Minister of Finance during the Budget 2022-23 wherein the Hon'ble Minister had referred to "Mahabharat" and the duty of the tax payer for voluntary compliance of the tax liability. Reliance was placed on the decision

[23] AIR 1973 SC 977

of the Hon'ble Supreme Court in ***McDowell and Co. Ltd. Versus CTO*** [24] wherein the Hon'ble Supreme Court held that tax planning may be legitimate provided its within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage and entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods and it is the obligation of every citizen to pay the tax honestly without resorting to subterfuges. Commenting upon the order passed by the Tribunal, it is submitted that the order of the Tribunal directly and substantially interferes with the interest of the revenue and the findings are not based on the evidence brought on record by the Assessing Officer, the order suffers from material irregularities without independent reasons and the Tribunal has glossed over the relevant facts and therefore, the order of the Tribunal suffers from perversity. In support of such contention, reliance was placed on the decision of the High Court at Madras in ***PCIT Versus Rakesh Sarin*** [25].

15. Mr. Om Narayan Rai, Learned Senior Standing Counsel appearing for the other appellant submitted that the case of the assessee from the inception is that the revenue has acted on generalized report of the investigation done by the department and there is nothing specific relatable to the assessee. Secondly, it was contended that copy of such investigation report was not furnished to the assessee. Learned Counsel submitted that circumstantial evidence can be the sole basis for taking the decision in the matter. In this regard, reliance was placed on the decision of the Hon'ble

[24] AIR 1986 SC 649
[25] TCA NO. 1060 of 2019

Supreme Court in ***SEBI Versus Kishore R. Ajmera*** [26]wherein the Court has pointed out as to the important aspect with regard to the proximity of time between the buy and sell orders, prior meeting of minds, unnatural rise in the prices of the scripts and how the conclusion can be gathered from the various circumstances coupled with preponderance of probabilities. Therefore, it is submitted that absence of direct evidence is immaterial. Reliance was placed on the decision of the Hon'ble Supreme Court in ***Commissioner of Customs Versus Dilip Kumar and Company*** [27] for the proposition that exemption notification should be interpreted strictly, as the burden of proof, admittedly would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification. It is submitted that Section 10 (38) of the Income Tax Act is a provision where exemption is being claimed by the assessee and the burden is on the assessee to prove that he is entitled to the claim for exemption which the assessees before this Court have failed to establish. With regard to the arguments of the assessee that the investigation report is general and not assessee specific, it is submitted that the assessee has not pleaded any prejudice on account of non-supply of the investigation report. Therefore mere non-furnishing of the report will not vitiate the proceedings. Without noting these legal principles, the Learned Tribunal had posed a wrong question to itself which has resulted in a wrong answer. The correct question that the learned Tribunal should have asked itself is whether the assessee was prejudiced on account of non-supply of the investigation

[26] (2016) 6 SCC 368
[27] (2018) 9 SCC 1

report. To explain the test of prejudice or the test of fair hearing. Reliance was placed on the decision of the Hon'ble Supreme Court in ***SBI Versus S K Sharma*** [28]**.** Reliance was also placed on the decision of the Hon'ble Supreme Court in ***SBI Versus M.J. James*** for the same proposition that prejudice should exist as a matter of fact or to be based upon the definite inference of likelihood of prejudice flowing through non-observance of natural justice. It is submitted that none of the assessees have pleaded any prejudice caused to them and merely by stating that the report has not furnished to them nor the Director of the company was not been made available for cross examination would not suffice. Reliance was placed on the decision of the Hon'ble Division Bench of this Court in ***Kishanlal Agarwalla Versus Collector of Land Customs*** [29]**.** This decision was pressed into service that as long as the party charged has a fair and reasonable opportunity to see, comment and criticize the evidence, statement or record on which the charge is being made against him, the demands and the test of natural justice are satisfied and cross examination in that sense is not a technical cross examination in a Court of Law. For the same proposition reliance was placed on the decision of the Hon'ble Supreme Court in ***State of J&K Versus Bakshi Ghulam Mohammad & Another*** [30] wherein it was held that a right of hearing cannot include a right of cross examination and the right must depend on the circumstance of each case and must also depend on the statute under which the allegations are being enquired into. Thus, by referring to the above decisions, it is

[28] (1996) 3 SCC 364
[29] AIR 1967 Cal 80
[30] AIR 1967 SC 122

submitted when the statements recorded during the investigation were not against the assessee, they are not entitled to claim any right of cross examination. The next submission of Mr. Rai is on the powers of the Appellate Tribunal under Section 254 of the Act. It is submitted that the nature of the powers were interpreted by the Hon'ble Supreme Court in ***Hukum Chand Mills Limited Versus CIT*** [31] wherein the Court held that the tribunal had jurisdiction to frame the question raised for the first time. It is submitted that on a reading of Section 254 (1) and Section 255 (6) of the Act clearly shows the power exercisable by the Tribunal and they are akin and equal to that of the power exercisable by the assessing authority and in the case on hand the tribunal ought to have exercised such power and or its failure renders the order as perverse. For the same proposition, reliance was placed on the decision of the High Court of Bombay in ***New India Assurance Limited Versus CIT*** [32]. It is submitted that the said decision was approved by the Hon'ble Supreme Court in ***Ajay Gandhi and Another Versus B. Singh and Others*** [33] wherein it was pointed out that the Income Tax Appellate Tribunal exercised judicial function and has trappings of a Court and that it is the ultimate fact finding authority under the Act. The Learned Standing Counsel referred to Section 107 and Order 41 CPC to explain the powers to the Appellate Court and as to how this Court can exercise the jurisdiction in the matter. The Learned Counsel referred to Section 260 A (7) of the Act as also Section 103 and Order 41 Rule 33 CPC to explain the powers of this Court. Further to explain the powers of the

[31] AIR 1967 (SC) 455
[32] AIR 1958 Bombay 143
[33] (2004) 2 SCC 120

Court, reliance was placed on the decision of the Hon'ble Division Bench of this Court in ***C.C.A.P. Limited Versus Commissioner of Income Tax*** [34]. The next submission was on the effect of Section 10 (38) of the Act. Reference was made to Section 2 (13) of the Act which defines the term "business". Elaborate reference was made to the decision of the Hon'ble Supreme Court in ***G. Venkataswami Naidu and Company Versus CIT*** [35] to explain as to how the adventure is in the nature of trade. It is submitted that the Hon'ble Supreme Court has laid down the test to be applied for determining the character of the transaction in paragraph 17 of the judgment and if the test are applied to the facts of the instant case, it will clearly reveal the intention behind the purchase of shared by the assessees.

16. The learned Senior Standing Counsel reiterated the findings in the report of the Special Investigation Team constituted pursuant to the orders passed by the Hon'ble Supreme Court and referred to the recommendations of the Special Investigation Team with specific reference to misuse of exemption on LTCG for money laundering. It was pointed out that a company with poor financial fundamentals in terms of past income or turn-over is able to raise huge capital allotment of preferential allotment of shares is made to various entities, there is sharp rise in price of script once the preferential allotment is done and this is clearly achieved through circular trading of shares among a selected group of companies. These scripts of the companies often have own promoters/brokers. The scripts with thus artificially inflated price are offloaded through companies whose funding is

[34] (2004) 270 ITR 248
[35] AIR 1959 SC 359

proved by the same set of people who want to convert black-money into white. Therefore, it was stated that there is an urgent need for an effective, preventive and punitive action in such matters to prevent recurrence of such instances. Several recommendations were made by the SIT after noting the relevant facts. It is submitted that in terms of Section 114 of the Evidence Act, the Court may presume existence of certain facts and if read along with Section 4 of the Evidence Act which explains the words "may presume", and the facts of the cases on hand being examined will clearly show the circumstances under which the Assessing Officers have acted and the facts were considered and also the normal human conduct of an investor, preponderance of probabilities and the surrounding circumstances and finding has been rendered. It is reiterated that the Tribunal clearly abdicated its powers, did not examine any of the facts which it is required to do in terms of the power conferred on the Tribunal under the Act. With the above submission, the learned Standing Counsel prayed for allowing the appeals.

17. Mr. Tilak Mitra, learned Senior Standing Counsel for the appellant while adopting the submissions made by the other learned Standing Counsels, referred to an assessment order dated 18.11.2016 in the case of the assessee, Sanjay Kumar Ostwal (HUF) for the assessment year 2013-14 and invited our attention to the observations made by the Assessing Officer to demonstrate the modus operandi adopted in the matters and as to how M/s. S.R.K. Industries was a penny stock company and how the share prices were rigged and the assessee who had invested a sum of Rs. 1,00,000/- for purchase of 10,000 shares in SRK Industries was able to sell those shares after 14 months for a total consideration of Rs. 75,61,372/-

thereby earning total LTCG of Rs. 74,68,959/-. Therefore, it is submitted that the Tribunal brushed aside these important facts and erroneously reversed the orders passed by the CIT. Further it is submitted that SRK Industries is one of the 84 companies which have been listed as penny stock companies in the investigation report.

18. Mr. Prithu Dhudhoria, learned Junior Standing Counsel appearing in the some of the appeals submitted that in one of the appeals in ITA no. 156 of 2021, (assessee, Girish Tikmani), the Assessing Officer without discussing the facts by a cryptic order accepted the claim of the assessee towards LTCG in respect of shares purchased and sold by the assessee of a shell company. The Commissioner of Income Tax (CIT), exercised power under Section 263 of the Act and reversed the order passed by the Assessing Officer. The learned Standing Counsel has elaborately referred to the findings recorded by the CIT and submitted that the assessee did not furnish any details which has been clearly noted by the Commissioner who on facts found the assessment order to be erroneous and prejudicial to the interest of the revenue. It is submitted that power under Section 263 of the Act could be exercised by the Commissioner and one of the circumstances which would justify invoking such a power is where the Assessing Officer has failed to conduct any enquiry. The CIT has clearly brought out in his order that no enquiry was conducted by the Assessing officer and mechanically the return filed by the assessee was accepted. Reliance was placed on the order passed by the Hon'ble Supreme Court in ***Deniel Merchants Pvt. Ltd. Versus ITO*** in Special Leave Appeal No. 23976 of 2017 dated 29.11.2017 wherein the Hon'ble Supreme Court dismissed a batch of appeals arising out of orders

passed by the CIT under Section 263 of the Act. The Hon'ble Supreme Court held that the CIT has observed that the Assessing Officer did not make any proper enquiry while making the assessment and accepting the explanation of the assessee insofar as receipt of share application money is concerned and on that basis the CIT had, after setting aside the order of the Assessing Officer, directed the Assessing Officer to carry a thorough and detailed enquiry and this order which had been upheld by the High Court was not interfered. With the above submissions, the learned Standing Counsel adopted the argument made by the other Standing Counsels.

19. Mr. Subhash Agarwal, Learned Advocate leading the arguments on behalf of the assessees, submitted by the department and that the copy of the investigation report was not furnished to the assessee and the stand taken by the revenue that the report is not required to be furnished is not tenable. The learned Advocate referred to the decision of the Hon'ble Supreme Court in ***T. Takano Versus SEBI in Civil Appeal No. 487-488 of 2022,*** dated February 18, 2022 and submitted that the revenue has no right to withhold the investigation report which appears to be the basis of the entire controversy. It is submitted that if the order of the tribunal, in the opinion of this Court has not properly discussed the facts of the case then the matter requires to be remanded to the tribunal for re-consideration. The Learned Advocate has drawn our attention to the investigation report and submitted that the report identifies the list of penny stocks and neither the name of the assessee, *Smt. Swati Bajaj*, nor the name of the stock broker of the assessee has been mentioned therein. To explain the concept of risk-reward ratio, the learned advocate referred to various articles which have

been published to demonstrate that there is nothing tainted to invest in a penny stock company and it is an accepted practice in the stock market to trade in such stocks. In this regard the learned advocate referred to an article which has been published in the internet advising the investors as to how to buy unlisted shares. Reference was also made to a news item in the Economic Times dated 27.04.2022 titled "*one multidagger stock a day! Tax's the average of what D-street caught in the last two years*". Nextly, the learned advocate referred to the final order passed by SEBI dated 21.09.2017 by which 244 entities which were treated as penny stocks have been exonerated and one such entity is M/s. *Kailash Auto* in which the assessee had invested. It is submitted that the revenue has taken strong exception to the off-market transaction which is approved manner of transaction and to explain the methodology of off-market transaction, reference was made to the news item in the Economic Times. Further referring to other articles which have been published in the internet, it is submitted that efficacy of both technical and fundamental analysis is disputed by the efficient- market hypothesis, which states that stocks market prices are essentially unpredictable and research on whether technical analysis offer any benefit has produced mixed result. The learned advocate also referred to a list of top investors in India and submitted that all of them hail from a particular state in the country whose business acumen and the courage to take risk has been well recognized. To explain the concept of fluctuation in the market price, the learned advocate referred to a tabular column culled out from a magazine, "Capital Market" issue of April-May, 2022. It is submitted that the percentage of fluctuation is calculated with the formula, viz, price divided by

earnings per share and referring to the figures therein, by way of illustration, it is explained that the percentage of fluctuations between 200 to 600 is realistic.

20. It is submitted that the four basic principles of law as has been consistently adopted by courts are:

(i) The person who alleges should prove, (ii) All adverse material is required to be supplied to the person against whom the allegations is made, (iii) No findings can be recorded on surmises and conjectures, (iv) Adverse action can be initiated only based on evidence.

It is submitted that these four cardinal principles have been ignored by the department. It is submitted that the assessee Smt. *Swati Bajaj* had invested in robust companies and there is absolutely no reason to doubt the genuinity of the transaction. Further it is submitted that if the addition made by the respective assessment officers on account of alleged bogus, LTCG/STCG at best it can be, a sum of Rs. 9822 crores and not the astronomical figure, (Rs. 38,000 crores), mentioned by the revenue before this Court. The learned Advocate has referred to the assessment in the case of *Smt. Swati Bajaj* and submitted that there is no adverse comment or statement against the share brokers of the assessee, M/s. Horizon Financial Consultant Private Limited. The documents which have been furnished by the assessee have been set out by the Assessing Officer in his order dated 22.12.2016 in paragraph 3 and in sub-para (d) of Para 3, the assessing officer has noted the explanation given by the assessee as to how the investment was made and going by the investment made by the assessee, it is seen that only 25 % of the investment made by the assessee was in

Surabhi Chemicals which is stated to be a penny stock company. Thus, it is submitted that the facts clearly shows that the assessee, *Smt. Swati Bajaj* is a bona fide investor in stocks and shares. Further it is submitted that the assessing officer himself notes that the sale of the shares done by the assessee was not immediately after the period eligible for LTCG but after 17 to 21 months. Further the assessing officer has referred to investigation report which forms part of the findings recorded by him and therefore the report should have been furnished to the assessee. Commenting upon the reasoning given by the CIT (A) in his order dated 22.11.2018, it is submitted that the First Appellate Authority failed to note that the investment made by the assessee was in a robust company and this fact has not been appreciated by the appellate authority. Further it is submitted that the revenue had raised serious objections with regard to the findings rendered by the tribunal in paragraph 4 of the order dated 26.06.2019 wherein it has been mentioned as STCL instead of LTCG and that being only a typographical error cannot be blown out of proportion. Further the articles appearing in *Hindu Business Line* were referred to show as to how the SEBI had banned off-market transaction of shares done by brokers through power of attorneys and other than that there is nothing wrong to enter into off-market transaction. To explain the concept of divergence, reference was made to an article published in *Investopedia*. Similarly, an article published on *"Delan"* was referred to and it is submitted that stocks that display a usually are blue chip stocks and once that for lower volatility and more predictable behavioural patterns. Investors used in normal probability

distribution of stocks past returns to make assumptions regarding expected future returns.

