

**IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA**

**BEFORE SHRI S. S. GODARA, JM & DR. A.L.SAINI, AM**

**आयकरअपीलसं./IT(SS)A Nos.125 & 126/Kol/2018**

**(निर्धारणवर्ष / Assessment Years:2013-14& 2014-15)**

<b>Shri Deepak Kumar Agarwal</b>	<b>Vs.</b>	<b>ACIT, CC-3(1), Kolkata</b>
<b>C/o, SalarpuriaJajodia&amp;Co. , 7, C.R. Avenue, Kolkata-700072</b>		
<b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ABSPA 2276 K</b>		
<b>(Assessee)</b>	<b>..</b>	<b>(Revenue)</b>

Assessee by :Shri S. Jhajharia, AR & Shri Sujoy Sen, AR  
Respondent by : Shri A.K. Singh, CIT DR

सुनवाईकीतारीख/ Date of Hearing : 18/04/2019

घोषणाकीतारीख/Date of Pronouncement : 10/05/2019

**आदेश / ORDER**

**Per Dr. A. L. Saini:**

The captioned two appeals filed by the assessee, pertaining to assessment years 2013-14 and 2014-15, are directed against the separate orders passed by the learned Commissioner of Income Tax (Appeals)-21, Kolkata, (in short the Id. 'CIT(A)'], which in turn arise out of separate assessment orders passed by the Assessing Officer u/s 153A / 143(3) of the Income Tax Act, 1961 ( in short the 'Act').

2. Since these two appeals pertain to the same assessee, identical and common issues are involved therefore, these have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity. Assessee's appeal in I.T.(SS).A. No. 125/Kol/2018, for assessment year 2013-14, is taken as lead case.

3. In this appeal, although assessee has raised a multiple grounds of appeal, but at the time of hearing we have carefully perused all the grounds raised by the Assessee. Most of the grounds raised by the Assessee, are either academic in nature or contentious in nature. However, to meet the end of justice, we confine ourselves to the core of the controversy and main grievances of the Assessee. With this background, we summarize and concise the grounds raised by the Assessee as follows:

“All the grounds of appeal emanate from the action of the Id A.O. in treating the claim of Long Term Capital Gain of Rs. 3,39,46,071/- as bogus and Id CIT(A) confirmed the same. The Id AO had made a further addition of Rs.1,69,730/-, as unexplained expenditure under section 69C of the Act for commission paid to procure the impugned Long Term Capital Gain and Id CIT(A) confirmed the same. The assessee has also challenged that in absence of incriminating material no addition can be made in the order u/s 153A of the Act in case of unabated assessment.”

4. Brief facts qua the issue are that a search and seizure operation u/s 132 of the Act, was carried out in the residential and business premises of ‘Gagan Group’ situated at various locations on 03.03.2015. The assessee, Shri Deepak Kumar Agarwal belongs to this group. The Assessing Officer, accordingly, issued notice u/s 153A of the Act on 22.01.2016, calling for return for the assessment year 2013-14. In response to notice u/s 153A, the assessee filed his return of income on 29.01.2016, declaring total income at Rs.18,29,180/-. It was observed by AO during the course of assessment proceedings that assessee has claimed Long Term Capital Gain to the tune of Rs.3,39,46,071/- by sale of shares of “Sulabh Engineers” on various dates. The Shares of “Sulabh Engineers” were purchased at the price of Rs. 14,00,000/- and the same were sold at Rs. 3,53,46,071/-. Thus, AO noticed that the assessee has received a gain of around 2400% in about 2 years of share holding and this seems to be inflated and unrealistic.

The assessing officer also mentioned in his assessment order, the basic details of the large scale of scam of pre- arranged bogus LTCG and its modus operandi for a better understanding, which is mentioned in brief as follows:

*“The Directorate Investigation, Kolkata on the basis of several information and actions unearthed the large scale racket, operating through close nexus of brokers, entry operators, promoters thus facilitating various individuals to brought their unaccounted money to regular books in the form of LTCG in quoted shares [exempted u/s 10(38) of the Income Tax Act, 1961] without any tax implications.”*

The modus operandi of this pre-arranged bogus long term capital gain is also mention by AO in his order which is not being reproduced here for the sake of brevity.

5. Assessing officer noticed that during the search and seizure, in its Disclosure Petition u/s 132(4) dated 08.06.2015, Mr. D eepak kumar Agarwal (on behalf of Group & Self) in point no. 12 & 13 duly accepted that pre-arranged bogus long term capital gain were availed by him and family members and thus the same are being offered for taxation. The AO noted that the scrip of ‘Sulabh Engineers’ was widely used for pre- arranged bogus long term capital gain purpose. Assessee also has availed the same facility and taken an amount of Rs.3,39,46,071/- in A.Y. 2013-14 as pre- arranged bogus Long Term Capital gain in his books. During the assessment proceedings, the assessee submitted the reply to justify the genuineness of LTCG, however, the Assessing Officer rejected the contention of the assessee and made an addition of Rs.3,39,46,071/-. The Assessing Officer has also made addition u/s 69C @ 0.5% of commission of final entry provider of Rs. 1,69,730/-.

6. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A), who has confirmed the addition made by the Assessing Officer. Aggrieved by the order of the Id. CIT(A) the assessee is in appeal before us.

7. Ld Counsel for the assessee submitted before us that the entire purchase of 70,000 equity shares and sale of 4,16,680 equity shares (31480 share at face value

of Rs.10/- each plus 385200 share at face value of Rs. 1/- each) of M/s Sulabh Engineers & Services Ltd, were made through Registered Stock Brokers company M/s. Consortium Securities Pvt. Ltd as per the Contract Notes issued by the Registered Brokers. The payment of the purchase price and the receipt of the sale proceeds were made through Banking channel and duly reflected in the Bank account of the assessee maintained with HDFC Bank, Durgapur Branch. All the relevant particulars and documents along with written submissions were filed by the assessee. Both the purchase and sale transactions were valid and genuine and no iota of doubt can be cast on it.

The Id Counsel also submitted that in the assessee's case under consideration, a search and seizure was conducted by the department on 03.03.2015. The assessment year for the search is A.Y. 2015-16, wherea assessee's both appeals pertain to assessment year 2013-14 and 2014-15 which are unabated assessment years. In the case of unabated assessment years, the addition can not be made without incriminating material. The search t am did not find any incriminating material, hence addition should not be made.

8.On the other hand,the Id. DR for the Revenue submitted that a search and seizure operation was carried out u/s 132 of the Income Tax Act, 1961, in the case of 'Gagan Group' on 03 03 2015. The assessee, being the key person of the group was also covered in the said search. The Panchanama was drawn in the name of assessee. In the course of search, a statement of Shri Deepak Kumar Agarwal was recorded under section 131 of the Income Tax Act, 1961 in the office premise of 'Gagan Group' at Diamond Prestidge, 41A, A J C Bose Road, 8th Floor, Room No.801, Kolkata-700017, wherein he admitted to have booked bogus Long Term Capital Gain on the scripts of Nikki Global Finance Ltd and Sulabh Engineers & Services Ltd, through his share broker M/s. Consortium Securities Private Limited. He also admitted that he and his family members booked bogus LTCG in connivance with M/s. Consortium Securities Private Limited and Ashok Kayan & Co. [Kindly see Q-17 to Q-19 'of the statement dt.03.03.2015, incorporated in the assessment order at Pp-21-22]. Shri Harshvardhan Kayan, (S/o Shri Ashok Kayan), the director of Kayan Securities Ltd in his statement recorded u/s.133A of

the Act on 27.01.2015 had admitted that M/s. Kayan Securities (P) Ltd was engaged in the business of providing bogus LTCG. [Kindly see Q-14 & Q-21 of the statement dt.27.01.2015, incorporated in the assessment order at Pp-15-17] .