21. Mr. Agarwal next referred to compilation of decisions and firstly took us through the decision in ***Sumati Dayal*** and referred to the facts as mentioned in paragraphs 8 and 12 of the judgment and submitted that the facts in the said case was entirely different and could not have been applied to the assessees case. Nextly, the learned counsel sought to distinguish the decision in ***Durga Prasad More*** and submitted that in the said decision the Hon'ble Supreme Court held that the case of the assessee was based on self-serving documents which is not the case of the assessee *Smt. Swati Bajaj*. The decision relied on by Mr. Rai Standing Counsel in the case ***Kishore R. Ajmera*** was referred to and it was submitted that the matter pertain to stocks brokers and the decision can have no application to the facts of the case of *Smt. Swati Bajaj*. With regard to the decisions in the case of ***Manish D. Jain***, it is submitted that on facts the Madras High Court recorded that SEBI and the assessing officer found that the assessee ***Manish D. Jain*** played a role in inflating price which is not so in the assessees case. Similarly, distinguishing the decision in ***Pinky Devi***, it is submitted that in the said case the assessee failed to discharge the onus cast upon her which is not so in the case of *Smt. Swati Bajaj* as she had furnished the contract notes and all other documents. To explain the concept of as to how a judgment has to be read, reliance was placed on the decision in ***CIT Versus Sun Engineering Works Private Limited*** [36]**.** Reliance was placed on the decision of the Hon'ble Supreme Court in ***Dhakeswari Cotton Mills***

[36] (1992) 198 ITR 297 (SC)

Limited Versus CIT [37] for the proposition that assessments cannot be based on surmises and conjectures. The learned advocate referred to the assessment order in the case of the assessee *Suman Kumar* which is the subject matter of ITAT No. 128 of 2021 and submitted that the assessment order clearly shows that the names of the brokers/sub brokers and nowhere the name of the assessee, *Suman Kumar* finds place. Reliance was placed on the decision of the Hon'ble Division Bench of this Court in ***ITA No. 129 of 2012, Classic Growers Limited Versus CIT Kolkata–(III), Kolkata,*** dated 28.02.2013 wherein the Court allowed the assessees appeal after having found that the assessee neither suppressed any income nor sold any property by undervaluing the same. Reference was made to the decision of the Division Bench of this Court in ITA 22 of 2009 in ***CIT Versus Bhagwati Prasad Agarwal*** wherein the Division Bench of this Court confirmed the order of the tribunal which held that the chain of transactions entered into by the assessee have been proved. Reliance was placed on the decision of this Court in ***ITAT No. 78 of 2017 in PCIT Versus M/s. BLB Cables and Contractors Private Limited*** dated 19.06.2018 for the same proposition. Reliance was placed on the decision of the Division Bench of this Court in ***CIT Versus Lakshmangarh Estate and Trading Company in ITA No. 270 of 1999*** dated 07.10.2013 for the proposition that suspicion can never be taken as proof. Reliance was placed on the decision of the Division Bench of this Court in ***PCIT Versus Rungta Properties Private Limited ITAT No. 105 of 2016*** dated 08.05.2017 wherein the Court affirmed the view taken by the First Appellate Authority holding that the assessing officer has not

[37] (1954) 26 ITR 775 (SC)

doubted the genuineness of the documents placed on record by the assessee therein as in the case of the assessee before this Court. Reference was made to the decision of the High Court of Bombay in ***ITA No. 456 of 2007 in CIT Versus Mukesh Ratilal Morolia*** dated 07.09.2011 wherein the Court refused to interfere with the decision of the Tribunal holding that the purchase and sale of shares are genuine. The appeal filed by the revenue before the Hon'ble Supreme Court in Special Leave to Appeal (Civil Appeal No. 20146 of 2012) was dismissed by the order dated 27.01.2014. For similar proposition as to how the assessee has discharged the burden of proof, reliance was placed on the decision of the High Court of Punjab and Haryana in ***ITA No. 18 of 2017 in PCIT Versus Hitesh Gandhi*** dated 16.02.2017 and also the decision in ***PCIT Versus Prem Pal Gandhi in ITA No. 95 of 2017*** dated 18.01.2018. Reliance was placed on the decision of the High Court of Gujarat in ***PCIT Versus Parasben Kasturchand Kochar in Tax Appeal No. 204 of 2020*** dated 17.09.2020 wherein the revenue was unable to prove that the transaction was pre-arranged as well as sham and was carried out through penny scripts companies/paper companies and the appeal filed by the revenue was dismissed. Reliance was placed on the decision of the High Court of Delhi in ***PCIT Versus Smt. Krishna Devi*** [38] wherein the argument based on the theory of human behaviour and preponderance of probability was rejected and the investment made by the assessee in the said case was also in penny stocks. To explain the doctrine of merger, reliance was placed on the decision of the High Court of Gujarat

[38] (2021) 126 taxmann.com 80

in ***Nirma Industries Limited Versus DCIT*** [39]**.** By placing reliance on the decision of the High Court of Rajasthan in ***CIT Versus Smt. Pushpa Malpani in ITA No. 50 of 2010*** dated 15.11.2010, it is submitted that in the said case the Court found that at the time of the transaction the broker in question was not banned by SEBI and this finding was approved by the High Court and the appeal filed by the revenue was dismissed. Thus, Mr. Agarwal summed up his submission by contending that no adverse findings has been recorded against *Surabhi Chemicals*, the assessee, *Smt. Swati Bajaj*, is a bonafide investor was advised by an expert stock broker who has not come under adverse notice and the assessee had placed all the document before the assessing officer and the genuinity of the same has not been doubted by the assessing officer. Further it is submitted that the sale effected by the assessee cannot be stated to be when the prices were at the peak and the transaction cannot be treated to be a speculative transaction to bring it under Section 43(5) of the Act. Therefore, it is submitted that the orders passed by the tribunal may be affirmed.

22. Mr. Saurabh Bagaria, learned advocate appearing for the appellant in ITAT No. 138 of 2021 had painstakingly taken us through the assessment order dated 09.12.2016 and submitted that the assessee had made investment in reputed companies yet suffered long term capital loss. The assessing officer while issuing the show cause notice alleged that the dealing of penny stocks by the assessee was nothing but manipulation to book manufactured loss in connivance with entry operators through stock brokers, though the three companies were alleged to be such penny stocks

[39] (2006) 155 Taxman 330 (Guj)

after reply was submitted by the assessee the assessing officer reconciled to the fact that one of the three companies cannot be branded as a penny stock. Further it is submitted that the assessee had held the stocks for more than 6 months. Further by referring to the paragraph 3.5 of the assessment order, it is submitted that the statements has been relied upon but the copy of the statement was not given to the assessee in spite of specific request that apart in the statement there is nothing alleged against the assessee, despite which, the addition was made. It is submitted that the assessee in the return of income had also mentioned about the short term capital gains on account of receipt of compensation received from the Government of Haryana for the land acquired from the assessee and this portion of the return has not been doubted. Further it is submitted that specific request was made by the assessee not only before the assessing officer but also before the First Appellate Authority to make available the persons from whom statements were recorded for being cross examined by the assessee. Furthermore, the details and documents produced by the assessee were never doubted either by the assessing officer or by the First Appellate Authority. Yet the appeal filed by the assessee was dismissed based on surmises and conjectures. Before the tribunal, the assessee had placed the facts and the learned tribunal in paragraph 4 of the impugned order notes the submissions made by the assessee and in paragraph 8 has dealt with factual position more particularly that the statement of the entry operators/promoters of the company nowhere mentions the name of the assessee alleging that he has adopted any dubious means for artificially rigging the share price. Therefore, it is submitted that the facts have been

considered by the learned tribunal and this Court would not interfere with such factual findings.

23. Mr. Bagaria referred to the compilation of case laws and for the convenience of the court he has categorized case laws under the seven topics. To explain the concept of tax avoiders/tax planning and as to how the decision of the Hon'ble Supreme Court in ***McDowell*** was interpreted, reliance was placed on the decision of the Hon'ble Supreme Court in ***Union of India Versus Azadi Bachao Andolan*** [40]. The learned counsel has elaborately referred to the various paragraphs of the decision and emphasized that all parties must have a common intention which is conspicuously missing in the assessees case. For the same proposition, reliance was placed on the decision of the Hon'ble Supreme Court in ***Vodafone International Holdings Versus Union of India*** [41] wherein the first question was regarding the correctness of the decision in ***Azadi Bachao Andolan***. For the same proposition, reliance was placed on the decision of the High Court of Hyderabad in ***Hill Country Properties Limited Versus Goman Agro Farms Private Limited*** [42]. Mr. Bagaria also referred to the decision of the ***House of Lords in IRC Versus Duke of Westminster*** [43] which has been extensively referred by the Hon'ble Supreme Court in ***Azadi Bachao Andolan***. On the next topic namely when civil consequences entails rules of natural justice must be complied with, reliance was placed on the decision of the Hon'ble Supreme Court in

[40] (2004) 10 SCC 1
[41] (2012) 341 ITR 1 (SC)
[42] (2015) SCC Online Hyd. 1021
[43] (1936) AC - 1

Sahara India Versus CIT [44] and ***Kothari Filaments Versus CC*** [45]**.** It is further submitted that in spite of specific request made by the assessee to provide the persons from whom statements were recorded for cross examination, they have not been produced and this clearly amounts to violation of principles of natural justice. To support such argument reliance was placed on the decision in ***Andaman Timber Industries Versus CCE*** [46], ***Kishinchand Chellaram Versus CIT*** [47], ***Arya Abhushan Bandhar Versus Union of India*** [48] and the judgment of this Court in ***CIT (E), Kolkata Versus Mayapur Dham Pilgrim and Visitors Trust in ITAT NO. 312 of 2017*** dated 16.02.2022.

24. To explain the concept of commercial expediency as to how the assessing officer cannot sit in the chair of the assessee, reliance was placed on the decision of the Hon'ble Supreme Court in ***S.A. Builders Versus CIT (Appeals)*** [49]. Reliance was also placed on the decision of the High Court of Delhi in ***Jain Manufacturing (India) Private Limited Versus The Commissioner*** [50] wherein the Court set aside the order cancelling the registration of a dealer under the Central Sales Tax Act with retrospective effect and held that retrospective cancellation should not prejudicially affect the party who acted on the basis of the valid registration. This judgment is pressed into service to support the contention that on the date when the assessee had purchased the shares there was no allegation against the

[44] (2008) 14 SCC 151
[45] (2009) 2 SCC 192
[46] (2015) 324 ELT 641 (SC)
[47] (1980) Supplementary SCC 660
[48] (2002) (143) ELT 25 (SC)
[49] (2007) 1 SCC 781
[50] (2016) 93 VST 326

company or the stock broker or any other person and therefore any investigation done subsequently cannot work prejudice to the assessee who is a genuine investor.

25. It is submitted that the revenue largely emphasized on the concept of circumstantial evidence which according to the revenue was available to lead to the conclusion that the claim of LTCG/STCL was bogus. To explain the concept of circumstantial evidence and the cardinal principles which the court has to follow, reliance was placed on the decision of the Hon'ble Supreme Court in ***State of Uttar Pradesh Versus Satish*** [51]**,** ***Chintalapati S. Raju Versus SEBI*** [52]. Further it is submitted that very recently the Hon'ble Supreme Court in ***Balram Garg Versus SEBI in CA No. 7054 of 2021*** dated April 19, 2022 considered the decisions in the case of ***Kishore R. Ajmera*** heavily relied upon by the revenue and had observed that unless there are foundational facts, question of relied upon circumstantial evidence could not arise. It is submitted that the reasonable expectation of the assessee is to know the things which obviously can be based on reasonable inference drawn from foundational facts which is missing in the assessee's case. The learned advocate referred to the decision of the Hon'ble Supreme Court in ***Gorkha Security Services Versus Government (NCT of Delhi)*** [53] to explain the concept of prejudice as to how the assessee has been prejudiced on account of non-supply of the materials, statements, report, not affording opportunity for cross examination etc. Lastly, it was contended that the investigation report which appears to be

[51] (2005) 3 SCC 114
[52] (2018) 7 SCC 443
[53] (2014) 9 SCC 105

the basis of the entire matter was not given to the assessee in spite of specific request made by the assessee, that apart the genuineness of the documents which were placed by the assessee was never doubted by the assessing officer or the First Appellate Authority and those documents where rightly taken note of the by the tribunal and the appeal filed by the assessee was allowed and the same would not call for any inference. Mr. Bagaria submitted that he has also been instructed to appear in ITAT No. 168 of 2021 wherein the assessee had invested in the shares of M/s. Esteemed Bio Organics though the trading activities of the said company was initially suspended subsequently SEBI had lifted the ban and exonerated the said company. With the above submission the learned advocate prayed for affirming order passed by the tribunal and dismissing the appeal filed by the revenue.

26. Mr. S.M. Surana, Learned Senior advocate appearing for the appellants in ITAT No. 156 of 2021, 157 of 2021 submitted that there is a small distinction in the case of the assessees than the other cases which were argued before this Court as the orders impugned in these appeals, passed by the Learned Tribunal arise out of an order passed by the Commissioner of Income Tax under Section 263 of the Act. Therefore, it is submitted that in the course of his argument he would seek to sustain the order of the tribunal not only on the grounds which were canvassed by the other learned advocates for the assessees but more importantly on the ground that the Commissioner could not have exercised his power under Section 263 of the Act. The Learned Senior Counsel referred to the facts in ITAT No. 156 of 2021 wherein the assessee is *Mr. Girish Tikmani*, it is

submitted that the assessing officer examined the return of income filed by the assessee in declaring the total income of Rs. 6,76,490/- and the return which was processed under Section 143(1) of the Act, was selected for scrutiny and subsequently the assessing officer issued notices under Section 143(2) and 142(1) of the Act. In response to such notice the assessee appeared through his authorized representative from time to time and produced details and documents as called for which were test checked and the case was discussed and thereafter the assessment was completed by the order dated 29.07.2016. The assessing officer stated that on perusal of the details submitted by the assessee that during the financial year 2013-2014 relevant to assessment year 2014-2015, the assessee derived income from LTCG and claimed exemption under Section 10(38) of the Act. Further the assessing officer noted that the assessee had made share transactions through *M/s. SHCIL Services Limited*. On noting that a letter was sent by the assessing officer under Section 133(6) of the Act to *M/s. SHCIL* for verification of the transactions done by the assessee regarding sale of shares from the reply received from *M/s. SHCIL*, the details appear to have been confirmed with the details furnished by the assessee and the assessing officer also noted that all transactions were made through banking channels and no discordance has been found in the transactions and accordingly, the total income was computed. It is submitted that the assessing officer noted that the transactions were done by the assessee through a public sector undertaking and to establish the same, the learned senior counsel referred to write up about the *SHCIL* downloaded from the goggle to show that it is the public sector undertaking and therefore the question of doubting the

bona fides of the sale transactions done by the assessee does not arise. Further it is submitted that the assessing officer after issuance of the notices under Section 143(2) and 142(1) of the Act had called for details and documents which were furnished by the assessee and after discussing the case and also verifying the fact from *M/s. SHCIL* by intimation under Section 133(6) of the Act, the assessment was completed and the assessment could not have been set aside by the Commissioner by invoking his powers under Section 263 of the Act. It is submitted that the learned Commissioner had pre-decided the issue even at the stage of issuance of the show cause notice under Section 263 of the Act. In the order dated 10.12.2018 passed under Section 263, the learned Commissioner would state that the assessees return of income was selected for scrutiny on the ground of suspicious LTCG based on inputs from investigation done. Further it was stated that an error was detected in the assessment order and proposal was received by the Commissioner for review of the assessment order under Section 263 of the Act. Further the Commissioner would state that prima facie it appears the assessing officer had failed to take a logical action on the information available with him and accordingly the assessment order is erroneous in so far as it was prejudicial to interest of revenue. It is submitted that this was the basis on which the show cause notice date 06.11.2018 was issued and in the said show cause notice reference was made to an investigation done by the Directorate of Income Tax (Investigation), Kolkata regarding the accommodation entry of LTCG and number of beneficiaries who have taken huge amount of bogus LTCG were identified and this led to the identification of penny stocks which have been

used for generating bogus LTCG. The Commissioner referred to the scripts of ***Unno Industries Limited*** which were traded by the assessee and without mentioning any details, the assessee was called upon to show cause as to why the assessment order should not be rendered as erroneous and prejudicial to the interest of revenue as the assessing officer should have treated the LTCG claimed by the assessee as bogus. It is submitted that the Commissioner foreclosed the issue and reduced the show cause notice as an empty formality. The assessee submitted their written submissions and also documents before the Commissioner. The Commissioner thereafter proceeded to hold that credible information was available with the assessing officer from which it was clear that the assessee had adopted the practice of accepting accommodation entries and in turn availed bogus LTCG, the assessee had benefited by trading and making manipulations in the scripts of ***Unno Industries Limited*** and claimed exemption under Section 10(38) of the Act. Thereafter the Commissioner proceeds to extract the report said to have been prepared by the Director General of Income Tax Investigation, West Bengal and observed that the scripts of ***Unno Industries Limited*** was suspended by the SEBI for price rigging and insider trading. In paragraph 5.6.3 and 5.6.4 of the order dated 10.12.2018, the Commissioner notes the transaction done by the assessee with regard to the shares of ***Unno Industries Limited*** and states that after completion of one year the assessee sold the shares which he had purchased at Rs 1.25 paisa was sold at Rs. 30/31, with an increase of about 25 times. The Commissioner blames the assessee for not submitting the details of the commissions paid by the assessee. Thereafter certain decisions have been referred to and following

decisions of the tribunal in ***Sanjay Bimalchand Jain Versus PCIT, Nagpur*** [54] and the judgment of the Hon'ble Supreme Court in ***N.K Proteins Limited Versus DCIT*** [55] passed an order to the effect that the sum of Rs. 24,35,006/- is an unexplained cash credit under Section 68 of the Act and accordingly directed the assessing officer to re-assess the income of the assessee for the relevant assessment years.