On 02.05.2015, a statement of Shri Deepak Kumar Agarwal was again recorded u/s.132(4) of the Income Tax Act, 1961 at Diamond Prestidge, 41A, A J C Bose Road, 8th Floor, Room No.801, Kolkata-700017 during the revocation of the Prohibitory Order imposed u/ s. 132(3) of the Act wherein he confirmed his earlier statement (recorded in the course of search) and reiterated that he had taken accommodation entries in his different group concerns to bring back unaccounted income into the regular books of account of the group through different jamakharchi companies. [Kindly see Q-6 & 7 of the statement dt.02.05.2015 at Page.61 to 64 of the Paper-book]

On 05.06.2015, another statement of Shri Deepak Kumar Agarwal was recorded u/s.131 of the Income Tax Act, 1961 in the office of Dy. Director of Income Tax (Inv), Unit-2(2), Kolkata at 5th Floor, Room No.5/3, Aayakar Bhawan (Annexe), P-13, Chowringhee Square, Kolkata-700069, wherein he confirmed that the shares of Nikki Global Finance Ltd and Sulabh Engineers & Services Ltd were purchased through Shri Biplab Chowdhury, the Entry Operator and the branch head of M/ s. Consortium Securities Private Limited for the purpose of introducing the unaccounted fund generated due to out of books trading into the individual files in the form of LTCG to avail the tax exemption benefit. [Kindly see Q-4 to Q-20 of the statement dt.05.06.2015, incorporated in the assessment order at Pp-23-25]

Statement of Shri Biplab Chowdhury was recorded u/s.131 of the Income Tax Act, 1961 in the office of Dy. Director of Income Tax (Inv), Unit-2(2), Kolkata at 5th Floor, Room No.5/3, Aayakar Bhawan (Annexe), P-13, Chowringhee Square, Kolkata-700069 on 05.06.2015 wherein he confirmed that he arranged bogus LTCG for Shri Deepak Kumar Agarwal & his family. [Kindly see Q-5 to Q-11 of the statement dt.05.06.2015, incorporated in the assessment order at Pp-26- 27]

Mr. Vinay Kumar Agarwal and the other individual beneficiaries of the group filed separate affidavits dt.08.06.2015 before the department affirming that the LTCG claimed by the individuals related to the group was bogus. Shri Vinay Kumar

Agarwal stated that Shri Biplab Chowdhury arranged bogus LTCG for a sum of Rs.53,80,90,944/- in aggregate for Deepak Kumar Agarwal (Rs.18,69,30,822/-), Suman Agarwal (Rs.2,86,69,983), Swati Agarwal (Rs.6,29,73,572/-) & Vinay Kumar Agarwal (Rs.25,95,16,567/-) through M/s. Anjaney Stock Broking Ltd, M/s. Bonanza Portfolio Ltd, M/s. Consortium Securities Ltd & M/s. Eureka Stock & Share Broking Services Ltd. The affidavit, in this regard, sworn by Mr. Vinay Kumar Agarwal before the Notary Public on 08.06.2015 has been extracted by the AO in the assessment order at Pp-27-28.

Therefore, Id DR submitted before Bench that based on the statement recorded it is clearly evident that assessee's long term capital gain is pre-arranged and hence addition made by AO should be confirmed.

9. We have heard both the parties and perused the material available on record. We note that the assessee submitted before us the copy of balance sheet and profit and loss account (vide PB-53 to 71), copy of Affidavit dated 29.06.2015 in respect of retraction of statement made u/s 131 of the Act (vide PB-72 to 77). The assessee submitted before us the copy of ledger accounts of broker M/s Consortium Securities Pvt. Ltd along with copy of bills (PB-78 to 99). The assessee has submitted the copy of bank statement of Allahabad Bank (PB-100 to 102), copy of HDFC Bank (PB-104 to 114), copy of Oriental Bank of Commerce (PB-115-116) again copy of Oriental Bank of Commerce (PB-117 to 119) and copy of Punjab National Bank (PB-120 to 124). The assessee also submitted the copy of demat statement accounts vide PB 122 to 153. Therefore, the Id Counsel for the assessee submitted that during the assessment proceedings the assessee submitted all the required documents and transactions which were done through banking channels and which are getting reflected in the demat statement accounts also. The Counsel also stated that the price of scrip was determined by the market forces and there is no any human intervention. By submitting this plethora documents and statements, the Id. Counsel claimed that the long term capital gain generated by the assessee is genuine.

We note that in the original Return of Income and the computation of total income the assessee had claimed Long Term Capital Gain ( LTCG) of Rs.3,39,46,071/- earned on sale of shares as exempt from tax u/s 10(38) of the Income Tax Act. The assessee`s return was processed u/s 143(1) of the Act on dated 26.03.2015 accepting the Returned income. Later on, a search and seizure operation u/s 132 of the Income Tax Act was conducted on 03.03.2015 at various residential and business premises of ‘Gagan Group’. The assessee belongs to this ‘Gagan Group’. Consequent upon the search, notice u/s 153A was issued on 22.01.2016 calling for the Return of Income for the A. Y. 2013-14. In response to that notice, the assessee filed Return of Income on 29.01.2016 declaring same total income of Rs.18,29,180/- as was declared in the original Return.

10. We note that it is not disputed that in the assessee`s case under consideration, a search and seizure action was conducted by the department on 03.03.2015. That is, search and seizure was conducted in the previous year 01.04.2014 to 31.03.2015, hence the assessment year for the search is A.Y. 2015-16, whereas assessee`s both appeals under consideration pertain to assessment years 2013-14 and 2014-15, which are unabated assessment years. In the case of unabated assessment years, the addition can not be made without incriminating material. We note that the search team did not find any incriminating material, hence addition should not be made in case of unabated assessment years (that is, concluded proceeding).

We are of the view that it would be necessary to address this preliminary issue of whether the addition could be framed u/s 153A of the Act in respect of a concluded proceeding without the existence of any incriminating materials found in the course of search. The scheme of the Act provides for abatement of pending proceedings as on the date of search. It is not in dispute that the assessment for the Assessment Years 2013-14 & 2014-15 were originally completed u/s 143(1)/143(3) of the Act and the time limit for issuance of notice u/s 143(2) of the Act had expired and hence it falls under concluded proceeding, as on the date of search on 03.03.2015. We hold that the legislature does not differentiate whether the assessments originally were framed u/s 143(1) or 143(3) or 147 of the Act. Hence

unless there is any incriminating material found during the course of search relating to such concluded year, the statute does not confer any power on the Assessing Officer, to disturb the findings given thereon and income determined thereon, as finality had already been reached thereon, and such proceeding was not pending on the date of search to get itself abated. The provisions of section 153A of the Act are reproduced hereunder for the sake of convenience :-

***"[Assessment in case of search or requisition***

*153A. [(1)] Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—*

- (a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;*
- (b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made :*

*Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:"*

We find that the Co-ordinate Bench of Delhi Tribunal in the case of *Dy. CIT v. Aggarwal Entertainment (P.) Ltd* reported in [\[2016\] 72 taxmann.com 340 \(Delhi - Trib.\)](#) had addressed this aspect. The relevant headnote is reproduced below:—

*"Section 153A, read with section 143, of the Income-tax Act, 1961-Search and seizure - Assessment in case of (in case of section 143(1) assessment)- Assessment year 2004-05- Whether assessment in respect of which return has been processed under section 143(1), cannot be regarded as pending for purpose of section 153A as Assessing Officer is not required to do anything further about such a return and, thus, said assessment cannot be reopened in exercise of power of section 153A-Held yes (Paras 10 and 12) (In favour of assessee)."*

We find that the Co-ordinate Bench of this tribunal in the case of *ACIT vs Kanchan Oil Industries Ltd in ITA No. 725/Kol/2011 dated 9.12.2015 reported in 2016-TIOL-167-ITAT-KOL* had explained the aforesaid provisions as below:-

*"6.4 In our opinion, the scheme of assessment proceedings should be understood in the following manner pursuant to the search conducted u/s. 132 of the Act :-*

- (a) Notice u/s. 153A of the Act would be issued on the person on whom the warrant of authorization u/s. 132 of the Act was issued for the six assessment years preceding the year of search and assessments thereon would be completed u/s. 153A of the Act for those six assessment years.*
- (b) In respect of the year of search, notice u/s. 143(2) of the Act would be issued and assessment thereon would be completed u/s. 143(3) of the Act.*
- (c) In respect of concluded assessments prior to the year of search, no addition could be made in the relevant assessment year unless any incriminating material is found during the course of search with respect to the relevant assessment year.*
- (d) Pursuant to the search u/s. 132 of the Act, the pending proceedings would get abated. In respect of abated assessments, the total income needs to be determined afresh in accordance with the provisions of section 153A and other provisions of the Act.*

*6.4.1 The concluded assessments for the purpose of section 153A of the Act shall be -*

- (i) assessment years where assessments are already completed u/s. 143(1) and time limit for issuance of notice u/s. 143(2) of the Act has expired or;*
- (ii) assessment years where assessments are already completed u/s 143(3) of the Act ;*

*unless they are reopened u/s 147 of the Act for some other purpose in both the scenarios stated above.*

*6.4.2 The scheme of assessment proceedings contemplated u/s 153A of the Act are totally different and distinct from the proceedings contemplated u/s. 147 of the Act and these procedures of assessment operate in different fields and have different purposes to be fulfilled altogether.*

*6.4.3 The expression 'assess or reassess' stated in section 153A(1)(b) has to be understood as below:-*

*'assess' means assessments to be framed in respect of abated assessment years irrespective of the fact whether there are any incriminating materials found during the course of search with respect to relevant assessment years ;*

*'reassess' means assessments to be framed in respect of concluded assessment years where incriminating materials were found during the course of search in respect of the relevant assessment year."*

We also find that the *Hon'ble Delhi High Court in the case of CIT vs Kabul Chawla reported in (2016) 380 ITR 573 (Del)* held as under:-

*'37. On a conspectus of section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:*

- (i) Once a search takes place under section 132 of the Act, notice under section 153A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.*
- (ii) Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the Ld AOs as a fresh exercise.*
- (iii) The Ld AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The Ld AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs in which both the disclosed and the undisclosed income would be brought to tax".*
- (iv) Although Section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the Ld AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."*
- (v) In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to complete assessment proceedings.*
- (vi) Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the Ld AO.*
- (vii) Completed assessments can be interfered with by the Ld AO while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were*

*not produced or not already disclosed or made known in the course of original assessment."*

We note that based on the above cited legal position, the present appeals concern AYs 2013-14 and 2014-15, on the date of the search (03.03.2015) the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.

11. Now coming to the merits of the case, we note that the assessee had purchased 70,000 equity shares of M/s. Sulabh Engineers & Services Ltd. (hereinafter referred to as M/s. Sulabh) on 16.03.2011 in the F.Y. 2010-11 relevant to the A.Y. 2011-12 at total cost of Rs.14,00,000/- @ Rs.20/- each. The purchase price was paid by the assessee through his bank account maintained with HDFC Bank, Durgapur Branch. The shares were received and recorded in the Demat account. Out of those 70,000 equity shares 38520 equity shares of M/s. Sulabh were subsequently split on 04.02.2013 in the ratio of 1: 10. Thus after split up the assessee had 385200 shares having face value of Rs. 1/- per share. The entire lot of those 4,16,680 equity shares (31480 share at face value of Rs.10/- each plus 385200 shares at face value of Rs.1/- each) of M/s Sulabh Engineers were sold by the assessee on different dates during the Financial Year 2012-13 relevant to the AY. 2013-14 for total consideration of Rs.3,53,46,071/- at different rates varying from Rs.17.68 to Rs.59.69 per share through the Registered Stock Broking company M/s Consortium Securities Pvt. Ltd. vide separate Contract Notes issued on different dates by the Registered Stock Broking company. The shares were sold as per the share price rate reflected in the concerned Stock Exchange on the respective dates of sale. The outflow of the quantity of shares on their sale were duly reflected in the Demat account. The sale proceeds received were credited in his aforesaid bank account maintained with HDFC Bank, Durgapur Branch.

The aforesaid 416680 equity shares of M/s. SulabhEngineers, were Long Term, Capital assets held by the assessee for more than a year prior to their sale during the F.Y. 2012- 13. On sale of those shares of M/s Sulabh Engineers, the

assessee had earned long term Capital Gain (in short LTCG) of Rs. 3,39,46,071/- (Sale price Rs.3,53,46,071/- Less Purchase price Rs.14,00,000/-). The sale of those shares were also subjected to Securities Transaction Tax (in short STT) which were paid as specified in the Contract Notes.

In order to prove the genuineness and bona fide of transactions of purchase and sale of those 4,16,680 equity shares of M/s. Sulabh Engineers, the copy of the Contract Notes, Demat account statement, relevant Bank Statements and Ledger accounts with the Registered Share Broker company were filed before the assessing officer. We note that assessing officer did not find any mistake or irregularity in these documents therefore, the claim of the assessee should be accepted.

12. We note that in the assessment the A.O. blindly relied on a general Report of the Investigation Wing, Kolkata, alleging tax evasion in respect of the transactions of shares of certain penny stock companies owing to alleged price rigging through entry operators/promoters / brokers causing benefit to certain assessee to introduce unaccounted money in their books of account in the form of LTCG without payment of tax because of exemption u/s 10(38) of the Income Tax Act. We note that placing reliance on such Report of the Investigation Wing, the AO treated the assessee transaction in the shares of M/s Sulabh Engineers as bogus, coloured and not genuine.

We note that the entire purchase of 70,000 equity shares and sale of 4,16,680 equity shares (31480 share at face value of Rs.10/- each plus 385200 share at face value of Rs.1/- each) of M/s Sulabh Engineers were made through Registered Stock Brokers company M/s. Consortium Securities Pvt. Ltd. as per the Contract Notes issued by the Registered Brokers. The payment of the purchase price and the receipt of the sale proceeds were made through Banking channel duly reflected in the Bank account of the assessee maintained with HDFC Bank, Durgapur Branch.

It is totally denied that in the above sale transactions of shares of M/s Sulabh Engineers by the assessee there was involvement of any entry operator or promoter or broker who had allegedly indulged in rigging and / or surging the

price of shares of M/s Sulabh Engineers upwards / downwards during the year under assessment and that they had provided any accommodation entry to the assessee to make him unlawfully earn Long Term Capital Gain.

We note that the company, 'M/s. Sulabh Engineers & Services Ltd.' cannot be branded as a penny stock company without any justified and valid reason. Besides having other activities, the assessee is not a regular investor of shares of companies as can be seen from the Audited accounts and the Balance Sheet. The share market does not always run strictly on the financial status and background of a company listed in a Stock Exchange. In a stock market various factors come into play for the upward / downward trend of shares of companies even if the financial condition of the companies is that favourable or not or that there is some temporary up rise or set back in the growth of the company. Truly these cannot be any definite yardstick or hard & fast rule or standard formula to judge a company's standing in the stock market and to determine or control its share price from day to day or periodically. The share market is always volatile and no prior prediction can be made by an average investor, who is not conversant with the daily affairs of the stock market, that what may be the price of share of a particular company in a distant future. Therefore, in the instant case the AO made addition solely on 'suspicion, which is not acceptable.