27. It is submitted that the assumption of jurisdiction by the Commissioner under Section 263 of the Act is unsustainable and the order is in violation of the principles of natural justice as even at the stage of issuance of show cause notice the Commissioner had pre-decided the issue. Furthermore, the allegation against the assessing officer is that he failed to take a logical action which cannot be a ground to invoke Section 263 of the Act. Furthermore, the copy of the report which has been referred to, was not furnished to the assessee. That apart the "report" is not a report and it has been submitted by an authority who is lowest in the hierarchy of authorities in the Income Tax Investigation department. It is submitted that in the Income Tax department more particularly in the investigation wing, the top most authority is the CBDT through its Member Investigation, followed by the Principal Director General of Income Tax (Investigation), Director General of Income Tax (Investigation), Director of Income Tax (Investigation), Additional Director of Income Tax, (Investigation) and lastly the Deputy Director of Income Tax (Investigation)/Additional Director of Income Tax (Investigation). It is submitted that the copy of the so-called investigation

[54] (2018) 89 Taxmann.com 196 (Bom)
[55] (2017) 84 Taxmann.com 195 (SC)

report was relied on by the senior standing counsel for the department during the course of argument and stated that it can be downloaded from www.taxguru.im. It is submitted that the "report" is not available in the official website of the CBDT or the Income Tax Investigation department. It is further submitted that the author of the "report" himself states that it is a write up and the same could not have been basis for setting aside the assessment order by invoking the power under Section 263 of the Act. Further it is submitted that there are several flaws in the "report" and nowhere the name of the stock broker through whom the assessee had transacted namely SHCL nor the name of the assessee features. The learned senior counsel has elaborately referred to the "report" and pointed out that the report is thoroughly flawed, they are all personal comments of the concerned officer who is in the rank of the Deputy Director of Income Tax (Investigation) and the "report" is not the report of the department and there is no direction issued by the department to conduct investigation as there is nothing mentioned in the said report. Further it is submitted that the "report" states that there is a bogus LTCG claim of nearly Rs. 38,000 crores. However, this figure has been arrived at based on total trade value. To explain what is trade value, the learned senior counsel produced a write up stated to have been downloaded from the google and it is submitted that trade value is the total amount of buy and sell trades taken place at a time. Therefore, the so-called figure of Rs. 38,000 crores does not represent the alleged sale value but it is a trade value which includes the purchase value as well. Therefore, the figures mentioned are incorrect and reliance cannot be placed on the said "report". Further it is submitted that the assessees

entire investment is in shares and mutual funds and to strengthen this argument, the copy of the profit and loss account and the balance sheet of the assessee for the relevant assessment year was produced. Further it is submitted that in one of the trading done by the assessee namely with regard to the shares of the CCL International, a reputed TV Channel, ZEE Bis.com had given a buy call widely published in the media and therefore to state that the transaction was bogus is unsustainable, more so when the assessees stock broker is a public sector undertaking. Further it is submitted that merely because there is escalation of the price of the shares, it cannot be stated that the transaction is bogus. In this regard, the various facts and figures were referred to for the purpose of showing the market trend. Nextly, the learned senior counsel referred to the various provisions of the Securities Contract (Regulation) Act 1956, (SCR). More particularly Section 2(a) which defines contract, 2(ac) which defines derivatives to include securities, Section 2(h) which defines securities to include shares, scripts, stocks, bonds etc. Section 2(j) which defines stock exchange. It is submitted that the contract entered into in terms of the provisions of the Securities Contract Act cannot be treated to be bogus. A stock exchange has to be recognized by the Central Government in terms of Section 9 of the said Act and in terms of Sub-Section (2) of Section 9, any recognized stock exchange with the previous approval of SEBI may make by-laws for the regulation and control of the contract and in terms of clause (k), by-law can be framed for regulating the contract between members or between a member and its constituent or between a member and the person who is not a member etc. Further the by-laws of the stock exchange in terms of clause

(r) also provides for making, comparing,, settling and closing of bargains. Further there is an obligation on the member of a stock exchange to supply information or explanation and to produce documents relating to their business as the governing body of the stock exchange may require. Further it is submitted that if in the opinion of the SEBI, there was insider trading and rigging of the share prices they could have taken appropriate action. The contract has not been cancelled by the SEBI nor termed to be bogus contract. SEBI could have delisted the company and they also have power to demolish any syndicate if found. However, no such action was taken by SEBI and even in cases where the trading was suspended for a brief while by SEBI, subsequently the order of suspension has been revoked and the shares of the companies are freely tradable. Nextly the learned senior counsel proceeded to refer to the case laws compilation. To support his contention that the show cause notice issued by the Commissioner under Section 263 dated 06.11.2018 was bad in law as it was not issued with an open mind and the assessees case was pre-decided by the CIT, reliance was placed on the decision in ***Oryx Fisheries Private Limited Versus Union of India*** [56]**.** Further it is reiterated that the "report" is not a report of the Government of India or the CBDT or by the head of the Income Tax Investigation department as there is nothing placed on record to show that investigation was directed to be conducted. Further it is reiterated that the officer who stated to have submitted the "report" himself states that it to be a write up and therefore it is his personal opinion. In any event such "report" is not binding as it is not a judgment, to support such contention

[56] 266 (ELT) 422 (SC)

reliance was placed on the decision in ***Sesa Sterlite Limited Versus Assistant Commissioner of Income Tax and Others*** [57] for the proposition on whom the onus of proof would lie, reliance was placed on the decision of the Learned tribunal in ***PCIT, Kolkata Versus Rajrani Export Private Limited in ITA No. 1402/Kol/2011*** dated 31.05.2012 which order was affirmed by this Court in ***CIT Versus Rajrani Export Private Limited*** [58]**.** It is further submitted that the entire disallowance as made by the Commissioner is based on third party information said to have been gathered by the alleged investigation and the same could not have been relied upon without independent verification either by the assessing officer/CIT. To support such contention reliance was placed on the decision of the Hon'ble Supreme Court in ***Commissioner of Income Tax Versus Odeon Builders Private Limited*** [59]**.**

28. The next argument of the learned senior counsel is that on the grounds mentioned by the Commissioner in the show cause notice, power under Section 263 could not have been exercised and such power could have been exercised only when the assessing officer failed to conduct an enquiry which is not the case of the assessee before this Court. With regard to under what circumstances the power under Section 263 could be invoked and the parameters to be fulfilled, reliance was placed on the decision in ***Commissioner of Income Tax Versus JN Morison India 366 ITR*** which was referred to by the learned tribunal. For the same proposition reference was made to the decision in ***PCIT Versus M/s. Kesoram Industries***

[57] (2019) 417 ITR 334 (Bom)
[58] 361 ITR 162
[59] (2019) 418 ITR 315 (SC)

Limited [60]**.** Nextly, the learned senior counsel elaborately referred to the order passed by the tribunal, impugned before us and submitted that elaborate discussion on the facts has been done, the learned tribunal rightly held that there is no material quoted against the assessee and the power under Section 263 could not have been invoked on a mere suspicion. To support the above arguments, reliance was placed on the decision in ***Commissioner of Income Tax Versus Mangilal Didwania*** [61]**, *Commissioner of Income Tax Versus Kavita Gupta*** [62] ***Commissioner of Income Tax Versus Saroj Devi*** [63]**, *Commissioner of Income Tax Versus Mehrotra Brothers*** [64]**.** Reliance was placed on the decision of the Hon'ble Division Bench of the High Court of Madras in ***Commissioner of Income Tax Versus Amalgamations Limited*** [65] to support the argument that when tribunal has found that there is no error of fact in the order of assessment and the Commissioner has not indicated any error in law committed by the assessing officer, the power under Section 263 cannot be invoked on assumptions. To explain under what circumstances the power under Section 263 can be invoked, reliance was placed on the decision in ***Commissioner of Income Tax Versus South East Construction Company Limited.*** Further it is submitted that general observations cannot be a basis for an addition and to support such proposition, reliance was placed on the decision of the High Court of Madras in ***The Commissioner of Income Tax, Chennai Versus M/s. Accel Limited 421 of 2012 dated 02.08.2021***.

[60] 423 ITR 180 (Kolkata)
[61] 286 ITR 126 (Raj)
[62] 211 ITR 206 (All)
[63] 178 ITR 598 (All)
[64] (2004) 270 ITR 157 (MP)
[65] (1998) 238 ITR 963 (Mad)

Reliance was also placed on the decision of the High Court of Rajasthan in ***Smt. Harshila Chordia Versus Income-Tax Officer 298 ITR 349 (Rajasthan).*** Further the learned senior counsel explained as to how the transaction was done by the assessee to establish bona fides. Further it is submitted that the department does not allege that the sale affected by the assessee to be bogus, but they used an expression "pre-arranged" sale, for which no material was referred to by the Commissioner or placed by the revenue before the learned tribunal.

29. The learned Senior Counsel submitted that if the Assessing Officer had failed to make an enquiry, it is a duty cast upon the CIT(A) to conduct an enquiry which he failed to do. Further, the Commissioner while exercising the power under Section 263 of the Act has to come to a firm decision that the order of the Assessing Officer was erroneous and was prejudicial to the interest of revenue and on a reading of the order passed by the Commissioner, it is clear that no firm decision has been arrived at by the Commissioner more particularly from the language adopted in the said order. To support such contention, reliance was placed on the decision in the case of ***Commissioner of Income Tax vs. Kanda Rice Mills*** [66]**.** For the same proposition reliance was placed on the decision in ***Uma Charan Shaw & Bros. Versus CIT*** [67]**.** Further, the learned Senior Counsel reiterated that suspicion can never take the place of proof. To support such argument, reliance was placed on the decision of ***CIT, Central-II, Calcutta Versus***

[66] 1989 178 ITR 446 (P&H)
[67] 37 ITR 271 SC

Lakshmangarh Estate & Trading Co. Ltd.[68] dated 7th October, 2017. Reliance was placed on the decision in ***CIT Versus Smt. Jamna Devi Agarwala***[69]**,** wherein the Court had distinguished the decision in ***Sumati Dayal.*** In support of his contention that the transactions were genuine as documents were produced by the assessee, reliance was placed on the decision in ***CIT Versus Anupam Kapoor*** [70] and the decision in ***PCIT Versus Parasben Kasturchand Kochar, in Tax Appeal No. 204 of 2020*** dated 17.09.2020 (Gujarat). Learned Senior Counsel submitted that the word "consider" finds place in Section 263 of the Act and this term was explained by the Hon'ble Supreme Court in ***Bhikhubhai Vihlabhai Patel Versus State of Gujarat*** [71] which was relied on in the case of ***Hotel Regal International & Anr. Versus ITO & Another, WP No. 22950 (W) of 2009*** in the High Court at Calcutta. To explain the meaning of the term "opinion", reference was made to ***P. Ramanatha Aiyar's The Law Lexicon, 2nd Edition*** which has defined "opinion" to mean a view, a statement**.** In this regard, reliance was placed on the decision of the Hon'ble Supreme Court in ***The Barium Chemicals Ltd. & Anr. Versus The Company Law Board & Ors.*** [72] It is submitted that the learned Senior Standing Counsel had argued that the transaction done by the assessee in the purchase of the shares of penny stock companies is of the nature of an adventure and to explain this concept, reliance was placed on the decision of this Court in ***ITO, "A" Ward,***

[68] ITA No. 270 of 1999
[69] 328 ITR 656 (Bom)
[70] 299 ITR 179 (P&H)
[71] 2008 4 SCC 144
[72] 1967 AIR 295

District (A), & Ors. Versus R. L. Rajghoria [73] and such argument was never raised by the revenue before the Tribunal and therefore, cannot be permitted to be raised for the first time before this Court. To support such contention, reliance was placed on the decision of this Court in ***V.P. Samtani Versus CIT, West Bengal-IV*** [74] and ***CIT Versus Indocount Finance Ltd.***[75] Further, it is submitted that the decisions referred to by the learned Senior Standing Counsel in the case of ***B.C. Jain, Manish D. Jain, Pinki Jain*** are distinguishably and the facts were entirely different and if the circumstances are different, the decisions cannot be applied to the assessee's case as each case depends upon its own facts. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in ***Megh Singh Versus State of Punjab*** [76]**.** The learned Senior Counsel produced a note on the modus operandi of share transactions which are being done. The learned Senior Counsel referred to the risk management framework as published by SEBI to explain as to how the share market functions. With the above submissions, the learned Senior Counsel prayed for sustaining the order passed by the Tribunal.

30. Mr. Pratyush Jhunjhunwala, learned Advocate appearing for the assessee in ITA No. 139 of 2021 submitted that the Assessing Officer in his order states that there is direct evidence, if so, such evidence ought to have been furnished to the assessee. Further the assessee had given a detailed explanation on 15.11.2017 which has been completely ignored by the Assessing Officer. The contention raised by the assessee before the

[73] (1979) 119 ITR 872 (Cal)
[74] (1982) 135 ITR 313 (Cal)
[75] (2004) 186 CTR Del 659
[76] AIR 2003 SC 3184

Assessing Officer was reiterated before the CIT(A), which has been noted in paragraph 4.2 of his order. That apart in paragraph 4.3, the CIT(A) notes that documents were produced by the assessee. However, in paragraph 4.24 the CIT(A) erroneously came to a conclusion that there was no documentary evidence. That apart, the assessee had invested in the purchase of shares of M/s. Jackson Investment Ltd. during October, 2012 and the shares were sold only in the assessment year 2015-16 and not immediately after the expiry of one year. It is pointed out that similar investment made by the other assessees in Jackson Investment was subject matter of consideration in appeals filed by the assessees before the Delhi Tribunal in ***ITO Versus Anupama Garg & Ors.***[77] and the said decision would clearly apply to the case of the assessee herein. Further it is submitted that the assessee had produced sufficient documents to prove the genuineness of the share transaction done by him and the investigation which has been referred by the Assessing Officer does not mention anything about the assessee. Therefore, there was absolutely no ground for the Assessing Officer and the CIT(A) to have rejected the evidence produced by the assessee and in support of such argument, reliance was placed on the decision of the Hon'ble Supreme Court in ***Sreelekha Banerjee Versus CIT*** [78]**.** Further, the learned Advocate referred to the computation of income of the assessee for the relevant assessment year, 2015-16, to demonstrate that the assessee has been investing in well known companies. It is argued that the findings rendered by the assessing officer and the CIT(A) are clearly based on

[77] 2018 SCC Online ITAT 2923
[78] (1963) 49 ITR 112 (SC)

surmises and conjectures and the department is required to bring in some evidence to doubt the genuinity of the transaction done by the assessee. In support of such contention, reliance was placed on the decision in ***CIT Versus Orissa Corpn, (P.) Ltd.***[79] To support his argument that under Section 133(6) of the Act, the Assessing Officer is empowered to issue notice calling for genuine information for the purpose of any enquiry even in a case where proceeding is not pending against the assessee, obtaining approval of the director or Commissioner, before issuance of notice and such power should have been exercised by the Assessing Officer and without doing so, the assessment could not have been completed based on presumptions and assumptions. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in ***Kathiroor Service Cooperative Bank Ltd. Versus CIT (CIB)***[80]**.** The decision of the Hon'ble Supreme Court in ***Kishinchand Chellaram Vesus CIT*** [81] was relied on for the proposition that before the Income Tax Authority could rely upon any evidence they are bound to produce, the same before the assessee so that the assessee could controvert the statement contained in it by seeking opportunities to cross-examine such persons from whom statement was recorded. Therefore, it is submitted that considering the fact that the assessee has proved the genuinity of the transaction, the Tribunal rightly allowed the assessee's appeal and prayed for sustaining the order.

31. Mr. Arif Ali, the learned Advocate appearing for the assessee Gupta Agarwal respondent in ITAT 44 of 2020 submitted that the grounds raised

[79] (1986) 25 Taxman 80F (SC)
[80] (2013) 39 Taxmann.com 49 (SC)
[81] (1980) 4 Taxman 29 (SC)

by the revenue in the memorandum of appeal does not relate to the assessee's case as the assessee's case is not one of LTCG, the assessee did not trade in the shares of M/s. Blue Print but had purchased shares of Sulav Engineering and the facts are entirely wrong. Further, the assessee had purchased the shares through online mode and not through offline mode and availed the services of a reputed broker, the assessee is a regular trader and the assessee had effected the transaction through disclosed source and to the said effect, materials were produced. However, the assessing officer erroneously brushed aside all these by holding that human conduct raises a presumption of bogus claim. Therefore, it is submitted that considering these factors, the learned Tribunal had rightly allowed the appeal.

32. Mr. Aryak Dutta, learned Senior Standing Counsel by way of reply had referred to paragraph 14 of the assessment order in the case of *Swati Bajaj* and submitted that the company has paid only Rs. 38 lakhs as income tax during the relevant year and it is incorrect on the part of the assessee to state that the company is a robust company. Further, it is submitted that there are three brokers involved in the entire operations and that has been mentioned by the assessing officer in his order and the modus adopted by the assessee has also been brought out. With regard to the decision in the case of ***T. Takano*** relied on by Mr. Agarwal it has been held that the right to disclosure is not an absolute right and more importantly, in the cases on hand the report does not deal with the assessee but with the company and the assessee does not identify himself with the company. Furthermore, the report contains third party information and if it was disclosed at the relevant

time, it will affect the entire security market and therefore, no prejudice has been caused to the assessee on account of non-furnishing of the copy of the investigation report. Reliance was placed on the decision of the Hon'ble Supreme Court in ***SEBI Versus Mega Corporation Ltd.*** [82]**,** wherein the claim made by the company for cross-examination was rejected.

33. Mr. Om Narayan Rai in his reply submitted that the claim made by the assessee under Section 10 (38) of the Act is a claim for exemption and the assessee is duty-bound to show that no addition can be made under the Section 68 of the Act. Unless the assessee discharges the burden, he is not entitled to any relief and the assessing officer is justified in making addition under Section 68 of the Act. It is reiterated that the trinity test has to be satisfied namely, the identity, genuineness and creditworthiness and more importantly, the investigation did not commence from the assessee but it commenced from the company, the stock brothers who were involved in the purchase and sale of the penny stock. Therefore, the creditworthiness and genuinity and identity need to be proved at the other end to enable the assessee to be entitled for exemption under Section 10(38) of the Act. In all the cases, the assessee has failed to satisfy the trinity test and therefore, the assessing officer was justified in making the addition. It is further submitted that Mr. Bagaria had argued that the law laid down in ***K.R. Ajmera*** is no longer good law which submission is incorrect and to demonstrate the same Paragraph 47 of the decision in ***Balram Garg*** was referred to and submitted that the law laid down in ***K.R. Ajmera*** is good law and has not been overruled.

[82] 2022 SCC Online (SC) 361

34. Furthermore, in a later decision in ***Chintalapati S. Raju,*** the decision in ***R. Ajmera*** was referred to and therefore the decision in ***R. Ajmera*** has not been overruled. Hence the test laid down in ***R. Ajmera*** more particularly in paragraph 26 has to be fulfilled. Referring to paragraph 13.2 of ***Chintalapati S. Raju,*** it is submitted that in the said case the onus was on SEBI whereas under Section 68, the onus is on the assessee and the requirements under the SEBI Act were totally different from that of the requirements to be complied with under the Income Tax Act. It is reiterated that the credit worthiness of the company has not been proved and therefore one of the crucial tests has not been fulfilled and the assessing officer was justified in making the addition. In support of such contention, reliance was placed on the decision in ***PCIT Versus NRA Iron and Steel Private Limited*** [83]**.**This decision is pressed into service to emphasis that the credit worthiness of the buyer has to be established. With regard to the arguments of Mr. Surana that the investigation report is only a write up, it is submitted that may a write up from pages 4 to 28 and the report and the details based on which the report has been brought out from pages 29 to 401. Therefore, it is incorrect to state that the report cannot be looked into. It is further submitted that the learned advocates for the assessees had argued that the various decisions relied on by the revenue are distinguishable. In this regard, certain factual findings in those decisions were referred to. It is submitted that what is required to be looked into in a judgment is the principle which has been laid down which is termed as the "ratio" and to explain this aspect reliance was placed on the decision in ***Punjab Land***

[83] (2019) 15 SCC 529

Development & Reclamation Corporation Limited Versus Presiding Officer, Labour Court [84]. Therefore, it submitted that what is crucial is the source of the source has to be established and the onus is on the assessee. Mr. Bagaria by way of submission in rejoinder, contended that the revenue had referred to the decision in the case of ***CIT Versus Redington*** [85] and in the said decision, the Court found that there were foundational facts which are conspicuously absent in the assessees case.

35. We have elaborately heard the learned standing counsels for the appellant department as well as the learned senior counsel and the learned advocates for the assessees.

36. In the batch of cases which we have heard together, there are broadly two categories. The first category of cases are which were dealt with by the tribunal by a common order dated 26.06.2019 in which 90 appeals filed by the assessees were allowed, though all 90 cases are not before us, substantial number of cases are on appeal before us and the lead case is that of the assessee *Smt. Swati Bajaj*. For arriving at a decision in the first category of cases, it would suffice to note the factual position in the case of *Swati Bajaj* as the learned tribunal had discussed the facts of the said assessee alone and taken a decision to allow the appeal and thereafter proceeds to hold that the said decision will apply to the other 89 appeals as well. The second category of cases are those where the assessee challenged the assumption of jurisdiction by the Commissioner of Income Tax under Section 263 of the Act. Even in those cases there are certain findings

[84] (1990) 3 SCC 683
[85] (2021) 430 ITR 298 (Mad)

rendered by the tribunal which are more or less identical to the batch of 90 appeals which were allowed by the tribunal. With regard to the correctness of assumption of jurisdiction under Section 263 of the Act, we shall deal with them separately in the course of this judgment. Reverting back to the case of the assessee *Smt. Swati Bajaj*, it is seen that she had filed her return of income declaring a total income of Rs. 6,57,300/-. The return was selected for scrutiny, notices under Section 143(2) and 142(1) of the Act were issued, served on the assessee pursuant to which she was represented by her authorized representatives and produced the documents in compliance with the notice issued under Section 142(1) of the Act. The assessing officer states that during the course of assessment proceedings, the assessee *Smt. Swati Bajaj* was asked to produce the details of shares purchased and sold during the assessment year under consideration and immediate three preceding years in respect of STT paid in LTCG/LTCL and called upon to explain with supporting evidence that the genuineness of the earned LTCG. In response to such notice the assessee stated that the assessing officer has mentioned that specific information has been received from the Director of Income Tax (Investigation), Kolkata that the company *Surabhi Chemicals and Investment Limited* in which the assessee had purchased and sold shares is a penny stock company which is used for providing entries for bogus LTCG. The assessee stated that there is no mention of any specific information either against the assessee or against *Surabhi Chemicals* in the letter of the assessing officer and it is a general statement or stated to be based on an enquiry conducted by Director of Income Tax (Investigation) on the transaction of some other companies or

equity broker. Therefore, the assessee requested to furnish specific details of manipulation or connivance carried out by either of the concerned persons directly related to the equity shares of the said company in which the assessee had traded. Further the assessee would state that any general information relating to other company's shares cannot be the basis for casting allegations of suspicion and treating a transaction in-genuine, as no addition can be made based on suspicion and surmises. Further unless there are corroborative materials, the transaction done by the assessee cannot be doubted. It was further stated if certain allegations are made against the stock broker having devised a scheme to convert unaccounted money to accounted income, there should be specific allegation against the assessees stock broker *Horizon Financial* who are reputed brokers and there is no specific information or allegations against *Horizon Financial.* Further the assessee stated that if there is any specific incident of any admission of price rigging as per the report of the Director of Income Tax, (Investigation) pointing towards the assessee, the said person may be made available for cross examination and without affording such an opportunity action cannot be initiated. Further the assessee would state that *Surabhi Chemicals* is a robust company, referred to its annual report and also mentioned about the profit earned by the company before tax, the tax paid by the said company for the year 2012-2013 when the assessee purchased the shares and also the profit before tax and the tax paid by the company in the year of sale of the shares by the assessee. Further the *Surabhi Chemicals* has sufficient business and financial assets and therefore the allegations made against the company are unfounded and misleading. Further the assessee stated that

she is a regular investor in equity shares and mutual funds in companies listed on the Bombay Stock Exchange (BSE) and National Stock Exchange (NSE) and she has been earning capital gains and they have been accordingly taxed as per the provisions of the Act. Further the investment made by the assessee is based upon feedback/tips of the peers of the investment industry and also based on research reports published in business newspapers/journals/analyst report. Further the assessee stated that in that process she had made investment in the equity share of *Surabhi Chemicals* quoted on the BSE. Further it was mentioned that the assessee fails to understand as to on what basis they had classified the shares of *Surabhi Chemicals* as a penny stock though the assessee received bonus from the said company, dividend from the said company and the prominent share analyst and research company *Abhron Consultancy Services Private Limited* issued a buy-call on the shares of the *Surabhi Chemicals* and since the assessee is a regular investor, she made such investment. The assessee stated that the payment was made by account payee cheque from the regular bank account, produced copies of the purchase bill and other documents. Further the assessee stated about the investment, how the bonus shares were declared and how the assessee had sent the transferred shares for D-Mat. Thus, the assessee would submit that the equity shares were in D-Mat account and all payments made/received were through proper banking channels and STT was paid at the point of sale of the shares and the shares were sold through BSE and the relevant contract notes for the sale of shares were produced. Further the assessee stated that from the details of LTCG, it is seen that the assessee had initially incurred a loss of

Rs. 70,765/- rather than earning profit. After relying upon the various decisions, the assessee stated that she has proper documents to prove the genuineness of the transactions and the sale was made through recognized stock exchange i.e BSE after payment of applicable STT. The share broker is a reputed person, the research report based on which investment was made was also by a reputed consultancy agency and in the absence of any specific material against the assessee coupled with the fact that the assessee has fully and truly disclosed all facts with supporting evidence the question of invoking Section 68 of the Act does not suffice. The case was discussed by the assessing officer who notes that in response to the notice issued under Section 142(1) the assessee had produced details which were called for. Thereafter the assessing officer proceeds to analyze the investment made by the assessee and notes that assessee purchased 50,000 shares of *M/s. Surabhi Chemicals* for Rs. 1,00,000/- on 16.03.2012 and 14.08.2012 and after completion of one year and few months, when the investment in shares becomes eligible for LTCG it was sold for Rs. 29,23,500/- between 04.12.2013 to 07.12.2013 and LTCG was computed for Rs. 28,23,500/- which will show that the assessee has managed to increase the amount by 2823 % in a short span of 17 to 21 months that to when the general market trend was recessive during the relevant period of time. After mentioning these details, the assessing officer proceeded to take note of the letter of a Directorate of Investigation dated 03.07.2015. After elaborately referring to the said letter wherein it was reported that prices of shares of some penny stocks were artificially rigged to benefit some assessees through bogus claim of LTCG, the assessing officer notes that the prices of the shares of *Surabhi*

Chemicals were also rigged for providing bogus LTCG and all the features of the companies which were used for providing bogus LTCG are clearly matching with the trend of the shares of *M/s. Surabhi Chemicals* and the trade pattern of the shares follow a "bell shape". The company *Surabhi Chemicals* had hardly any business activity, splitting of shares had taken place and after splitting of shares the prices of the shares on the exchange goes down automatically in proportion with the ratio of split and one does not seem anything adverse happening in the scrip. This according to the assessing officer was adopted by the company to avoid any hype on such rise in the prices of the shares. Further the shares of *Surabhi Chemicals* were very thinly traded and gradually jacked to a desired level in a period of one year so as to provide desired amount to selected beneficiary. Further the movement in the price of the shares were not backed by any fundamentals of the company, the company did not make any announcement nor does it have any history of declaring dividends from the financial year 2009-2010 up the financial year 2013-2014. Further the assessing officer noted that from December 2011 to August 2013, the share market was almost flat and even the investment in peers have not resulted in any gain but the share of *Surabhi Chemicals* had risen to such a level without any fundamentals which is beyond imagination of anyone. Therefore, the assessing officer observed that the facts and circumstances compels him to see the transactions entered into by the assessee in a larger frame of accommodation entry scam as reported. Further investments of the assessee in a company having no financial worth did not confirm to normal behaviour of an investor and the behaviour of the assessee does not appear to be real.

The assessing officer placed reliance on the decision in ***Durga Prasad More*** and held that surrounding circumstances and test of human probabilities has to be applied in the assessees case coupled with the report of the Director of Investigation to hold that the assessee had entered into pre-designed modes of transactions and invested in the shares of *Surabhi Chemicals* just to convert unaccounted cash under the guise of LTCG and therefore proceeded to treat the LTCG amount of Rs. 28,23,500/- as income from undisclosed sources and denied claim of exemption as LTCG. The assessee preferred appeal before the Commissioner of Income Tax (Appeals) (CIT (A)).

37. In the preceding paragraphs of this judgment, we have referred to the grounds raised by the assessee before the CIT and the various decisions which were referred to. After noting the arguments of the assessee, the CIT (A) in paragraph 6 of its order dated 22.11.2018, records its findings and decision. The CIT (A) agreed with the findings recorded by the assessing officer noting the rise and fall of the prices to be artificial and not commensurate with the normal market as *Surabhi Chemicals* had no business at all. The CIT (A) observes that whatever papers were submitted by the assessee in pursuance to notice issued cannot be construed as an evidence to establish the genuinity of the transaction, the transactions are unnatural, suspicious and the banking documents produced by the assessee are self-serving. Further CIT (A) holds that merely because a transaction was done through banking channel itself cannot validate the same and the burden of proof is on the assessee to prove genuinely of the claim. After referring to the decisions of the Hon'ble Supreme Court in

Mohanakala, Durga Prasad More, Sumati Dayal and the decision of the Delhi High Court in ***Sajan Dass,*** CIT (A) holds that the documents relied on by the assessee should pass the test of normal behaviour of the assessee in the course of business, namely human conduct, preponderance of probability and surrounding circumstances and if they do not then the addition is justified. The CIT (A) referred to the decision in ***N.R. Portfolio*** to explain the role of the assessing officer, he being both an investigator and adjudicator. Further the CIT(A) holds that in Section 143 (3) the word used is "evidence" which will include circumstantial evidence also and in tax jurisprudence the word evidence has much wider connotation and further the word "material" used in Section 143(3) of the Act, showed that the assessing officer not being a court could rely upon material which might not be strictly admissible under the Indian Evidence Act and therefore the assessing officer is not fettered by the technical rules of evidence and would be entitled to act on the "material". Further the CIT (A) holds that as per the principle laid down in ***Sumati Dayal*** the true nature of transaction can be ascertained from surrounding circumstances and proof beyond reasonable doubt has no applicability in determination of matters under taxing statute. Further the human probability has to be the guiding principle as held by the Hon'ble Supreme Court in ***Chuhar Mal Versus CIT*** [86]**.** Further the CIT (A) holds that the payment through banks, transactions through stock exchange and other features are only apparent features and the real feature are the manipulated and abnormal price of off-loan and the sudden dip thereafter. Therefore, the CIT (A) holds that the transactions would fall

[86] (1988) 172 ITR 250 (SC)

within the realm of suspicious and dubious transaction. The CIT (A) then proceeds to take note of the various other decisions of the co-ordinate bench of the Tribunal to highlight the importance of reports of the investigating agencies and would point out that it may be true that when transactions are through cheques it looks like real transactions but the authority is entitled to look behind the transactions and ascertain the motive behind the transactions. Thus, the CIT (A) concludes by holding that considering the facts of the assessee's case and the preponderance of probabilities against the assessee, the entire capital gains demand has to be treated as fictitious and bogus more particularly when the assessee has not furnished cogent evidence to explain how the shares in an unknown company jumped up in no time and such fantastic sale price was not at all possible when there was no economic or financial basis to justify the price rise and therefore affirms the order passed by the assessing officer. Aggrieved by such order, the assessee was on appeal before the learned tribunal. As mentioned, the learned tribunal (SMC) took up for consideration 90 appeals together which includes the appeal filed by the assessee *Smt. Swati Bajaj.* The learned tribunal in paragraph 3 of the impugned order extracts the order passed by the CIT (A) in its entirety which runs to ten pages. The discussion is in paragraph 4 of the impugned order which is as follows:-

> *I have given any thoughtful consideration to rival contentions. Learned departmental representative vehemently supports both the lower authorities' identical action holding the assesses STCL as bogus since derived from rigging of the scrip prices in issue and involving accommodation entry in collusion with the concerned*

entry operators. Hon'ble apex court's decision in Sumati Dayal vs. CIT (1995) 80 Taxmann.89/214 ITR 801 (SC) and CIT Versus Durga Prasad More (1971) 82 ITR 540 (SC) are quoted before me during the course of hearing at the Revenue's behest. It strongly argues that the department has disallowed/added the impugned STCL based on circumstantial evidence unearthed after a serious of search actions/investigations undertaken by the DDIT (Inv). I find no merit in Revenue's instant arguments. The fact remains that the assessee has duly placed on record the relevant contract notes, share certificate(s), detailed corroborative documentary evidence indicating purchase/sale of shares through registered brokers by banking channel, demat statements etc. The Revenue's only case as per its pleadings and both the lower authorities unanimously conclusion that there is very strong circumstantial evidence against the assessee suggesting bogus STCL accommodation entries. I find that there is a not even a single case which could pin-point any making against these assesses which could be taken as a revenue nexus. I make it clear that the CBDT's circular dated 10.03.2003 has itself made it clear that mere search statements in the nature of admission in absence of supportive material do not carry weight. I notice that this tribunal's coordinate bench's decision in ***ITA No. 2474/Kol/2018*** *in Mahavir Jhanwar Vs. ITO decided on 01.02.2019 has taken into consideration identical facts and circumstances as well as latest developments on legal side whilst deleting the similar bogus LTCG addition.*

38. The learned tribunal proceeds to extracts the decision of a coordinate Bench of the tribunal in ***Mahavir Jhanwar Versus Income Tax Officer in***

ITA No. 2474/Kol/2018 dated 01.02.2019 and the conclusion of the tribunal in paragraph 5 and 6 are as follows:-

> *5. Coupled with this, hon'ble jurisdictional high court's other decision in CIT Vs. Rungta Properties Pvt. Ltd. ITA NO. 105 of 2016, CIT Vs. Shreyahi Ganguli ITA No. 196 of 2012, M/s. Classic Growers Ltd. Vs. CIT ITA No. 129 of 2012 also hold such transactions in scrips supported by the corresponding relevant evidence to be genuinene. I adopt the above extracted reasoning mutatis mutandis therefore to delete the impugned STCL disallowance/addition of Rs. 28,23,500/-. Unexplained commission expenditure disallowance, if any shall automatically follow suit as a necessary corollary. No other argument or ground has been agitated before me during the course of hearing. This "**lead**" case ITA No. 2623/Kol/2018 is allowed in above terms [**Same order to follow in all the remaining eighty nine appeal(s)]** in absence of any distinction being pointed out at Revenue's behest.*
>
> *6. All these assesses" ninety appeals are allowed in above terms, A copy of the instant common order be placed in the respective case file(s).*
>
> *Order pronounced in open court on 26/06/2019*

39. The correctness of the above decision is called in question in these appeals. As noted by us the tribunal has not ventured to examine the factual position of 89 other cases which were also allowed by the tribunal by the common order. It is the submission for the learned standing counsel for the department that the facts which are necessary to take a decision in the assessees case has been elaborately dealt with by the CIT (A) which was

completely ignored by the learned Tribunal and the learned tribunal held that the assessee had placed on record contract notes, share certificates, shown to have traded through registered brokers, payment effected through banking channels and D-Mat statements and that the revenue's only the case is that there is a very strong circumstantial evidence against the assessee and there is not a single case which could pin-point against the assessee and therefore was of the view that the decision in ***Mahavir Jhanwar*** could be applied to the assessees case as well. We note that in the decision in ***Mahavir Jhanwar*** four decisions of the High Court have been referred to, two of which are of this Court namely ***Carbo Industrial Holdings Limited*** and ***Emarald Commercial Limited***, the other two decisions are of the Bombay High Court in *Shri* **Mukesh Ratilal Marolia** and that of the Punjab and Haryana High Court in ***Prempal Garg.*** Thus, the predominant issue which falls for consideration is to ascertain whether the claim of LTCG would be considered as genuine. The assessee pleads absolute innocence, a regular trader in shares and stocks, payments effected and received through banking channels, her stock broker is a reputed person, the financial advisor is a reputed organization, the regulatory authorities namely SEBI or The Stock Exchange have not taken any action against the trading of the shares of the said company, the materials which appear to be the basis for the assessment were not furnished to the assessee, the person who is stated to have given statements were no made available for cross examination in spite of specific request and therefore, the theory of circumstantial evidence or the theory of human probabilities cannot be applied to the assessees case.