13. We note that AO accepted the Report of the Investigation Wing, but AO did not make any independent inquiry and investigation on his own to verify and ascertain the veracity and genuineness of the sale transaction made by the assessee in the shares of M/s Sulabh Engineers during the year. The Registered Share Broker companies through whom the assessee had sold the long term shares of M/s Sulabh Engineers were never called for through any notice or otherwise to prove the authenticity of the said transactions. Therefore, any observation, finding and conclusion drawn by the AO merely on the basis of the Report of the Investigation Wing without any application of mind and behind the back of the assessee was wholly wrong and unjustified.

We note that the assessee has purchased the shares from the recognized stock exchange through his broker on various dates. The assessee submitted Contract Notes. This transaction is not through any preferential allotment or offline sale. All the transactions are made through proper banking channels. The shares were sold through registered share broker. In the course of assessment proceedings, the assessee has submitted all the details and documents that were necessary for allowing the claim of the assessee. In the assessment order u/s.153A/ 143(3), Ld. AO has stated that there was inflow of some information from the Investigation wing alleging that the assessee was involved in selling of so called "penny stock". In this regard it was submitted by the assessee before the assessing officer as follows:

- i) The shares were purchased and sold through a Registered Broker.
- ii) The shares were purchased and sold based on the prevailing market condition.
- iii) The purchase and sale of shares are supported by contract notes. The payments were received through proper banking channel.
- iv) The purchase and sale transactions were subjected to Security Transaction Tax, Service Tax, Brokerage charges and Stamp duty.
- v) The share purchase and sale transactions are reflected in the d-mat account.
- vi) These facts are verifiable from the regular books of accounts.
- vii) The transactions can also be verified from the Stock Exchange.

Therefore, we note that so far this allegation of the assessing officer is concerned, the assessee has proved beyond any doubt that the shares were purchased and sold through a Registered Broker. The shares were purchased and sold based on the prevailing market condition. The payments were received through proper banking channel. The purchase and sale transactions were subjected to Security Transaction Tax, Service Tax, Brokerage charges and Stamp duty. The share purchase and sale transactions are getting reflected in the d-mat account. These facts are verifiable from the regular books of accounts. The transactions can also

be verified from the Stock Exchange. Therefore, we do not agree with the assessing officer and hence the addition made by assessing officer is not justified.

14. We note that assessing officer mainly made addition based on theory of "Suspicious Transactions", on the basis of report of Investigation Wing. We note that the Ld. A.O. was required to convert the suspicion into the legal evidence by way of bringing concrete and conclusive findings and material onrecords. Since, the Ld A.O. took no step whatsoever the suspicion remains intact and suspicion whatsoever strong cannot take the position of legal evidences. We note that the Assessing officer as well as the Commissioner (Appeals) has been guided by the report of the investigation wing prepared with respect to bogus capital gains transactions. However, the Assessing Officer as well as the Commissioner (Appeals), have not brought out any part of the investigation wing report in which the assessee has been investigated and /or found to be a part of any arrangement for the purpose of generating bogus long term capital gains. Nothing has been brought on record to show that the persons investigated, including entry operators or stock brokers, have named that the assessee was in collusion with them. In absence of such finding how is it possible to link their wrong doings with the assessee. In fact, the investigation wing is a separate department which has not been assigned assessment work and has been delegated the work of only making investigation. The Act has vested widest powers on this wing. It is the duty of the investigation wing to conduct proper and detailed inquiry in any matter where there is allegation of tax evasion and after making proper inquiry and collecting proper evidences the matter should be sent to the assessment wing to assess the income as per law. No such action executed by investigation wing against the assessee. In absence of any finding specifically against the assessee in the investigation wing report, the assessee cannot be held to be guilty or linked to the wrong acts of the persons investigated. In this case, the Assessing Officer at best could have considered the investigation report as a starting point of investigation. The report only informed the Assessing Officer that some persons may have misused the script for the purpose of collusive transaction. The Assessing Officer was duty bound to make inquiry from all concerned parties relating to the

transaction and then to collect evidences that the transaction entered into by the assessee was also a collusive transaction. However, the Assessing Officer has not brought on record any evidence to prove that the transactions entered by the assessee which are otherwise supported by proper third party documents are collusive transactions.

We note that the Assessing Officer having failed to bring on record any material to prove that the transaction of the assessee was a collusive transaction could not have rejected the evidences submitted by the assessee. In fact, in this case nothing has been found against the assessee with aid of any direct evidences or material against the assessee despite the matter being investigated by various wings of the Income Tax Department hence under these circumstances nothing can be implicated against the assessee.

15. Now we deal with statement of Mr. Deepak Kumar Agarwal. We note that Mr. Deepak Kumar Agarwal has retracted from his statement which was taken by the DDIT (Inv). Wing Kolkata on 05.06.2015, by filing the following affidavit. The important content of the said affidavit is reproduced below for ready reference:

*“2. On 05.06.2015 I was called upon by DDIT(Inv), Unit 2(2), Kolkata, at Investigation Wing, Chowringhee Square, to clarify on certain issues raised by him on 04.06.2015. On the said date my deposition under Section 131 of the Income Tax Act, 1961 was done and began questioning about the details of income earned from long Term Capital Gain. In the course of questioning, queries were raised for Long Term Capital Gain booked by various individuals in the past, irrespective of the fact that I was not responsible or answerable, directly or indirectly, for the individuals' tax affairs.*

*3. That on 02/05/2015 in the course of revoking Technical prohibitory order, statement for LTCG was given and again was forced to give statement on same subject.*

*4. My statement was recorded by DDIT (Inv), Unit 2(1), Kolkata, Mr. Pankaj Dwivedi after waiting of prolonged 6-8 hrs, which caused mental torture, agony, and harassment. I was threatened to give the statement as required by him otherwise I would have to face the dire consequences. After this I was extremely nervous and afraid and to save my family reputation, business, and the sole interest of my family, I gave my statement for which I was not willingly ready. DDIT(Inv) also asked me to provide Affidavit, as per write-up provided by him for Mr. Vinay Kumar, Agarwal Ms. Swati Agarwal, Ms. Suman*

*Agarwal. The statement was recorded under threat, coercion and undue influence, which is not permissible under any law.*

*5. So far as the issue of the genuineness of certain Long Term Capital Gain is concerned, this is my honest submission before your lordship that all the transaction are genuine and were made as per the land of Law. In the stock Exchange when the transaction is entered into, I am not supposed to know about the details of buyer of the shares sold by me. I entered into valid transaction only through a registered stock / share broker in online portal. With regards to pricing the exchanges have a limit at the lower end and at the highest end within which the order price could be placed. The orders are fed in the exchange trading platform and the trades are marched in the exchange when the order price matches a counter party. Therefore, contention of fictitious buyer cannot be the basis to ascertain the transaction to be non-genuine, one. There is nothing wrong in my opinion to deal in penny stock and this is a usual practice in the business to take risk for windfall gain. From the entire appreciation of the fact, as a investor I had acquired the shares, the purchase of which was duly declared in the books of accounts which stand accepted by the law. The shares are sold through stock brokers who were registered with the Stock Exchange. Shares were, sold at the prices quoted at the Stock Exchange at the relevant time. The payment of sale consideration also flown from the bank account as per the settled rule/principle or stock exchange and SEBI. Nothing was brought as sufficient evidences and material to prove that we/our entity were involved in bogus, false or fabricated long term capital gain.”*

We note that statement recorded under section 132(4) of the Act can form basis for an assessment only if such statement relates to any incriminating evidence of undisclosed income unearthed during search. We note that in assessee`s case under consideration, the search team did not find any incriminating material therefore, addition merely on the statement recorded under section 132(4) of the Act should not be made, for that we rely on the following judgments:

**1.Hon`able Andhra Pradesh, High Court in the case of CIT Vs. Naresh Kumar Agarwal,[2015] 53 taxmann.com 306 (AP-HC)** held that where in absence of any incriminating material etc, found from premises of assessee during course of search, statement of assessee recorded under section 132 (4) would not have any evidentiary value.

**2. Hon`able Delhi, High Court in the case of CIT Vs. Harjeev Aggarwal [2016] 70 taxmann .com 95 (Del)**, held that a statement recorded under section 132(4) can form basis for a block assessment only if such statement relates to any incriminating evidence of undisclosed income unearthed during search.

**3. Hon`able Gujarat, High Court in the case of CIT Vs. Chandrakumar Jethmal Kochar [2015] 55 taxmann .com 292 (Gujarat)**, held that merely on basis of admission that few benami concerns were being run by assessee, assessee could not be subjected to addition when assessee retracted from such admission and revenue could not furnish any corroborative evidence in support of such admission.

16. We note that Hon`ble Bombay High Court in the case of CIT vs. Lavanya Land Pvt. Ltd. [2017] 83taxmann.com 161 (Bom) held that there was no evidence whatsoever to allege that money changed hands between the assessee and the broker or any other person including the alleged exit provider whatsoever to convert unaccounted money for getting benefit of LTCG as alleged. In the said case, the Hon`ble High Court at Para 21 held that in absence of any material to show that huge cash was transferred from one side to another, addition cannot be sustained.

17. We note that all the observations, conclusions and findings of the lower authorities are based on suspicion, surmises and rumor. It is trite law that the suspicion howsoever strong cannot partake the character of legal evidence. Reference was made to the judgement of Hon`ble Supreme Court in the case of Lalchand Bhagat Ambica Ram vs. CIT (1959) 37ITR 288 (SC, Umacharan Shaw 37 ITR 271 and Omar Salay Mohamed Sait 37ITR 151. We note that the entire case of the revenue is based upon the presumption that the assessee has ploughed back his own unaccounted money in the form of bogus LTCG. However, this presumption or suspicion howsoever strong it may appear to be, but needs to be corroborated by some evidence to establish a link that the assessee had brought back his unaccounted income in the form of LTCG.

18. We note that since the purchase and sale transactions are supported and evidenced by Bills, Contract Notes, Demat statements and bank statements etc., and when the transactions of purchase of shares were accepted by the Id AO in earlier years, the same could not be treated as bogus simply on the basis of some reports of the Investigation Wing and/or the orders of SEBI and/or the statements of third parties. In support of the aforesaid submissions, the Id Counsel, in addition to the aforesaid judgements, has referred to and relied on the following cases:-

- (i) *Baijnath Agarwal vs. ACIT – [2010] 40 SOT 475 (Agra (TM))*
- (ii) *ITO vs. Bibi Rani Bansal – [2011] 44 SOT 500 (Agra) (TM)*
- (iii) *ITO vs. Ashok Kumar Bansal – ITA No. 289/Agra/2009 (Agra ITAT)*
- (iv) *ACIT vs. Amita Agarwal & Others – ITA Nos. 247/(Kol)/ of 2011 (Kol ITAT)*
- (v) *Rita Devi & Others vs. DCIT – IT(SS)A Nos. 22-26/Kol/2p11 (Kol ITAT)*
- (vi) *Surya Prakash Toshniwal vs. ITO – ITA No. 1213/Kol/2016 (Kol ITAT)*
- (vii) *Sunita Jain vs. ITO – ITA No. 201 & 502/Ahd/2016 (Ahmedabad ITAT)*
- (viii) *Ms. Farrah Marker vs. ITO – ITA No. 3801/Mum/2011 (Mumbai ITAT)*
- (ix) *Anil Nandkishore Goyal vs. ACIT – ITA Nos. 1256/PN/2012 (Pune ITAT)*
- (x) *CIT vs. Sudeep Goenka – [2013] 29 taxmann.com 402 (Allahabad HC)*
- (xi) *CIT vs. Udit Narain Agarwal – [2013] 29 taxmann.com 76 (Allahabad HC)*
- (xii) *CIT vs. Jamnadevi Agarwal [2012] 20 taxmann.com 529 (Bombay HC)*
- (xiii) *CIT vs. Himani M. Vakil – [2014] 41 taxmann.com 425 (Gujarat HC)*
- (xiv) *CIT vs. Maheshchandra G. Vakil – [2013] 40 taxmann.com 326 (Gujarat HC)*
- (xv) *CIT vs. Sumitra Devi [2014] 49 Taxmann.com 37 (Rajasthan HC)*
- (xvi) *GaneshmullBijay Singh Baid HUF vs. DCIT – ITA Nos. 544/Kol/2013 (Kolkata ITAT)*

*(xvii) Meena Devi Gupta & Others vs. ACIT – ITA Nos. 4512 & 4513/Ahd/2007 (Ahmedabad ITAT)*

*(xviii) Manish Kumar Baid ITA 1236/Kol/2017 (Kolkata ITAT)*

*(xix) Mahendra Kumar Baid ITA 1237/Kol/2017 (Kolkata ITAT)*

19. The Id Counsel also brought to our notice that once the assessee has furnished all evidences in support of the genuineness of the transactions, the onus to disprove the same is on revenue. He referred to the judgement of *Hon'ble Supreme Court in the case of Krishnanand Agnihotri vs. The State of Madhya Pradesh [1977] 1 SCC 816 (SC)*. In this case the Hon'ble Apex Court held that the burden of showing that a particular transaction is benami and the appellant owner is not the real owner always rests on the person asserting it to be so and the burden has to be strictly discharged by adducing evidence of a definite character which would directly prove the fact of benami or establish circumstances unerringly and reasonably raising inference of that fact. The Hon'ble Apex Court further held that it is not enough to show circumstances which might create suspicion because the court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence. The Id AR submitted that similar view has been taken in the following judgments while deciding the issue relating to exemption claimed by the assessee on LTCG on alleged Penny Socks.

*(i) ITO vs Ashok Kumar Bansal – ITA No. 289/Agr/2009 (Agra ITAT)*

*(ii) ACIT vs. J. C. Agarwal HUF – ITA No. 32/Agr/2007 (Agra ITAT)*

20. Moreover it was submitted before us by Id Counsel that the AO was not justified in taking an adverse view against the assessee on the ground of abnormal price rise of the shares and alleging price rigging. It was submitted that there is no allegation in orders of SEBI and/or the enquiry report of the Investigation Wing to the effect that the assessee, the Companies dealt in and/or his broker was a party to the price rigging or manipulation of price in BSE/CSE. The Id AR referred to the following judgments in support of this contention wherein under similar facts of the case it was held that the AO was not justified in refusing to allow the benefit

under section 10(38) of the Act and to assess the sale proceeds of shares as undisclosed income of the assessee under section 68 of the Act :-

- (i) *ITO vs. Ashok Kumar Bansal – ITA No. 289/Agr/2009 (Agra ITAT)*
- (ii) *ACIT vs. Amita Agarwal & Others - ITA Nos. 247/(Kol)/ of 2011 (Kol ITAT)*
- (iii) *Lalit Mohan Jalan (HUF) vs. ACIT – ITA No. 693/Kol/2009 (Kol ITAT)*
- (iv) *Mukesh R. Marolia vs. Addl. CIT – [2006] 6 SOT 247 (Mum)*

21. We note that the Id. D.R. for the Revenue had heavily relied upon the decision of the Hon'ble Bombay High Court in the case of Bimalchand Jain in Tax Appeal No. 18 of 2017. We note that in the case relied upon by the Id. D.R, we find that the facts are different from the facts of the case in hand. Firstly, in that case, the purchases were made by the assessee in cash for acquisition of shares of companies and the purchase of shares of the companies was done through the broker and the address of the broker was incidentally the address of the company. The profit earned by the assessee was shown as capital gains which was not accepted by the A.O. and the gains were treated as business profit of the assessee by treating the sales of the shares within the ambit of adventure in nature of trade. Thus, it can be seen that in the decision relied upon by the Id. DR, the dispute was whether the profit earned on sale of shares was capital gains or business profit.