40. Before we examine the contentions, we are tempted to point out that the exercise done by the tribunal was a bit perfunctory. There is absolutely no discussion of the factual position in any of the 89 appeals, the exception is in paragraph 4 with regard to the certain facts of the assessees case (*Swati Bajaj*). We are not very appreciative of the manner in which the bunch of appeals have been disposed of. The cardinal principles which courts and tribunal have followed consistently is that each assessment year is an individual unit and unless and until it is shown that there are distinguishing feature in a particular assessment year, the decision taken for the earlier years are to be followed to ensure consistency. While doing so the Courts/ Tribunals are required to examine the facts and render a finding as to why the decision in the earlier assessment years should be adopted or not.

41. Be that as it may, the appeals having travelled thus far and elaborates submissions having been made before us, we shall deal with the issues and proceed to render a decision.

42. We have heard, Mr. Vipul Kundalia, Learned Senior Standing Counsels assisted by Mr. Samarjit Roychowdhury, Mr. Aryak Dutta Mr. Tilak Mitra, Mr. Om Narayan Rai, Mr. Prithu Dhudhoria. Mr. Amit Sharma and Mr. Soumen Bhattacharya for the appellants/revenue, and Mr. S.M. Surana, Senior Advocate, assisted by Mr. Sourav Bagaria, Mr. Avra Mazumdar, Mr. Subash Agarwal, Mr. Soumya Kejriwal, Mr. Pratyush Jhunjhunwala, Mr. Varun Kedia, Mr. Brijesh Kumar Singh, Mr. G.S. Gupta, Mr. Bhaskar Sen Gupta, Mr. Binayak Gupta, Sk. Md. Bilwal Hossain, Mr. K. Roy, and Mr. Arif Ali for the respondent/assessee.

43. From the assessment order passed in the case of the assessee *Smt. Swati Bajaj,* we find that the genesis of the issue commenced from an investigation report submitted by the Directorate of Income Tax, Investigation, Kolkata (DIT). The investigation report has been prepared by the Deputy Director of Income Tax, Investigation Unit -II and III, Kolkata. Before we examine the report, we shall deal with the objection raised by Mr. Surana, learned senior advocate as regards the effect of such report, whether at all it is a "report" and can the assessing officer or the CIT (A) can proceed on the basis of such "report". The above submission is sought to be buttressed by placing reliance on the decision in ***Sesa Sterlite and Odeon Builders***.

44. In ***Sesa Sterilite,*** all the assessees were traders and exporters of iron ore and some of them were also miners and processors of the ore. Allegations of large-scale illegal mining and trading necessitated the Government of India to appoint a Commission of Inquiry under Section 3 of the Commission of Inquiry Act, 1952. The Commission so appointed by the Union of India submitted three reports wherein finding was rendered with regard to the violation of various statutes and other infirmities and that there were illegal exports particularly by means of under-invoicing on the part of the mining lessees and exporters. In the said case this report was the basis for the Income Tax Officer to issue notice under Section 148 of the Act proposing to re-open the assessments under Section 147 of the Act for the assessment year 2008-2009.The reason for re-opening were:

(a) Under-invoicing of exports by the assessee, (b) Illegal mining activity and income arising from it to be assessed as income

from other sources and (c) Escapement of income from assessment on account of failure on the part of the assessee to disclose wholly and truly part all material fact necessary for the assessment.

45. In support of the first reason, the third report of the Commission of Inquiry was relied on. The assessee challenged the re-opening as being bad in law as it was solely on the basis of the report of the Commission of Inquiry and such report itself was vitiated on account of serious violation of principles of natural justice by reason of breach of Section 8B and 8C of the Commission of Inquiry Act. That the lessees including the assessee therein were not given any opportunity to explain the material used by the Commission of Inquiry in its report. Further it was contended that the report of the Commission is in the nature of expression of an opinion by the Commission and has no efficacy either as a legal findings or admissible evidence. The Division Bench of the Bombay High Court while testing the correctness of the said submissions observed that in so far as the allegations of under-invoicing by the exporters is concerned, it is nothing but a matter of expression of opinion by the Commission of Inquiry. Further the Court noted that the report of the Commission of Inquiry was a subject matter of challenge in a writ petition by the mining lessees and exporters including the assessee ***Sesa Sterlite***. The Court further held that the report of the Commission neither constitutes a binding judgment nor a definitive pronouncement. Further by referring to the decision of the Hon'ble Supreme

Court in ***State of Karnataka Versus Union of India*** [87]**,** it was held that the report submitted by the Commission of Inquiry may or may not be accepted by the authority appointing the Commission of Inquiry. In the background of these findings, the Court held that the re-opening of the assessment could not have been done exclusively based on the report of the Commission of Inquiry.

46. Mr. Surana, learned senior counsel relied on the decision of the Allahabad High Court in ***Smt. Kavita Gupta*** and submitted that the report of the Deputy Director of Income Tax, Investigation (DDIT) cannot be the basis of the assessment more so when the report was not furnished to the assessee, there is no finding as against the asessee in the report which was produced for the first time before this Court during the course of the arguments of these appeals. It is submitted in ***Smt. Kavita Gupta***, it was held that a mere report of the DDIT suggesting that some of the gifts received by the assessee therein may be non-genuine and that to when not confronted to the assessee was not sufficient to conclude that the gifts obtained by the assessee were not genuine. It was further argued that the report of the DDIT is a third-party information which has not been independently subjected to further verification by the assessing officer who has not provided the copy of the statements to the appellants. Thus, the appellant thereby denying opportunity of cross examination to the assessee therein who had in the said case discharged the initial burden of substantiating the purchases through various documents is in violation of

[87] (1977) 4 SCC 608

principle of natural justice. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in ***Odeon Builders***.

47. We are required to test the correctness of the objection raised by Mr. Surana the learned senior counsel with the aid of the aforementioned three decisions. The decision in ***Sesa Sterilite*** as noted, arises out of a report submitted by the Commission of Inquiry constituted by the Union of India to enquire into the allegations of illegal mining and trading of ore in various states including the state of Goa. The court after noting the provisions of the Commission of Inquiry Act more particularly as to the effect of such report on the authority appointing the Commission of Inquiry and also on the ground that the report was vitiated on account of breach of Sections 8B and 8C of the Commission of Inquiry Act, has rendered a finding in favour of the assessee therein. That apart, the Court also found that the very report of the Commission of Inquiry was subject matter of challenge in a writ petition before the Bombay High Court by the mining lessees and exporters. Therefore, the Court taking note of the facts and also the decision in ***State of Karnataka*** which has held that the report of the Commission of Inquiry may or may not be binding on the authority appointing the Commission, held that the re-opening of the assessments under Section 147 of the Act could not have been solely based upon such report. Firstly, we need to note that the report of the DDIT is by an authority of the investigation wing of the Income Tax department. Therefore, at the threshold it cannot be treated to be a third-party report. That apart the effect of a report submitted in terms of the provisions of the Commission of Inquiry Act is quite different and distinct from a report submitted in-house by the Income Tax department.

Therefore, in our view the decision in ***Sesa Sterlite*** is distinguishable. In so far as the decision in ***Kavita Gupta*** the challenge was whether the assumption of jurisdiction by the Commissioner of Income Tax under Section 263 of the Act was justified in the eye of law. In the said case, the Court noted the legal position that when an inquiry is launched under Section 143(3) of the Act, the findings will not depend only upon the presumption, the onus of proof could not be cast entirely upon the revenue and such onus would shift on the revenue only if the assessee produced some material to show that what she states may be correct. On facts the Court, in the said case, found that the onus had shifted to the revenue as the assessment was completed by the assessing officer after inquiry and in such factual position, the Court held that a mere report of the Deputy Director (Intelligence) suggesting that some of the gifts obtained by the assessee therein were not genuine and such report having been not confronted to the asessee therein was not sufficient to conclude the gifts were not genuine. The said decision is distinguishable for several reasons. Firstly, the Court considered as to whether the assumption of jurisdiction under Section 263 of the Act by the CIT (A) was justified and on facts the Court was satisfied that when the scrutiny assessment was completed under Section 143(3) the assessing officer had conducted a proper inquiry. Therefore, the Court found that there was no cause for invoking power under Section 263 of the Act by merely relying upon the report of the Deputy Director (Investigation) which was not furnished to the assessee therein. These distinguishing factors will clearly show that the decision is inapplicable to the facts and circumstances of the cases on hand. In ***Odeon***

Builders the appeal filed by the revenue was dismissed by the Hon'ble Supreme Court as no substantial questions of law arise from the order passed by the tribunal. The CIT (A) and the learned Tribunal concurrently held in favour of the assessee therein on facts holding that the information gathered by the investigation wing of the department which was not independently subjected to further verification could not have been relied upon by the assessing officer more particularly that the department did not furnish the report to the assessee therein and the Hon'ble Supreme Court was satisfied that the assessee therein had prima facie discharged the initial burden of substantiating the purchases through various documents. In our humble view the decision is wholly distinguishable on facts.

48. In the background of the aforementioned discussions, we have no hesitation to hold that the plea raised on behalf of the assesses that the report should be discarded cannot be accepted. The report has to be read as a whole along with the annexures/chapters. We shall go into the finer details of the report, the effect of such report in the later part of this judgment.

49. An investigation is commenced when allegations crops up regarding tax evasion. The Income Tax department was nowhere in the picture when the assessees effected purchase of the shares and subsequently sold the shares well after the period of 12 months. It is only when the assessees, substantially in large numbers, made fanciful claims of LTCG, time had come to examine its genuinity of such claims. While on this issue, it would be relevant to take note of the decision of the Hon'ble Supreme Court in ***Ram Jethmalani and Others***. The matter before the Hon'ble Supreme

Court was in respect to transfer of monies and accumulation of monies which were unaccounted for by many individuals and legal entities in the country in foreign banks. The degree of control on such transactions by the states was explained by the Hon'ble Supreme Court in the following terms:

> *If the State is soft to a large extent, especially in terms of the unholy nexus between the law makers, the law keepers, and the law breakers, the moral authority, and also the moral incentives, to exercise suitable control over the economy and the society would vanish. Large unaccounted for monies are generally an indication of that.*
>
> *These matters before us relate to issues of large sums of unaccounted for monies, allegedly held by certain named individuals, and loose associations of them; consequently we have to express our serious concerns from a constitutional perspective. The amount of unaccounted for monies, as alleged by the Government of India itself is massive. The show-cause notices were issued a substantial length of time ago. The named individuals were very much present in the country. Yet, for unknown, and possible unknowable, though easily surmisable, reasons the investigations into the matter proceeded at a laggardly pace. Even the named individuals had not yet been questioned with any degree of seriousness. These are serious lapses, especially when viewed from the perspective of larger issues of security, both internal and external, of the country.*

50. The Hon'ble Supreme Court proceeded to frame two issues the first of which was the appointment of a Special Investigation Team (SIT) and the

justification for appointing a Special Investigation Team was made by the Hon'ble Supreme Court in the following terms:

> *In the light of the fact that the issues are complex, requiring expertise and knowledge of different departments, and the necessity of coordination of efforts across various agencies and departments, it was submitted to us that the Union of India has recently formed a High Level Committee, under the aegis of the Department of Revenue in the Ministry of Finance, which is the nodal agency responsible for all economic offences. The composition of the High Level Committee (HCL) is said to be as follows: (i) Secretary, Department of Revenue as the Chairman; (ii) Deputy Governor Reserve Bank of India; (iii) Director (IB); (iv) Director, Enforcement; (v) Director, CBI; (vi) Chairman, CBDT; (vii) DG, Narcotics Control Bureau; (viii) DG, Revenue Intelligence; (ix) Director, Financial Intelligence Unit; and (x) JS (FT & TR-I), CBDT. It was also submitted that the HLC may co-opt, as necessary, representation not below the rank of Joint Secretary from the Home Secretary, Foreign Secretary, Defence Secretary and the Secretary, Cabinet Secretariat. The Union of India claims that such a multi-disciplinary group and committee would now enable the conducting of an efficient and a systematic investigation into the matters concerning allegations against Hassan Ali Khan and the Tapurias; and further that such a committee would also enable the taking of appropriate steps to bring back the monies stashed in foreign banks, for which purposes a need may arise to register further cases. The Union of India also claims that the formation of such a committee indicates the seriousness with which it is viewing the entire matter.*

51. The above decision would render support to cause an investigation by the Income Tax department when matters come to their notice showing abnormally high and inflated claims of LTCG especially when the share market in the country during the relevant time was not progressive. Therefore, no fault can be attributed to the Income Tax department for causing an investigation and any finding rendered pursuant to such investigation could very well be a material to commence further proceedings under the Act against the assessees who fall within the ring of suspicion. Mr. Surana, learned Senior Counsel would contend that unlike in the cases relied upon by him, there is nothing to show that the Government of India or the CBDT had directed conduct of an investigation by the DDIT who is the lowest in the rung of officers in the investigation wing of the Income Tax department. To examine, this we had perused the preamble portion of the report. The report has been prepared by the DDIT and it has been forwarded to the DGIT (Investigation) in all the states in the country as well as the Director General of International Tax, Mumbai. The report prepared by the DDIT is on behalf of the Directorate of Investigation, Kolkata, and this is evident from the report dated 27.04.2015. Therefore, to discredit the report as if to be initiated by the DDIT on his own accord is in an incorrect submission. The learned senior counsel referred to the penultimate paragraph of the report and submitted that the officer who prepared the report himself mentions it to be a “write” up and therefore it is not a “report” in the strict sense. We are unable to agree with the said submission as substance over form has to be looked into and preferred. Therefore, to pick up the words “write up” and to brand the report to be a personal opinion of

the DDIT is not tenable. Therefore, on the grounds raised by the learned senior counsel, we are not persuaded to hold that the report has to be discarded in its entirety and accordingly this objection raised on behalf of the assessee is decided against them.

52. Having steered clear of the objection raised regarding the report, we shall briefly deal with the contents of the report which states that the DIT, Kolkata had under taken the accommodation entries LTCG investigation on a much larger scale than earlier as a result they were able to identify a very large number of beneficiaries who have together taken a huge amount of bogus entries of LTCG and 64,811 beneficiaries were identified to be involved in the bogus claims of LTCG which was estimated above Rs. 38,000 crores. It is stated that in order to cast the net wide the department adopted a different approach of investigation which acquired a character of a project. The report states that illegal business of bogus LTCG involves three different individuals, the promoter of "penny stocks" companies also known as syndicate member, the share brokers and the entries operators who purchases the shares through paper companies by taking cash and many at times the three categories of individuals perform overlapping roles and at times, a single individual may perform all the three functions. The report further states in the investigations done earlier with regard to the bogus LTCG, the approach was to target the individuals and through him identify the penny stock and beneficiary and this method had yielded results on a limited scale emanating only from individual/individuals targeted. Therefore, keeping in mind, the rampant nature and exponential growth of the illegal business in the recent times and to cast the net wide the

department reversed the methodology of investigation. In that process, it is stated, that they first identified the "penny stocks" and then started targeting the individuals who dealt in them. The report states that by adopting such method they were able to virtually cover almost all Kolkata based operators in one investigation. Further the report states that it is an on-going process which acquires the character of a project that will continue for quite some time unlike usual investigation which aims at the individual involved. The report has identified 84 penny stocks listed with the BSE which have been used for generating bogus LTCG which includes 18 scripts on which the DIT (Investigation-I) Delhi had conducted investigation and the results were circulated. The report mentions 22 entities who are brokers who were covered in the investigation involved in the purchase/sale and price rigging of the penny stocks of the 84 companies. The report states that it is pertinent to note that the list includes some of the big names like Anand Ratithi, Religare and SMC. The report further states that the figure of the total transaction of the brokers is only above Rs. 15,970 crores as against the total trade in the script which is more than Rs. 38,000 crores. The reason being that there are other brokers from other cities including some leading names who have traded in these scripts but they could not be covered in the investigation. Further the report states that the department was able to establish full cash trail starting from cash deposit account to the accounts of the beneficiary for nearly a sum of more than Rs. 1575 crores and the broker wise split up was provided in a tabular form. The report explains the modus operandi in the following terms:-

Modus Operandi

The whole business of providing entries of bogus LTCG over the years have become much more organised and with economy of scale in full operation the stake involved have become huge. Before the actual transaction start taking place there are brokers in different towns who contact prospective clients and take paper booking for entries. The Commission to be paid to the operators is decided at this stage however, no money is paid. Once the booking is complete the operators have a reasonably good idea of how much LTCG is to be provided along with the break-up of individual beneficiaries. This data is essential to decide which penny stock or companies to use for the job and which beneficiary to buy how many shares.