22. We note that when the transactions were as per norms prescribed by SEBI and concerned stock exchange and suffered STT, brokerage, service tax, and cess. There is no iota of evidence over the transactions as it were reflected in demat account. AO did not doubt the genuineness of the documents submitted by assessee. The Id AO failed to bring on record any evidence to suggest that the sale of shares by the Assessee were not genuine. The assessee produced the contract notes, details of demat accounts and produced documents showing all payments were received by the assessee through banks. In these circumstances, the long term capital gain (LTCG) earned by the assessee should not be treated as bogus, as held

by the jurisdictional Hon`ble Calcutta High court in various cases, as mentioned below:

**(i) . CIT V. Shreyashi Ganguli [ITA No. 196 of 2012] (Cal- HC)**

In this case the Hon`ble Calcutta High Court held that the Assessing Officer doubted the transactions since the selling broker was subjected to SEBI's action. However, the transactions were as per norms and suffered STT, brokerage, service tax, and cess. There is no iota of evidence over the transactions as it were reflected in demat account. The appeal filed by the revenue was dismissed.

**(ii) CIT V. Rungta Properties Private Limited [ITA No. 105 of 2016] (Cal-HC)**

In this case the Hon`ble Calcutta High Court affirmed the decision of this tribunal, wherein, the tribunal allowed the appeal of the assessee where the ld AO did not accept the explanation of the assessee in respect of his transactions in alleged penny stocks. The Tribunal found that the ld AO disallowed the loss on trading of penny stock on the basis of some information received by him. However, it was also found that the ld AO did not doubt the genuineness of the documents submitted by the assessee. The Tribunal held that the ld AO's conclusions are merely based on the information received by him. The appeal filed by the revenue was dismissed.

**(iii) CIT V. Andaman Timbers Industries Ltd [ITA No. 721 of 2008] (Cal-HC)**

In this case the Hon`ble Calcutta High Court affirmed the decision of this Tribunal wherein the loss suffered by the Assessee was allowed since the ld AO failed to bring on record any evidence to suggest that the sale of shares by the Assessee were not genuine.

**(iv) CIT V. Bhagwati Prasad Agarwal [2009- TMI-34738 (Cal- HC) in ITA No. 22 of 2009 dated 29.4.2009]**

In this case the Assessee claimed exemption of income from Long Term Capital Gains. However, the ld AO, based on the information received by him from Calcutta Stock Exchange found that the transactions were not recorded thereat. He

therefore held that the transactions were bogus. The Hon'ble Jurisdictional High Court, affirmed the decision of the Tribunal wherein it was found that the claim of transactions entered into by the assessee have been proved, accounted for, documented and supported by evidence. It was also found that the assessee produced the contract notes, details of demat accounts and produced documents showing all payments were received by the assessee through banks. On these facts, the appeal of the revenue was summarily dismissed by High Court.

**(v)..The Hon'ble High Court of Calcutta in the case of ALPINE INVESTMENTS ITA 620 of 2008, dated 26<sup>th</sup> August 2008, held as follows:**

*“It appears that the share loss and the whole transactions were supported by contract notes, bills and were carried out through recognized stockbroker of the Calcutta Stock Exchange and all the payments made to the stockbroker and all the payments received from stockbroker through account payee instruments, which were also filed in accordance with the assessment.*

*It appears from the facts and materials placed before the Tribunal and after examining the same the Tribunal came to the conclusion and allowed the appeal filed by the assessee. In doing so the Tribunal held that the transaction fully supported by the documentary evidences could not be brushed aside on suspicion and surmises. However, it was held that the transactions of share are genuine. Therefore, we do not find that there is any reason to hold that there is any substantial question of law involved in this matter. Hence, the appeal being ITA No.620 of 2008 is dismissed.”*

**(vi) The Hon'ble Calcutta High Court in the case of [Principal Commissioner Of Income vs M/S. Blb Cables And Conductors](#); ITAT No.78 of 2017, GA No.747 of 2017; dt. 19 June, 2018, had upheld the order of the Tribunal by observing as follows:-**

*“4. We have heard both the side and perused the materials available on record. The ld. AR submitted two papers books. First book is running in pages no. 1 to 88 and 2nd paper book is running in pages 1 to 34. Before us the ld. AR submitted that the order of the AO is silent about the date from which the broker was expelled.*

*There is no law that the off market transactions should be informed to stock exchange. All the transactions are duly recorded in the accounts of both the parties and supported with the account payee cheques. The ld. AR has also submitted the IT return, ledger copy, letter to AO and PAN of the broker in support of his claim which is placed at pages 72 to 75 of the paper book. The ld. AR produced the purchase & sale contracts notes which are placed on pages 28 to 69 of the paper book. The purchase and sales registers were also submitted in the form of the paper book which is placed at pages 76 to 87. The Board*

*resolution passed by the company for the transactions in commodity was placed at page 88 of the paper book. On the other hand, the ld. DR relied in the order of the lower authorities.*

*4.1 From the aforesaid discussion we find that the assessee has incurred losses from the off market commodity transactions and the AO held such loss as bogus and inadmissible in the eyes of the law. The same loss was also confirmed by the ld. CIT(A). However, we find that all the transactions through the broker were duly recorded in the books of the assessee. The broker has also declared in its books of accounts and offered for taxation. In our view to hold a transaction as bogus, there has to be some concrete evidence where the transactions cannot be proved with the supportive evidence.”*

**(vii).M/s Classic Growers Ltd. vs. CIT [ITA No. 129 of 2012] (Cal- HC)**

In this case the ld AO found that the formal evidences produced by the assessee to support huge losses claimed in the transactions of purchase and sale of shares were stage managed. The Hon`ble High Court held that the opinion of the AO that the assessee generated a sizeable amount of loss out of prearranged transactions so as to reduce the quantum of income liable for tax might have been the view expressed by the ld AO but he miserably failed to substantiate that. The High Court held that the transactions were at the prevailing price and therefore the suspicion of the AO was misplaced and not substantiated.

**(viii)CIT V. Lakshmanarh Estate & Trading Co. Limited [2013] 40 taxmann.com 439 (Cal)** – In this case the Hon`ble Calcutta High Court held that on the basis of a suspicion howsoever strong it is not possible to record any finding of fact. As a matter of fact suspicion can never take the place of proof. It was further held that in absence of any evidence on record, it is difficult if not impossible, to hold that the transactions of buying or selling of shares were colourable transactions or were resorted to with ulterior motive.

We note that above mentioned judgments of Hon`ble Calcutta High Court, by and large held that where the whole transactions were supported by contract notes, bills and were carried out through recognized stockbroker of Stock Exchange and all the payments made to the stockbroker and all the payments received from stockbroker through account payee cheques, then in these facts and circumstances addition made by assessing officer on account of bogus long term capital gain should be deleted. We note that unless and until the order of Jurisdictional Hon`ble

High Court is reversed by Hon`ble Supreme Court, the same has to be given due effect. Judicial discipline demands that once an order has been passed in the assessee's own case, by the Jurisdictional High court, the Tribunal is duty bound to act in accordance with the same.

We note that in the case of **Union of India v. Raghbir Singh (1989) 178 ITR 548 (SC)**, the Supreme Court held that the doctrine of binding precedent has merit of promoting certainty and consistency in judicial decisions. As per the doctrine of precedent, all lower Courts, Tribunals and authorities exercising judicial or quasi-judicial functions are bound by the decisions of the High Court within whose territorial jurisdiction these Courts, Tribunals & authorities functions. Therefore, respectfully following the judgments of the Jurisdictional, Hon`ble High Court of Calcutta, on similar and identical facts, the addition made by assessing officer should be deleted.

23. We note that when the transactions were as per norms prescribed by SEBI and concerned stock exchange and suffered STT, brokerage, service tax, and cess. There is no iota of evidence over the transactions as it were reflected in demat account. AO did not doubt the genuineness of the documents submitted by assessee. The ld AO failed to bring on record any evidence to suggest that the sale of shares by the Assessee were not genuine. The assessee produced the contract notes, details of demat accounts and produced documents showing all payments were received by the assessee through banks. In these circumstances, the long term capital gain (LTCG) earned by the assessee should not be treated as bogus, as held by the Coordinate Benches of ITAT Kolkata, in the following cases:

**(i). Mr. Sanjiv Shroff, I.T.A. No. 1197/Kol/2018, Assessment Year: 2014-15, order dated, 02.01.2019**

*“28. We note that since the purchase and sale transactions are supported and evidenced by Bills, Contract Notes, Demat statements and bank statements etc., and when the transactions of purchase of shares were accepted by the ld AO in earlier years, the same could not be treated as bogus simply on the basis of some reports of the Investigation Wing and/or the orders of SEBI and/or the statements of third parties. In support of the aforesaid submissions, the ld AR, in addition to the aforesaid judgements, has referred to and relied on the following cases:-*

- (xx) *Baijnath Agarwal vs. ACIT – [2010] 40 SOT 475 (Agra (TM))*
- (xxi) *ITO vs. Bibi Rani Bansal – [2011] 44 SOT 500 (Agra) (TM)*
- (xxii) *ITO vs. Ashok Kumar Bansal – ITA No. 289/Agra/2009 (Agra ITAT)*
- (xxiii) *ACIT vs. Amita Agarwal & Others – ITA Nos. 247/(Kol)/ of 2011 (Kol ITAT)*
- (xxiv) *Rita Devi & Others vs. DCIT – IT(SS)A Nos. 22-26/Kol/2p11 (Kol ITAT)*
- (xxv) *Surya Prakash Toshniwal vs. ITO – ITA No. 1213/Kol/2016 (Kol ITAT)*
- (xxvi) *Sunita Jain vs. ITO – ITA No. 201 & 502/Ahd/2016 (Ahmedabad ITAT)*
- (xxvii) *Ms. Farrah Marker vs. ITO – ITA No. 3801/Mum/2011 (Mumbai ITAT)*
- (xxviii) *Anil Nandkishore Goyal vs. ACIT – ITA Nos. 1256/PN/2012 (Pune ITAT)*
- (xxix) *CIT vs. Sudeep Goenka – [2013] 29 taxmann.com 402 (Allahabad HC)*
- (xxx) *CIT vs. Udit Narain Agarwal – [2013] 29 taxmann.com 76 (Allahabad HC)*
- (xxxi) *CIT vs. Jamnadevi Agarwal [2012] 20 taxmann.com 529 (Bombay HC)*
- (xxxii) *CIT vs. Himani M. Vakil – [2014] 41 taxmann.com 425 (Gujarat HC)*
- (xxxiii) *CIT vs. Maheshchandra G. Vakil – [2013] 40 taxmann.com 326 (Gujarat HC)*
- (xxxiv) *CIT vs. Sumitra Devi [2014] 49 Taxmann.com 37 (Rajasthan HC)*
- (xxxv) *GaneshmullBijay Singh Baid HUF vs. DCIT – ITA Nos. 544/Kol/2013 (Kolkata ITAT)*
- (xxxvi) *Meena Devi Gupta & Others vs. ACIT – ITA Nos. 4512 & 4513/Ahd/2007 (Ahmedabad ITAT)*
- (xxxvii) *Manish Kumar Baid ITA 1236/Kol/2017 (Kolkata ITAT)*
- (xxxviii) *Mahendra Kumar Baid ITA 1237/Kol/2017 (Kolkata ITAT)*

29. The ld AR also brought to our notice that once the assessee has furnished all evidences in support of the genuineness of the transactions, the onus to disprove the same is on revenue. He referred to the judgement of Hon'ble Supreme Court in the case of *Krishnanand Agnihotri vs. The State of Madhya Pradesh [1977] 1 SCC 816 (SC)*. In this case the Hon'ble Apex Court held that the burden of showing that a particular transaction is benami and the appellant owner is not the real owner always rests on the person asserting it to be so and the burden has to be strictly discharged by adducing evidence of a definite character which would directly prove the fact of benami or establish circumstances unerringly and reasonably raising inference of that fact. The Hon'ble Apex Court further held that it is not enough to show circumstances which might create suspicion because the court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence. The ld AR submitted that similar view has been taken in the following judgments while deciding the issue relating to exemption claimed by the assessee on LTCG on alleged Penny Socks.

- (iii) *ITO vs. Ashok Kumar Bansal – ITA No. 289/Agr/2009 (Agra ITAT)*
- (iv) *ACIT vs. J. C. Agarwal HUF – ITYA No. 32/Agr/2007 (Agra ITAT)*

30. Moreover, it was submitted before us by ld AR that the AO was not justified in taking an adverse view against the assessee on the ground of abnormal price rise of the shares and alleging price rigging. It was submitted that there is no allegation in orders of SEBI and/or the enquiry report of the Investigation Wing to the effect that the assessee, the Companies dealt in and/or his broker was a party to the price rigging or manipulation of price in CSE. The ld AR referred to the following judgments in support of this contention wherein under similar facts of the case it was held that the AO was not justified in refusing to allow the benefit under section 10(38)

of the Act and to assess the sale proceeds of shares as undisclosed income of the assessee under section 68 of the Act :-

- (v) ITO vs. Ashok Kumar Bansal – ITA No. 289/Agr/2009 (Agra ITAT)
- (vi) ACIT vs. Amita Agarwal & Others - ITA Nos. 247/(Kol)/ of 2011 (Kol ITAT)
- (vii) Lalit Mohan Jalan (HUF) vs. ACIT – ITA No. 693/Kol/2009 (Kol ITAT)
- (viii) Mukesh R. Marolia vs. Addl. CIT – [2006] 6 SOT 247 (Mum)

31. We note that the ld. D.R. had heavily relied upon the decision of the Hon'ble Bombay High Court in the case of Bimalchand Jain in Tax Appeal No. 18 of 2017. We note that in the case relied upon by the ld. D.R, we find that the facts are different from the facts of the case in hand. Firstly, in that case, the purchases were made by the assessee in cash for acquisition of shares of companies and the purchase of shares of the companies was done through the broker and the address of the broker was incidentally the address of the company. The profit earned by the assessee was shown as capital gains which was not accepted by the A.O. and the gains were treated as business profit of the assessee by treating the sales of the shares within the ambit of adventure in nature of trade. Thus, it can be seen that in the decision relied upon by the ld. DR, the dispute was whether the profit earned on sale of shares was capital gains or business profit.

32. It is clear from the above that the facts of the case of the assessee are identical with the facts in the cases wherein the co-ordinate bench of the Tribunal has deleted the addition and allowed the claim of LTCG on sale of shares of M/s KAFL. We, therefore, respectfully following the same, and set aside the order of Ld. CIT(A) and direct the AO not to treat the long term capital as bogus and delete the consequential addition.”