53. Thereafter the report speaks of the types of penny stock companies, the entities involved in the transaction, the transaction which involves three legs, the merger method, and a pictorial representation as to how the share prices raised to astronomical level and thereafter there is a downward trend which according to the department is used by the operators for booking bogus LTCL. The report further states that list of beneficiaries DGIT (INB) wise along with the statements have been forwarded for dissemination to the assessing officers through the Chief Commissioner of Income Tax concerned. The information was provided in a soft form recorded in a DVD. There were five folders namely:- (i) Investment report, (ii) LTCG data base, (iii) LTCG summary, (iv) LTCG trade ledger, (v) STCL summary, (vi) STCL trade ledger and (vii) SEBI orders

54. Further the report states that the data of DGIT(International Tax) shows that large number of NRIs and well-known FIIs are buying and selling

these penny stocks and this appears to be a case where the black money stashed a broad is coming back to India (purchase) or money being sent out of the country (sale). The report points out that while only Rs. 27.57 crores have been gone out of the country, an amount of above Rs. 114.97 crores has come in. The report has been signed by the Principal Director of Income Tax (Investigation), Kolkata. The report has been communicated to the DGIT (Investigation) of all the states. Thus, we find that the methodology of the investigation by the department is quite different from the normal method of investigation which commences from the investor or the assessee as the case may be. The report states that on account of huge sums of money being claimed as LTCG/LTCL, a different approach/methodology was adopted by the department, by commencing the investigation not from the individuals who traded with the penny stocks but investigation has started targeting the individuals who dealt with those penny stocks. This concept can be mentioned to be one of "working backwards". This is one of the modes of causing an investigation, considering its magnitude. The approach of the department cannot therefore be faulted. Therefore, a different approach is required to be taken on the effect and efficacy of the report according to the department is in the nature of a project. The Court sit in judgment over the methodology adopted by the department as no taxpayer is entitled to any benefit which shall not accrue to him under the provisions of the Act. If any dubious methodology has been adopted for the purpose of availing certain benefits not admissible under law, the same will not come within the ambit of tax planning but shall be a case of tax avoidance by adopting illegal methods. Therefore, we are of the view that the department was justified in

proceeding to take up the cases, not only within the jurisdiction of the state of West Bengal but other states as well. Thus, the moot question would be if the report is the starting point for considering as to how the claim of LTCG/LTCL by the respective assessees were genuine, we should consider as to whether the assessing officers have committed any error of law, error of jurisdiction or error on facts, leading to the assessments being held to be not sustainable.

55. The first argument on behalf of the assessee is that the copy of the investigation report was not furnished to them despite specific written request made on behalf of the assesses to furnish the copy of the report, the statements recorded and provide those persons from whom statements were recorded to be cross examined on behalf of the assessee. There is no dispute to the fact that the copy of the statement said to have been recorded during the course of investigation has not been furnished to the assessees and the request made by some of them for cross examining of those persons was not considered. The question would be as to whether the non-compliance of the above would render the assessments bad in law. The argument of the revenue is that the assessments cannot be held to be illegal merely on the grounds that the copy of the report was not furnished as the respective assessing officers have clearly mentioned as to the nature of investigation done by the department and as the report itself states that the investigation commenced not from the assessees end but the individuals who dealt with these penny stocks who were targeted. It is equally true invariably in all cases, the statement of the stock brokers, the entry operators or the Directors of the various penny stock companies does not directly implicate

the assessee. If such being the situation, the assessee cannot be heard to say that the copy of the entire report should have been furnished to him, the person from whom the statements were recorded should have been produced for cross examination as admittedly there is nothing to implicate the assessee *Smt. Swati Bajaj* of insider trading or rigging of share prices. But the allegation against the assessee is that the claim for LTCG/LTCL is bogus. As pointed out by Mr. Rai, learned senior standing counsel, the investigation report is general in nature not assessee specific. Therefore, we are required to see as to whether non-furnishing of the report which according to the revenue is available in the public domain would vitiate the proceedings on the ground that the assessee was put to prejudice.

56. In ***State Bank of Patiala and Others Versus S.K. Sharma,*** the Hon'ble Supreme Court pointed out that violation of any and every procedural provision cannot be said to automatically vitiate the domestic enquiry held against the delinquent employee or the order passed by the disciplinary authority except in cases falling under no notice, no opportunity and no hearing categories. Further it was held that if no prejudice is established to have resulted from such violation of procedural provisions no interference is called for, against the ultimate orders. The test laid down was whether the person has received a fair hearing considering all things as the ultimate test is always the test of prejudice or the test of fair hearing as. Further the Hon'ble Supreme Court pointed out a distinction between a case of no opportunity and a case of no adequate opportunity and while examining the latter case, it was held that the violation has to be examined from the stand point of prejudice, in other words the Court or the tribunal

has to see whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answers to the said query. Further it was held that there may be a situation where interest of the state or public interest may call for curtailing of rule of *audi alteram partem* and in such a situation the Court may have to balance public/state interest with the requirements of natural justice and arrive at an appropriate decision.

57. In a very recent decision of the Hon'ble Supreme Court in ***M.J. James*** after referring to a catena of decisions on the point the Hon'ble Supreme Court pointed out that natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the *audi alteram partem* rule cannot by itself, without more lead to the conclusion that prejudice is thereby caused. Where procedural and /or substantive provisions of law embodied the principles of natural justice, their infraction per-se does not lead to invalidity of the order passed. The prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest but also in public interest. Further by referring to the decision in ***State of Uttar Pradesh Versus Sudhir Kumar Singh*** [88]**,** it was held that the "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant, it should exist as a matter of fact or to be cast upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice.

[88] (2020) SCC Online SC 847

58. Therefore, the assessees have to specifically point out as to how they were prejudiced on account of non-furnishing of the investigation report in its entirety, failure to produce the persons from whom the statements were recorded for being cross examined would cause prejudice to the assessee as nowhere in the report the names of the assessees feature. The investigation report states that the investigation has not commenced from the individuals but it has commenced who had dealt with the penny stocks, concept of working backwards. This is a very significant factor to be remembered. Therefore, there has been absolute anonymity of the assessee in the process of investigation. The endeavour of the department is to examine the "modus operandi" adopted and in that process now seek to identify the assessees who have benefited on account of such "modus operandi". Therefore, considering the factual scenario no prejudice has been established to the assessee by not furnishing the investigation report in its entirety nor making the persons available for cross examination as admitted by the department in substantial number of cases the assessees have not been specifically indicted by those persons from whom statements have been recorded.

59. We are conscious of the fact that there may be exceptions however nothing has been brought before us to show that there was an exception in any of these appeals heard by us. In a few cases the assessee has been made known of the statement of the Director of the penny stock company or the stock broker, entry operator despite which those assessees could not make any headway. While on this issue, we need to consider as to whether and under what circumstances the right of cross examination can be demanded as a vested right. In ***Kishanlal Agarwalla***, the Hon'ble Division

Bench of this Court pointed out that no natural justice requires that there should be a kind of formal cross examination as it is a procedural justice, governed by the rules and regulations. Further it was held that so long as the party charged has a fair and reasonable opportunity would receive, comment and criticize the evidence, statements or records on which the charges is being against him, the demand and tests of natural justice are satisfied.

60. In ***Bakshi Ghulam Mohammad*** [89] the Hon'ble Supreme Court held that the right of hearing cannot include the right of cross examination and the right must depend upon the circumstances of each case and must also depend on the statute under which the allegations are being enquired into.

61. Having noted the above legal position, it goes without saying there is no vested right for the assessee to cross examine the persons who have not deposed anything against the assessee. The investigation report proceeds on a different perspective commencing from a different point and this has led to the enquiry being conducted by the assessing officer calling upon the assessee to prove the genuineness of the claim of LTCG.

62. In the light of the above conclusion we hold that the decision in ***Gorkha Security Services*** does not lend any support to the case of the assessees and is distinguishable.

63. The copy of the recommendations of SIT on black money as contained in the third SIT report as published by the Press Information Bureau, Government of India, Ministry of Finance, dated 24.07.2015 was placed

[89] AIR (1967) SC 122

before us with reference to the misuse of exemption on LTCG for money laundering and the recommendations are as hereunder:

> *A company with very poor financial fundaments in terms of past income or terms of past income or turnover is able t raise huge capital allotment of Preferential allotment of shares is made to various entities.*
>
> *There is a shop rise in price of scrip once the preferential allotment is done. This is normally achieved through circuading shares of shares among a select group of companies. These groups of companies often have common promoters/directors. The scrips with thus artificially inflated price rise are offloaded through companies whose funding is provided by the same set people who want to convert black money into while.*
>
> *There is an urgent need for having an effective preventive and punitive action is such matters to prevent recurrence of such instances.*
>
> *We recommend the following measures in this regard:*
>
> *SEBI needs to have an effective monitoring mechanism to study unusual rise of stocks prices of Companies while such a rise is taking place. We understand that SEBI has a strong IT infrastructure which can generate red flag for such instances. Such red flags could be built upon trading volumes, entities which contribute to trading volume financial background of firms through their annual returns and any other indicators SEBI may develop. We believe that with effective and timely monitoring by SEBI a significant number of such instances can be checked in time. Once such instances are detected, SEBI should invariably share this information with CBDT and FIU.*

Barring such entities from securities market would not be of strong deterrence in itself. In case it is established, the stock platforms have been misused for taking LTCG benefits, prosecution should invariably be launched and relevant sections of SEBI Act. Section 12A read with section 24 of the Securities Exchange Board of India Act 1992 are predicate offences.

Enforcement Directorate should then be informed to take action under Prevention of Money Laundering Act for the predicate offences.

64. From the above it is seen that there is a discussion about the "modus operandi" adopted and the SIT opines that there is an urgent need for having an effective, preventive and punitive action in such matters to prevent recurrence of such instances. This is a relevant aspect to be borne in mind.

65. Thus, the report submitted by the investigation department cannot be thrown out on the grounds urged on behalf of the assessees. The assesses have not been shown to be prejudiced on account of non-furnishing of the investigation report or non-production of the persons for cross examination as the assessee has not specifically indicated as to how he was prejudiced, coupled with the fact as admitted by the revenue, the statements do not indict the assessee. That apart, we have noted that the investigation has commenced targeting the individuals who dealt with the penny stocks and after examining the modus seeing the cash trail the report has been submitted recommending the same to be placed before the DGIT (investigation) of all the states of the country. It is thereafter the concerned

assessing officers have been informed to consider as to the bonafideness and genuineness of the claims of LTCG/LTCL of the respective assessees qua the findings which emanated during the investigation conducted on the individuals who dealt with the penny stocks. Therefore, the assessments have commenced by the assessing officers calling upon the assessee to explain the genuineness of the claim of LTCG/ LTCL made by them. In all the assessment orders, substantial portion of the investigation report has been noted in full. A careful reading of the some would show that the assessee has not been named in the report. If such be the case, unless and until the assessee shows and proves that she/he was prejudiced on account of such report / statement mere mentioning that non-furnishing of the report or non-availability of the person for cross examination cannot vitiate the proceedings. The assessees have miserably failed to prove the test of prejudice or that the test of fair hearing has not been satisfied in their individual cases. In all the cases, the assessees have been issued notices under Sections 143(2) and 142(1) of the Act they have been directed to furnish the documents, the assessee have complied with the directions, appeared before the assessing officer and in many cases represented by Advocates/Chartered Accountants, elaborate legal submissions have been made both oral and in writing and thereafter the assessments have been completed. Nothing prevented the assessee from mentioning that unless and until the report is furnished and the statements are provided, they would not in a position to take part in the inquiry which is being conducted by the assessing officer in scrutiny assessment under Section 143(3) of the Act. The assessee were conscious of the fact that they have not been named in the

report, therefore made a vague and bold statement that the non-furnishing of report would vitiate the proceedings. Therefore, merely by mentioning that statements have not been furnished can in no manner advance the case of the assessee. If the report was available in the public domain as has been downloaded and produced before us by the learned standing counsel for the revenue, nothing prevented the assesses who are ably defended by Chartered Accountants and Advocates to download such reports and examine the same and thereafter put up their defence. Therefore, the based on such general statements of violation of principles of natural justice the assessees have not made out any case.

66. While on this issue, it is important to take note of the decision in ***T. Takano***. In the said case, the SEBI took a stand that the investigation report under Regulation 9 of the SEBI Regulations could also include sensitive information about the business affairs of various entities and persons concerned and if disclosed it would affect their privacy and the competitive position of other entities. While considering the correctness of the submissions made on behalf of the SEBI, the Hon'ble Supreme Court held that if the disclosure of the report would affect third party rights the onus then shifts to the appellant to prove that the information is necessary to defend the case appropriately. On facts it was found that the appellant therein did not sufficiently discharge his burden by proving that the non-disclosure of the information would affect his ability to defend himself.

67. In the cases on hand, undoubtedly the report contains information about various penny stocks companies about the directors of the companies and also the stock brokers, entry operators and others who have been

named in the report. It is an admitted case that the names of the assessees do not figure in the report. Therefore, non-furnishing of the report has in no manner prejudiced the rights of the assessees to discharge the onus cast upon them in terms of Section 68 of the Act.

68. It is equally not in dispute that whatever information which was required to be made known to the assessee has been informed to the assessee by the assessing officer by issuance of a notice to each of the assesses to which they have responded by submitting their replies. Therefore, in the absence of any prejudice caused to the assessee on account of non-furnishing of the entire report, the assessees cannot be a heard to say that there has been violation of principles of natural justice and their right to defend themselves was in any manner affected. At this juncture, it would be of much relevance to refer to the decision in ***K. R. Ajmera***. The question of law which arose for consideration before the Hon'ble Supreme Court was as to what is the degree of proof required to hold brokers/sub-brokers liable for fraudulent/manipulative practices under the SEBI Regulations and for violating the code of conduct of the SEBI (Stocks brokers and Sub-brokers) Regulations. It was pointed out that the code of conduct for stock brokers lays down that they shall maintain high standard of integrity, promptitude and fairness in the conduct of all investment business and shall act with due skill and care and diligence in the conduct of all investment business. The Code also enumerates different shades of duties of stock brokers towards the investor and those duties pertain to high standard of integrity that the stock broker is required to maintain in the conduct of his business. It was further pointed out that it is

a fundamental principle of law that prove of an allegation levelled against a person may be in the form of direct substantive evidence or as in many cases such proof may have to be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/ charges made and levelled. It was further held that direct evidence is a more certain basis to come to a conclusion yet in the absence thereof the courts cannot be helpless. It was further pointed out that it is the judicial duty to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded and to reach what would appear to the Court to be a reasonable conclusion therefrom. The test would always be that what inferential process that a reasonable/prudent man would adopt to arrive at a conclusion. The above tests laid down by the Hon'ble Supreme Court were applied to the facts of the case in ***K.R. Ajmera*** and it was noted that the scrips in which trading had been done wherefore illiquid scrips meaning thereby that such scrips though listed in the BSE were not a matter of every day buy and sell transactions. Further it was held that trading in such illiquid scrips is not impermissible yet voluminous trading over a period of time in such scrips is a fact that should attract the attention of a vigilant trader engaged in such trades. It was further pointed out that though proximity of time between the buy and sell orders may not be conclusive in an isolated case such an event in a situation where there is a huge volume and trading can reasonable point to some kind of a fraudulent/manipulative exercise with prior meeting of minds. Such meeting of minds so as to attract the liability of the brokers / sub-broker and may be between the

brokers/sub-broker and the client or it could be between two brokers/sub-brokers engaged in the buy and sell transactions. Further it was pointed out that when over a period of time such transactions have been made between the same set of brokers or a group of brokers a conclusion can be a reasonable reached that there is a concerted effort on the part of the brokers concerned to indulge in synchronized trade the consequences of which is large volumes of fictitious trading resulting in unnatural rise in hiking the price/value of the scrips. In the said case, it was argued that on a screen-based trading the identity of the second party to be a client or the broker is not known to the first party/client or broker. This argument was rejected as being irrelevant. It was pointed out that the screen-based identity system keeps the identity of the parties anonymous and it will be too naïve to rests the final conclusions on said basis which overlooks a meeting of minds elsewhere. Further it was held that direct proof of such meeting of mind elsewhere would rarely be forth coming and therefore the test is one of the preponderance of probabilities so far as the adjudication of a civil liability arising out of violation of the Act or to the Regulations. Further it was held that the conclusion has to be gathered from various circumstances like that volume of trade effected; the period of persistence in trading in particular scrips; the particulars of the buy and sell orders, namely, the volume thereof; the proximity of time between the two and such other relevant factors.

69. Thus, the legal principle which can be culled out from the above decision is that to prove the allegations, against the assessee, can be inferred by a logical process of reasoning from the totality of the attending facts and

circumstances surrounding the allegations/charges made and levelled and when direct evidence is not available, it is the duty of the Court to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded so as to reach a reasonable conclusion and the test would be what inferential process that a reasonable/prudent man would apply to arrive at a conclusion. Further proximity and time and prior meeting of minds is also a very important factor especially when the income tax department has been able to point out that there has been a unnatural rise in the price of the scrips of very little known companies. Furthermore, in all the cases, there were minimum of two brokers who have been involved in the transaction. It would be very difficult to gather direct proof of the meeting of minds of those brokers or sub-brokers or middlemen or entry operators and therefore, the test to be applied is the test of preponderance of probabilities to ascertain as to whether there has been violation of the provisions of the Income Tax Act. In such a circumstance, the conclusion has to be gathered from various circumstances like the volume from trade, period of persistence in trading in the particular scrips, particulars of buy and sell orders and the volume thereof and proximity of time between the two which are relevant factors. Therefore, in our considered view the methodology adopted by the department cannot be faulted.

70. It was argued by Mr. Bagaria that in the decision in ***Balram Garg***, the decision in ***K.R. Ajmera*** has been overruled. To examine the correctness of the said submission, we have carefully gone through the findings rendered by the Hon'ble Supreme Court in paragraph 47 of the judgment in ***Balram Garg*** which reads as follows:

> *Lastly, we have given our anxious consideration to the judgments relied upon by the learned counsel of the Respondent viz.* ***SEBI vs. Kishore R. Ajmera [(2016) 6 SCC 368] and Dushyant N. Dalal vs. SEBI [(2017) 9 SCC 660].*** *Suffice it to hold that these cases are distinguishable on the facts of the present case, as the former is not a case of insider trading but that of Fradulent/Manipualtive Trade Practices; and the latter case relates to Interest Penalty rather than the subject matter at hand. Reliance placed on the case of* ***Kishore R. Ajmera (supra)*** *to show that presumption can be drawn on the basis of immediate and relevant facts is contrary to law already settled by this Court in the case of* ***Chintalapati Srinivasa Raju (supra)*** *where it is held that "a reasonable expectation to be in the know of things can only be based on reasonable inference drawn from foundational facts." It has further been held that merely because a person was related to the connected person cannot be itself be a foundational fact to draw an inference.*

71. On a careful reading of the above paragraph will show that the argument by placing reliance on the case of ***K.R. Ajmera*** to show that presumption can be drawn on the basis of immediate and relevant facts was contrary to the law already settled by the Hon'ble Supreme Court in ***Chintalapati S. Raju.*** Therefore, it would be incorrect to submit that the decision in ***K.R. Ajmera*** has been overruled. This position becomes clearer as the decision in ***K.R. Ajmera*** was referred to in ***Chintalapati S. Raju*** as could be seen in paragraph 30 of the said judgment. Therefore, we hold that the law laid down in ***K.R. Ajmera*** continues to be good law.

72. In the light of the above discussion, the only conclusion that can be arrived at is that the opinion can be formed and the decision can be taken by taking note of the surrounding circumstances which had been elaborated upon in ***K.R. Ajmera***.

73. It is very rare and difficult to get direct information or evidence with regard to the prior meeting of minds of the persons involved in the manipulative activities of price rigging and insider trading. We can draw a parallel in cases of adulteration of food stuff, more than often action is initiated under the relevant Act after the adulteration takes place, the users of adulterated products get affected etc. Therefore, a holistic approach is required to be made and the test of preponderance of probabilities have to be applied and while doing so, we cannot loose sight of the fact that the shares of very little known companies with in-significant business had a steep rise in the share prices within the period of little over a year. The Income Tax department was not privy to such peculiar trading activities as they appear to have been done through the various stock exchanges and it is only when the assessees made claim for a LTCG/STCL, the investigation commenced. As pointed out the investigation did not commence from the assessee but had commenced from the companies and the persons who were involved in the trading of the shares of these companies which are all classified as penny stocks companies. Therefore, the argument of the assessee that the copy of the investigation report has not been furnished, the persons from whom statements have been recorded have not been produced for cross examination are all contention which has to necessarily fail for several reasons which we have set out in the proceedings

paragraphs. To reiterate, the assessee we not named in the report and when the assessee makes the claim for exemption the onus of proof is on the assessee to prove the genuinity. Unfortunately, the assessees have been harping upon the transactions done by them and by relying upon the documents in their hands to contend that the transactions done were genuine. Unfortunately, the test of genuinity needs to be established otherwise, the assessees are lawfully bound to prove the huge LTCG claims to be genuine. In other words if there is information and data available of unreasonable rise in the price of the shares of these penny stock companies over a short period of time of little more than one year, the genuinity of such steep rise in the prices of shares needs to be established and the onus is on the assessee to do so as mandated in Section 68 of the Act. Thus, the assessees cannot be permitted to contend that the assessments were based on surmises and conjectures or presumptions or assumptions. The assessee does not and cannot dispute the fact that the shares of the companies which they have dealt with were insignificant in value prior to their trading. If such is the situation, it is the assessee who has to establish that the price rise was genuine and consequently they are entitled to claim LTCG on their transaction. Until and unless the initial burden cast upon the assessee is discharged, the onus does not shift to the revenue to prove otherwise. It is incorrect to argue that the assessees have been called upon to prove the negative in fact, it is the assessees duty to establish that the rise of the price of shares within a short period of time was a genuine move that those penny stocks companies had credit worthiness and coupled with genuinity and identity. The assesses cannot be heard to say that their claim has to be

examined only based upon the documents produced by them namely bank details, the purchase/sell documents, the details of the D-Mat Account etc. The assesses have lost sight of an important fact that when a claim is made for LTCG or STCL, the onus is on the assessee to prove that credit worthiness of the companies whose shares the assessee has dealt with, the genuineness of the price rise which is undoubtedly alarming that to within a short span of time. The revenue had placed heavy reliance on the decision in ***McDowell*** to show that the claim of the assessee is not case of tax planning to be one of the tax avoidance by indulging in dubious methods. Mr. Bagaria had argued the rule in ***McDowell*** was considered in ***Azadi Bachao Andolan*** and ***Vodafone International*** and it is in the manner explained in these decisions the rule in ***McDowell*** needs to be applied. From paragraph 138 onwards the Hon'ble Supreme Court considered in detail as to *why* ***McDowell*** *and what it says and what it does not say*. The argument of Mr. Bagaria would primarily rests on as to what would mean by a sham transaction as a legal one and it is pointed out that all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. Further by referring to the decision in ***Vodafone International,*** it is submitted that the revenue cannot start with the question as to whether the transaction was a tax deferment/avoidance but the revenue should apply the "*look at*" test to ascertain its true legal nature and that genuine strategic planning had not been abandoned. Further the revenue has to establish on the basis of facts and circumstances surrounding the transactions that the impugned transaction is a sham or tax avoidance. In this regard Mr. Bagaria

also referred to the decision in the case of ***Hill Country Properties Limited Versus Goman Agro Farms Private Limited*** [90] and also the decision in ***IRC Versus Duke of Westminster*** [91]**.**

74. In our considered view we need not travel thus far and wide to examine as to how and what is said and what is not said in ***McDowell*** Mr. Soumen Bhattacharya referred to the decision for the simple reason, to point out that tax planning may be legitimate provided it is within the frame work of law as colourable devices cannot be part of tax planning which cannot be encouraged. Therefore what we are required to see is whether the claim made by the assesees before us are legitimate and whether there was any colourable devices adopted in the process and these colourable devices may or may not be directly but indirectly attributable to the assessee. Therefore, we need not labour much to examine as to how rule in ***McDowell*** needs to be applied as we are required to examine the factual scenario from the cases on hand which appear to be quite unique not probably drawn the attention of the courts and the tribunal earlier.

75. While it may be true that *M/s. Swati Bajaj, Mr. Girish Tigwani* or other assessees who are before us could have been regular investors, investors could or could not have been privy to the information or modus adopted. In our considered view, what is important is that it is the assessee who has to prove the claim to be genuine in terms of Section 68 of the Act. Therefore, the assessee cannot escape from the burden cast upon him and unfortunately in these cases the burden is heavy as the facts establish that

[90] (2015) SCC Online Hyderabad 1021
[91] (1936) AC 1 – House of Lords

the shares which were traded by the assessees had phenomenal and fanciful rise in price in a short span of time and more importantly after a period of 17 to 22 months, thereafter has been a steep fall which has led to huge claims of STCL. Therefore, unless and until the assessee discharges such burden of proof, the addition made by the assessing officer cannot be faulted.

76. It was argued that unless there are foundational facts, circumstantial evidence cannot be relied on. This argument does not merit acceptance as wealth of information and facts were on record which is the outcome of the investigation on the companies, stock brokers, entry operators etc. Based on those foundational facts the department has adopted the concept of "working backward" leading to the assessees. While at that relevant stage the sounding circumstances, the normal human conduct of a prudent investor, the probabilities that may spill over, were all taken into consideration to negative the claim for exception made by the assessee. Therefore, the department was fully justified in taking note of the prevailing circumstances to decide against the assessees.

77. While on the issue regarding the onus of proof, it would be beneficial to refer to the decisions which were relied on. In ***Durga Prasad More,*** the Hon'ble Supreme Court pointed out that on the question of onus that law does not prescribe any quantitative test to find out whether the onus in a particular case has been discharged or not and it depends on the facts and circumstances of each case. It was further held that in some cases, the onus may be heavy whereas in others, it may be nominal. In the said case the assessee was receiving some income which he stated that it is not his

income but that of his wife. On facts, it was found that the assessee's wife is supposed to have had Rs. 2 lakhs neither deposited in bank, nor advanced to others but safely kept in a safe. The assessee was unable to show from what source she built up the amount and Rs. 2 lakhs before the year 1940 which was a big sum during the relevant time. The Tribunal disbelieved the story of the assessee and held it to prima facie be a fantastic story, a story that does not accord with human probabilities. It was further held that the Courts and Tribunals have to judge the evidence before it by applying the test of human probabilities, human minds may differ as to the reliability of a piece of evidence but in that sphere, the decision of the final fact finding authority is made conclusive by law.

78. In ***Sumati Dayal,*** the appeals were filed by the assessee against the order passed by the Income Tax Settlement Commission. On the aspect of burden of proof, it was pointed out that in all cases in which a receipt is sought to be taxed as income, the burden lies on the department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act, lies upon the assessee. With regard to the effect of Section 68 of the Act, it was held that where any sum is found credited in the books of the assessee in previous year, the sum 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. It was further held that in such a case, the prima facie evidence against the assessee namely, the receipt of money and if he fails to rebut, the said evidence being

unrebuted, can be used against him by holding that it was a receipt of an income nature. The Hon'ble Supreme Court proceeds to discuss the facts of the case where the dispute was whether the winnings of the assessee therein were from horse races. Pointing out as to how this matter has to be examined, it was held that the matter has to be considered in the light of human probabilities and by applying the said test it was held that the assessee's claim therein about the amount being her winnings from horse races was not genuine.

79. It was argued on behalf of the assessees that the decision in ***Durga Prasad More*** and ***Sumati Dayal*** cannot be relied upon by referring to the factual scenario in those cases. The question would be as to whether the interpretation sought to be given by the learned Advocates for the assessees as regards the principle laid down by the Hon'ble Supreme Court in the aforementioned decisions is justified or not. In ***Salmond On Jurisprudence, 12th Edition,*** the concept of ratio decidendi was explained by stating that what it decides generally, is the ratio decidendi or rule of law for which it is authority; what it decides between the parties includes far more than just this. The principles that have to be borne in mind, is to determine the ratio of any particular case which was explained. Further, a ratio is the rule the Judge acted on and it would be always said for certain what the rule was as in some cases an order or judgment is unsupported by reasons and the others there are lengthy judgment in which may be embodied several different propositions of all which support the decision. Therefore, the principle laid down in the decision has to be looked into by

culling out the ratio laid therein. Therefore, the revenue is fully justified and cannot be precluded from referring to the above decisions.

80. The decisions in ***Durga Prasad More*** and ***Sumati Dayal*** have been consistently referred in subsequent decisions of the Hon'ble Supreme Court and in this regard, it will be beneficial to refer to the decision in ***P. Mohanakala.*** The questions of law which were framed for consideration are more or less identical as the substantial questions of law raised before use with regard to the burden of proof cast on the assessee under Section 68 of the Act. It was held that the expression "the assessee offers no explanation" means where the assessee offers no proper, reasonable and acceptable explanation as regard the sums found credited in the books maintained by the assessee. Further it was pointed out that in cases where the explanation offered by the assessee about the nature and source of sums found credited in the books is not satisfactory shows, prima facie evidence against the assessee namely, the receipt of money, the burden is on the assessee to rebut the sum and if he fails to rebut, it can be held against the assessee that it was a receipt of an income nature. Further, it was held that in the absence of satisfactory explanation of the assessee, the Income Tax Officer may assume that cash credit entries in the books represented income from undisclosed sources. In the said case also the Court took note of the fact that the Assessing Officer considered various surrounding circumstances before rejecting the explanation offered by the assessee which finding was approved by the Hon'ble Supreme Court as it was based on the material available on record and not on any conjectures and surmises.

81. In ***Roshan Di Hatti,*** it was held that the onus of proving the source of money found to have been received by an assessee is on him, if he disputes, it is not liable to tax, it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation and in the absence of such proof the revenue is entitled to treat it as taxable income. Further, it was held that where the nature of and source of a receipt whether it be of money or of the property, cannot be satisfactorily explained by the assessee, it is open to the revenue to hold that it is the income of the assessee and no further burden lies on the revenue to show that the income is from any particular source.

82. In ***Kale Khan Mohammad Hanif,*** one of the questions referred was whether the burden of proof, source of cash credit is on the assessee. It was held that the answer to question must be in the affirmative and that is how it was answered by the High Court therein. It was held that the onus of proving the source of the sum of money found to have been received by the assessee is on him, if he disputes liability for tax, it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation under the provision of the Act.

83. In ***Tharakumari,*** the appeal by the assessee was questioning the correctness of the finding as to whether LTCG claimed by the assessee, which was brought to tax by the Assessing Officer as unexplained income under Section 68 of the Act was justified. The said case also arose out of a penny stock where the assessee had purchased shares in M/s. Luminaries Technologies Ltd. The Division Bench of the Madras High Court took note of the findings recorded by the Tribunal which also referred to the report of the

DITI, Kolkata and held that the nature of transactions of sale of shares of a shell company was rightly held to be sham transactions and the same are to be taxed as undisclosed income under Section 68 of the Act.

84. In ***N.R. Portfolio Pvt. Ltd.,*** the substantial question of law framed for consideration was whether the Tribunal was right in deleting the additions under Section 68 of the Act and whether the decision of the Tribunal is perverse. While answering the said question, it was pointed out that the Assessing Officer is both an investor and an adjudicator. The Assessing Officer can also refer to incriminating material or evidence available with him and call upon the assessee to file their response and a general and universal procedure or method to be adopted by the Assessing Officer while verification of facts cannot be laid down. Further, 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. Further, it was held that the provisions of the 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 balance of equity, fairness of justice and the principle of preponderance of probabilities apply. The assessee argued that the revenue must have evidence to show circulation of money from the assessee to the third party which contention was rejected by the Court holding it to be fallacious and after referring to the decision in ***A. Govindarajulu Mudaliar Versus CIT*** [92] wherein the Hon'ble Supreme Court observed that it is not the duty of the revenue to adduce

[92] (1958) 34 ITR 807 (SC)

evidence to show from what source income was derived and why it should be treated as concealed income and the assessee must prove satisfactorily the source and the nature of cash received during the accounting year and it is not necessary for the revenue to locate the exact source. Further, it was observed that the Court was conscious of the doctrine of "source of source" or "origin of origin" and pointed out as follows:

> *"We are conscious of the doctrine of 'source of source' or 'origin of origin' and also possible difficulty which an assessee may be faced with when asked to establish unimpeachable creditworthiness of the share subscribers. But this aspect has to be decided on factual matrix of each case and strict or stringent test may not be applied to arms length angel investors or normal public issues. Doctrine of 'source of source' or 'origin of origin' cannot be applied universally, without reference to the factual matrix and facts of each case. The said test in case of normal business transactions may be light and not vigorous. The said doctrine is applied when there is evidence to show that assessee may riot be aware, could not have knowledge or was unconcerned as to the source of money paid or belonging to the third party. This may be due to the nature and character of the commercial/business transaction relationship between the parties, statutory postulates etc. However, when there is surrounding evidence and material manifesting and revealing involvement of the assessee in the "transaction" and that it was not entirely an arm's length transaction, resort or reliance to the said doctrine may be counterproductive and contrary to equity and justice. The doctrine is not an eldritch or a camouflage to circulate ill-gotten and*

unrecorded money. Without being oblivious to the constraints of the assessee, an objective and fair approach/ determination is required."

85. The Court then proceeded to refer to the decision of the Full Bench in ***CIT Versus Sophia Finance Ltd.***[93] wherein it was held as follows:

"In this analysis, a distillation of the precedents yields the following propositions of law in the context of s. 68 of the IT Act. The assessee has to prima facie prove (1) the identity of the creditor/ subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/ subscriber; (4) if relevant details of the address or PAN identity of the creditor/ subscriber are furnished to the Department along with copies of the shareholders register, share application forms, share transfer register etc., it would constitute acceptable proof or acceptable explanation by the assessee; (5) the Department would not be justified in drawing an adverse inference only because the creditor/ subscriber fails or neglects to respond to its notices; (6) the onus would not stand discharged if the creditor/ subscriber denies or repudiates the transaction set up by the assessee nor should the AO take such repudiation at face value and construe it, without more, against the assessee; (7) the AO is duty bound to investigate the creditworthiness of the creditor/ subscriber the genuineness of the transaction and the veracity of the repudiation."

[93] (1993) 113 CTR (Del) (FB) 472 : (1994) 205 ITR 98 (Del) (FB)

86. The Court referred to the decision in ***Commissioner of Income Tax Versus Nova Promoters Finlease Private Limited*** [94] wherein it was held that in view of the link between the entry providers and incriminating evidence, mere filing of PAN, acknowledgement of IT Returns of the entry providers, bank account statements etc. where not sufficient to discharge the onus under Section 68 of the Act. Further it was held that credit worthiness cannot be proved by mere issue of a cheque or by furnishing a copy of the bank account and circumstances might require that there may be some evidence of positive nature to show that the said subscribers had made a genuine, investment as well as angel investor after due diligence or for personal reasons and the findings or a conclusion must be practicable, pragmatic and might in a given case take into account that the assessee might find it difficult to unequigibly established credit worthiness of the shareholders. After noting the several decisions, it was held that the Court or the Tribunal should be convinced about the identity, credit worthiness and the genuineness of the transactions and the onus to prove the three factoms is on the assessee as the facts are within the assessee's acknowledge. Mere production of incorporation details, PANs or the fact that the third persons or the companies had filed income tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up. Further it was held that the facts in the case reflect proper paper work or the documentation but genuineness and credit worthiness, identity are deeper and obtrusive. It was held that it would be incorrect to state that the onus to prove the genuineness of the

[94] (2012) 342 ITR 169 (Delhi)

transactions and credit worthiness of the creditors stands discharged in all cases if payment is made through banking channels. Whether or not onus is discharged depends upon the facts of each case, it depends on whether the two parties are related or known to each other, the manner or mode by which the parties approached each other, whether the transaction was entered into through written documentation to protect the investor, whether the investor professes an angel investor, the quantum of money, credit worthiness of the recipient and the object and purpose for which payments/investment was made etc. It was held that these facts are basically and primarily in the knowledge of the assessee and it is difficult for revenue to prove and establish the negative. Certification of incorporation of company payment by bank channels etc. cannot be in all cases tantamount to satisfactory discharge of onus.

87. Mr. Agarwal sought to distinguish the decision in ***Manish D. Jain*** by pointing out the facts of the case and the modus operandi of the assessee. As pointed out earlier, what we are required to examine in a judgment is the ratio and if we bear the said concept in mind, we would be guided in a proper manner. In the said decision, the judgment in ***Sumati Dayal*** was referred to which decision was followed in ***Sanjay Kaul Versus PCIT*** [95] wherein it was held that where the assessee was not a regular investor in shares and had only invested in high risk stocks of obscure companies with no business activities or assets, which were identified as the penny stocks, the assessing officer had correctly concluded that the assessee entered into a pre-arranged sham transaction so as to convert

[95] (2020) 199 Taxmann.com 470

unaccounted money into accounted money in guise of capital loss and therefore, the alleged Short Term Capital Loss (STCL) was rightly disallowed. Similar view was taken in ***Sanjay Bimalchand Jain Versus PCIT Nagpur*** [96]**,** in the said case the assessee had purchased shares from the penny stocks companies for a lower amount and within a year, sold such shares at higher amount and the assessee had not tendered cogent evidence to explain as to why the shares in unknown company had jumped to such a higher amount in no time and also failed to provide details of persons, who purchased the said shares and the transaction was held to be an attempt to hedge the undisclosed income as LTCG. In ***Suman Poddar Versus ITO*** [97] it was held that the share transactions were bogus because the company whose shares were allegedly purchased was a penny stock and this decision was affirmed by the Hon'ble Supreme Court in (2019) 112 Taxman.com 330. In ***CIT Versus Oasis Hospitality Private Limited*** [98] it was held that the initial onus is upon the assessee to establish three things necessary to obviate the mischief of Section 68 and those are: (i) identity of the investors; (ii) their credit worthiness/investments and (iii) genuineness of the transactions and only when these three ingredients are established prima facie, the department is required to undertake further exercise. The Court after noting the legal position had examined the facts of the case, the modus operandi and

[96] (2018) 89 Taxmann.com 196
[97] (2019) 112 Taxmann.com 330 (SC)
[98] (2011) 333 ITR 119 (Del)

allowed the appeal filed by the revenue. This decision was followed in ***PCIT Versus Prabha Jain*** [99]**.**

88. The facts in ***NDR Promoters Private Limited*** are more or less similar to that of the cases on hand, identical objection was raised by the assessee with regard to the non-production of directors for cross examination etc. and the Court noted the facts in particular that the assessee did not have any business income in the year ending March 31st, 2007 and had a marginal income from other sources in the year ending 31st March 2008 and did not incur any expenditure in the year ending 31st March, 2007 and the shares of face value of Rs. 10/- each were issued at a premium of Rs. 40/-, the total Rs. 50/-. Thus, taking note of the factual position, the Court held that the transaction in question were clearly sham and make believe with an excellent paper work to camouflage their bogus nature.

89. The decision in ***Sanjay Kaul*** would also apply to the cases on hand as it was also a case where shares of penny stocks companies were involved and some of the companies are also in the list of companies in which the assessees before us have traded and one such company being *Kailas Auto Finance limited.* The Court took note of the decision in ***Suman Poddar Versus ITO*** [100] and the dismissed appeal filed by the assessee, was dismissed.

90. At this juncture it would be relevant to take note of the decision of the High Court of Delhi in ***Suman Poddar Versus Income Tax Officer***

[99] (2021) 439 ITR 304 (Mad)
[100] (2019) 112 Taxmann.com 330 (SC)

(ITO) which was affirmed by the Hon'ble Supreme Court in (2019) 112 taxman.com 330:-

> *The first, issue which has been raised by the assessee that it has not been confronted with the statements of various parties relied upon by the Assessing Officer. The assessee has also contended that opportunity of cross-examining those parties/persons was not provided to the assessee. According to the assessee, this resulted in the violation of the principles of natural justice and thus assessment should be held void ab intio. However,, in our opinion, not providing opportunity of cross-examination may be in the nature of irregularity which is curable but not an illegality leading to annulling of the assessment. Further, the ld. CIT(A) in para 4.1 of the impugned order has held that addition has not been made solely on the basis of the statement of those persons/parties. The relevant part of the order of Ld. CIT(A) is reproduced as under:*
>
> *I have considered the submission of the appellant and observation of the AO made in the assessment order on the issue. The appellant has stated that it has not been allowed cross-examination of parties on the basis of whose statement, the addition has been made. On this issue it is observed from the assessment record that the AO has made the addition on the strength of independent analysis of the documents to arrive at the conclusion that the appellant has failed to prove genuineness of the transaction in respect of STCL as discussed above.*

Statements and other material found in the course of investigation has been used by him as a corroborative material to strengthen his findings. As per the requirements of Section 68 of the Act, the AO has shifted the onus back on the appellant by confronting the adverse findings. Therefore, the appellant has failed to discharge the onus cast upon it u/s. 68 of the Act to explain the transaction. The Investigation Wing has conducted detailed enquiries, made analysis of the seized/impounded documents and made analysis of beneficiaries. The report prepared contains details of complete modus operandi, commission charge against accommodation entries, list of conduit companies, list of their bank accounts in the name of conduits. The said list contains names of companies in which the appellant dealt. Therefore, the findings in the case of Investigation Wing corroborate the independent findings of the AO. Therefore, the AO was not required to allow the appellant the opportunity to cross-examine.

The Tribunal in the case of Ram Nilwas Gupta, Dehradun vs. DCIT, Dehradun on 6th February, 2019 in ITA No. 4881 to 4883/Del/2016 (Assessment Years: 2010-11, 2012-13 and 2013-14), after considering various decisions of the Hon'ble Supreme Court, including the decision in the case Andaman Timbers Industries vs. Commissioner of Central Excise, Kolkata-II reported in MANU/SC/1250/2015: 2015 (324) E.L.T. 641 (SC), 2017 (50) S.T.R. 93 (SC), 2016 (15) SCC 785 has held as under:

In our opinion right to cross-examine the witness who made adverse report is not an invariable attribute of the requirement of the dictum, "audi alteram partem". The principles of natural justice do not require formal cross-examination. Formal cross-examination is a part of procedural justice. It is governed by the rules f evidence, and is the creation of Court, It is a part of legal and statutory justice therefore it cannot be laid down as a general proposition of law that the revenue cannot rely on any evidence which has not been subjected to cross-examination.

However, if a witness has given directly incriminating statement and the addition in the assessment is based solely or mainly on the basis of such statement, in that eventuality it is incumbent on the Assessing Officer to allow cross-examination.

Adverse evidence and material, relied upon in the order, to reach the finality, should be disclosed to the assessee. But this rule is not applicable where the material or evidence used is of Collateral Nature.

We find that the Assessing Officer in the assessment order has referred to the general modus operandi of the bogus accommodation entry and thereafter, he has further referred to statement of the parties who has provided accommodation entry through managing and controlling the shares of the companies, in which the assessee has also transacted. The Assessing Officer thereafter asked the assessee to justify the rationale behind investment in these penny stock companies not having financial worth, however, the assessee failed

to justify the same. The Assessing Officer provided as why the investment in the shares transacted by the assessee was not justified in view of the comparison of the other shares available. The Assessing Officer also pointed out the price fluctuation in the shares of the companies over a period, dividend history and other financial parameters to substantiate that there was no term capital loss against receipt of cash money. The Ld. Assessing Officer accordingly concluded that the addition was made on the basis of the material available on record, the surrounding circumstances, the human conduct and preponderance of probabilities.

In view of the above facts and circumstances and in law, we find that in instant case addition in dispute is not solely on the basis of the statement of persons and the Assessing Officer has relied on other materials. The statements of the persons who controlled the business of providing accommodation entry have been corroborated with the material, surround circumstances and preponderance of probability. We accordingly uphold the finding of the CIT(A) on that issue in dispute. The relevant grounds of the appeal of the assessee are accordingly rejected.

After describing the general modus operandi of accommodation entry by way of bogus capital gain/loss, the Assessing Officer has highlighted the statement of the persons who claimed to have provided bogus capital gain/loss entries. The assessee was then asked to justify the investment

in the relevant shares. The Assessing Officer has pointed out that these companies are not having any significant/real business as seen from the financial statement of those companies. The price movement of the shares was also found to be unrealistic by him. The Assessing Officer has particularly pointed out that price movement of the relevant transacted by the assessee, were not matching with movement of the share market in general and movement of the other scrips in the same line of the business. The Assessing Officer also pointed out that volume transacted in those companies. The ld. Assessing Officer has pointed out that the assessee could not explain, why it invested in such script without knowing the financial performance of the company. The relevant analysis has been reproduced by the Assessing Officer in Para 3.4 (page 1 J.) of the assessment order. The conclusion of AO has already been reproduced by us in brief facts of the case.

The Hon'ble Delhi High Court in the case of Suman Poddar (supra), observed that shares of Cressanda Solutions Ltd. Have been identified by the Bombay Stock Exchange as penny stock used for obtaining bogus Long Term Capital Gain and no evidence of actual sale except contract notes issued by the share broker were produced by the assessee. The Hon'ble High Court accordingly dismissed the appeal of the assessee as no substantial question of law involved.

Thus, Tribunal has in depth analyzed balance sheets and profit and loss accounts of Cressanda Solution is Ltd. Which shows that astronomical increase in share price of said company which led to

returns of 491 % for Appellant, was completely unjustified. Pertinently, EPS of said company was Rs. 0.01/- as in March 2016, it was Rs. 0.01/- as in March 2015 and -0.48/- as in March 2014. Similarly other financial parameters of said company cannot justify price in excess of Rs. 500/- at which Appellant claims to have sold said shares to obtain Long Term Capital Gains. It is not explained as to why anyone would purchase said shares at such high price.

Tribunal goes on to observe in impugned order as follows:

With such financials an affairs of business, purchase of share of face value Rs. 10/- at rate of Rs. 491/- by any person and assessee's contention that such transaction is genuine and credible and arguing to accept such contention would only make decision of judicial authorities fallacy.

Evidences put forth by Revenue regarding entry operation fairly leads to conclusion that assessee is one of beneficiaries of accommodation entry receipts in form of long term capital gains assessee has failed to prove that share transactions are genuine and http://itatonlin.org could not furnish evidences regarding sale of shares except copies of ITA 841/2019 Page 7 of 10 contract notes, cheques received against overwhelming evidences collected by Revenue regarding operation of entire affairs of assessee. This cannot be case of intelligent investment or simple and straight case of tax planning to gain benefit of long term capital gains earnings @ 491% over period of 5 months is beyond

human probability and defies business logic of any business enterprises dealing with share transactions net worth of company is not known to assesses. Even brokers who coordinated transactions were also unknown to assessee. All these facts give credence to unreliability of entire transaction of shares giving rise to such capital gains ratio laid down by Hon'ble Supreme Court in case of Sumati Dayal vs. CIT case. Though assessee has received amounts by way of account payee cheques, transactions cannot be treated as genuine in presence of overwhelming evidences put forward by Revenue fact that in spite of earning such steep profits assessee never ventured to involve himself in any other transaction which broker cannot be mere coincidence of lack of interest. Reliance is place on judgment in case of Nipun Builders and Developers Pvt. Ltd. (supra) where it was held that it is duty of Tribunal to scratch surface and probe documentary evidence in depth, in light of conduct of assessee and other surrounding circumstances in order to see whether assessee is liable to provisions of section 68 or not in case of NR Portfolio, obtrusive. Similarly bank statements provided by assessee to prove genuineness of transaction cannot be considered in view of judgment of Hon'ble Court in case of Pratham Telecom India Pvt. Ltd. Wherein it was stated that bank statement is not sufficient enough to discharge burden. Regarding failure to accord opportunity of cross examination, we rely on judgment of Prem Castings Pvt. Ltd. Similarly tribunal in case of Udit Kalra ITA No. 6717/Del/2017 for assessment year 2014-15 has

categorically held that when there was specific confirmation with Revenue that assessee has indulged in ITA 841/2019 page 8 of 10 non-genuine and bogus capital gains obtained from transactions of purchase and sale of shares, it can be good reason to treat transactions as bogus difference of case of Udit Kalra attempted by Ld. AR does not add any credence to justify transactions. Investigation Wing has also conducted enquires which proved that assessee is also one of beneficiaries of transactions and entries provided, Even BSE listed this company as being used for generating bogus LTCG. On facts of case and judicial pronouncements will give rise to only conclusion that entire activities of assessee is colourable device to obtain bogus capital gains. Hon'ble High Court of Delhi in case of Udit Kalra ITA No. 220/2009 held that company had meagre resources and astronomical growth of value of company's shares only excited suspicion of Revenue and hence, treated receipts of sale of shares to be bogus. Hon'ble High Court has also dealt with arguments of assessee that he was denied right of cross examination of individuals whose statements led to enquiry. Ld. AR arguments that no question of law has been framed in case of Udit Kalra also does not make any tangible difference to decision of this Case, Since additions have been confirmed based on enquiries by Revenue, taking into consideration ratio laid down by various High Courts and Hon'ble Supreme Court, our decision is equally applicable to receipts obtained from all three entities. Further, reliance is also placed on orders of various Courts and Tribunals listed below. MK Rajeshwari vs. ITO

in ITA No. 17231Bang/2018, order dated 12.10.2018. Abhimanyu Soin vs. Sanjay Bimalchand Jain vs. ITO 89 taxmann.com 196. Dinesh Kumar Khandelwal, HUF vs. ITO in ITA No. 58 & 591 Nag/2015, order dated 24.08.2016. Ratnakar M Pujari vs. ITO in IT no. 995/Mum/2012, order dated 03.08.2016. ITA 841/2019 page 9 of 10 Disha N. Lalwani vs. ITO in ITA No. 6389/Mum/2012, order dated 22.03.2017. ITO vs. Shamin M. Bharwani MANU/IU/0493/2015: [2016] 69 taxmann.com 65. Usha Chandresh Shah vs. ITO in ITA No. 6858/Mum/2011, order dated 26.09.2014, CIT vs. Smt. Jasvinder Kaur MANU/GH/0241/2013: 357 ITR 638

Facts as well as rationale given by Hon'ble High Court are squarely applicable to case before us. Hence, keeping in view overall facts and circumstances of case that profits earned by assessee are part of major scheme of accommodation entries and keeping in view ratio of judgments quoted above, we, hereby decline to interfere in order of ld. CIT(A).

91. In ***Udit Kalra Versus ITO in Manu/De/1507/2019***, a similar case of investment in 4000 shares in a penny stock company which share prices increased astronomically within a period of approximately 19 months when the price of acquisition was Rs. 12/- per share, on the date of sale it was Rs. 720/-. The High Court of Delhi affirmed the order passed by the Tribunal and dismissed the appeal filed by the assessee.

92. During the course of argument, it was submitted on behalf of the revenue that if the Court is satisfied that the order of the tribunal is

perfunctory, the matter may be remanded to the tribunal for fresh consideration. The question would be as to whether remand of the matter to the tribunal is warranted and justified considering the submissions on either side. Unless and until, it is a case of absolutely no material, a remand was not called for. If the tribunal had failed to exercise its jurisdiction and test the correctness of the findings of the CIT (A) and the assessing officer, this Court can very well ignore the decision of the tribunal and consider the findings rendered by the assessing officer and the CIT(A) for its legality.

93. In ***CIT Bihar Versus S.P. Jain*** [101]**,** the order passed by the High Court confirming the conclusions arrived at by the tribunal was put to challenge before the Hon'ble Supreme Court and it was contended on behalf of the revenue that tribunal based its conclusion on inadmissible evidence and on wrong facts and gave no reason for rejecting the findings of the income tax officer, failed to take into account the relevant material on record and based its conclusions on mere conjectures and surmises. The question was whether the Court is denuded of jurisdiction to consider the correctness of the findings recorded by the assessing officer and the CIT(A).The Hon'ble Supreme Court while answering the said issue held as follows:-

> *This question was repeated in its application under s.66(2) but perhaps the High Court thought that questions 2 and 3 or which it directed the Tribunal to state a case would cover the scope and ambit of question 3 on which the revenue had asked for reference. We think that the two questions on which the reference has been made impugn the findings and the*

[101] (1973) AIR 997

validity of the Tribunal's conclusion that Rs. 10,80,000 was not an income from undisclosed sources, but the, product of a genuine sale by the vendor companies. Though this question, in what circumstances will this Court interfere with the finding given by the Tribunal or arrive at different conclusion to that arrived by it.

In our view, the High Court and this Court have always the 'jurisdiction to intervene if it appears that either the Tribunal has misunderstood the statutory language, because the proper construction of the statutory language is a matter of law, or it has arrived at a finding based on no evidence or where the finding is inconsistent with the evidence or contradictory of it, or it has acted on material partly irrelevant or where the tribunal draws upon its own imagination imports facts and circumstances not apparent from the record of bases its conclusions or mere conjectures or surmises or where no person judicially acting and properly instructed as to the relevant law could have come to the determination reached. In all such cases the findings arrived at are vitiated.

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.

100. 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.

102. 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.

(T.S. SIVAGNANAM, J)

I agree.

(HIRANMAY BHATTACHARYYA, J)

(P.A- SACHIN/PRAMITA)