**(ii) Jagmohan Agarwal Vs. ACIT, ITA No.604/Kol/2018, order dated 05.09.2018.**

“35. In the light of the documents stated in para 30 at Page 14 (supra) we find that there is absolutely no adverse material to implicate the assessee to the entire gamut of unfounded/unwarranted allegations leveled by the AO against the assessee, which in our considered opinion has no legs to stand and therefore has to fall. We take note that the ld. DR could not controvert the facts which are supported with material evidences furnished by the assessee which are on record and could only rely on the orders of the AO/CIT(A). We note that the allegations that the assessee/brokers got involved in price rigging/manipulation of shares must therefore consequently fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the transactions relevant to the purchase and sale of shares resulting in long term capital gain. Neither these evidences were found by the AO nor by the ld. CIT(A) to be false or fictitious or bogus nor the AO had issued any notice to the brokers for confirmation. The facts of the case and the evidence in support of the evidence clearly support the claim of the assessee that the transactions of the assessee were genuine and the authorities below was not justified in rejecting the claim of the assessee exempted u/s 10(38) of the Act on the basis of suspicion, surmises and conjectures. It is to be kept in mind that suspicion how so ever strong, cannot

*partake the character of legal evidence. In the aforesaid facts and circumstance, for allowing the appeal we rely on the decision of the Hon'ble Calcutta High Court in the case of M/s. Alipine Investments in ITA No.620 of 2008 dated 26<sup>th</sup> August, 2008 wherein the High Court held as follows :*

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

*It appears from the facts and materials placed before the Tribunal and after examining the same, the tribunal allowed the appeal by the assessee.*

*In doing so the tribunal held that the transactions cannot be brushed aside on suspicion and surmises. However it was held that the transactions of the shares are genuine. Therefore we do not find that there is any reason to hold that there is no substantial question of law held in this matter. Hence the appeal being ITA No.620 of 2008 is dismissed."*

36. *We note that the ld. AR cited plethora of the case laws to bolster his claim which are not being repeated again since it has already been incorporated in the submissions of the ld. AR (supra) and have been duly considered to arrive at our conclusion. The ld. DR could not bring to our notice any case laws to support the impugned decision of the ld. CIT(A)/AO. In the aforesaid facts and circumstances of the case, we hold that the ld. CIT(A) was not justified in upholding the addition of sale proceeds of the shares as undisclosed income of the assessee u/s 68 of the Act. We therefore direct the AO to delete the addition."*

**(iii).Navneet Agarwal, ITA No.2281/Kol/ 2017, order dated 05.09.2018**

*"The assessee in this case had stated that the assessee was allotted of 50000 equity shares of SCITIL. The payment for the allotment of shares was made through an account payee cheque (copy of the bank statement evidencing the source of money). Annual return no. 20B was filed with Registrar of companies by SCITIL showing the assessee's name as shareholder. The assessee lodged the said shares with the Depository ESSBSL with a Demat request. The said shares were dematerialized and copy of demat request slip along with the transaction statement is placed on record. Later on, the High Court approved the scheme of amalgamation of SCITIL with CSL. In accordance with the said scheme of amalgamation, the assessee was allotted 50000 equity shares of CSL. The demat shares are reflected in the transaction statement of the period from 1-11-2011 to 31-12-2013. The assessee sold 50000 shares through her broker SKP which was a SEBI registered broker and earned a Long Term Capital Gain. Copy of Form No. 10DB issued by the broker, in support of charging of S.T.T. in respect of the transactions appearing in the ledger is placed on record. The holding period of the said scrip is more than one year (above 500 days) through in order to get the benefit of claim of Long Term Capital Gain the holding period is required to be 365 days*

*The Assessing Officer as well as the Commissioner (Appeals) have rejected these evidences filed by the assessee by referring to 'Modus Operandi' of persons for earning long term capital gains which is exempt from income tax. All these*

*observations of Investigation wing were general in nature and were applied across the board to all the 60,000 or more assesseees who fall in this category. Specific evidences produced by the assessee were not controverted by the revenue authorities. No evidence collected from third parties was confronted to the assesseees. No opportunity of cross-examination of persons, on whose statements the revenue relied to make the addition, was provided to the assessee. The addition is made based on a report from the investigation wing.*

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

*It is well settled that evidence collected from third parties cannot be used against an assessee unless this evidence is put before him and he is given an opportunity to controvert the evidence. In this case, the Assessing Officer relied only on a report as the basis for the addition. The evidence based on which the DDIT report was prepared is not brought on record by the Assessing Officer nor is it put before the assessee. The submission of the assessee that she is just an investor and as she received some tips and she chose to invest based on these market tips and had taken a calculated risk and had gained in the process and that she is not party to the scam etc., has to be controverted by the revenue with evidence. When a person claims that she has done these transactions in a bona fide and genuine manner and was benefitted, one cannot reject this submission based on surmises and conjectures. As the report of investigation wing suggests, there are more than 60,000 beneficiaries of LTCG. Each case has to be assessed based on legal principles of legal import laid down by the Courts of law*

*Just the modus operandi, generalisation, preponderance of human probabilities cannot be the only basis for rejecting the claim of the assessee. Unless specific evidence is brought on record to controvert the validity and correctness of the documentary evidences produced, the same cannot be rejected by the assessee. The burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidences, which would directly prove the fact of bogusness or*

*establish circumstance unerringly and reasonably raising an interference to that effect.*

*The Assessing officer as well as the Commissioner (Appeals) has been guided by the report of the investigation wing prepared with respect to bogus capital gains transactions. However, the Assessing Officer as well as the Commissioner (Appeals), have brought out any part of the investigation wing report in which the assessee has been investigated and /or found to be a part of any arrangement for the purpose of generating bogus long term capital gains. Nothing has been brought on record to show that the persons investigated, including entry operators or stock brokers, have named that the assessee was in collusion with them. In absence of such finding how is it possible to link their wrong doings with the assessee. In fact, the investigation wing is a separate department which has not been assigned assessment work and has been delegated the work of only making investigation. The Act has vested widest powers on this wing. It is the duty of the investigation wing to conduct proper and detailed inquiry in any matter where there is allegation of tax evasion and after making proper inquiry and collecting proper evidences the matter should be sent to the assessment wing to assess the income as per law. No such action executed by investigation wing against the assessee. In absence of any finding specifically against the assessee in the investigation wing report, the assessee cannot be held to be guilty or linked to the wrong acts of the persons investigated. In this case, the Assessing Officer at best could have considered the investigation report as a starting point of investigation. The report only informed the Assessing Officer that some persons may have misused the script for the purpose of collusive transaction. The Assessing Officer was duty bound to make inquiry from all concerned parties relating to the transaction and then to collect evidences that the transaction entered into by the assessee was also a collusive transaction. However, the Assessing Officer has not brought on record any evidence to prove that the transactions entered by the assessee which are otherwise supported by proper third party documents are collusive transactions.*

*The Assessing Officer having failed to bring on record any material to prove that the transaction of the assessee was a collusive transaction could not have rejected the evidences submitted by the assessee. In fact, in this case nothing has been found against the assessee with aid of any direct evidences or material against the assessee despite the matter being investigated by various wings of the Income Tax Department hence under these circumstances nothing can be implicated against the assessee*

*One is bound to consider and rely on the evidence produced by the assessee in support of its claim and base decision on such evidence and not on suspicion or preponderance of probabilities no material was brought on record by the Assessing Officer to controvert the evidence furnished by the assessee. Under these circumstances, the evidence filed by the assessee is accepted and the claim that the income in question is a bona fide Long Term Capital Gain arising from the sale of shares is allowed and hence exempt from income tax. [Para 20]"*

24. To conclude, we note that the assessee submitted before us the copy of balance sheet and profit and loss account (vide PB-53 to 71), copy of Affidavit dated

29.06.2015 in respect of retraction of statement made u/s 131 of the Act (vide PB-72 to 77). The assessee submitted before us the copy of ledger accounts of broker M/s Consortium Securities Pvt. Ltd. along with copy of bills (PB-78 to 99). The assessee has submitted the copy of bank statement of Allahabad Bank (PB-100 to 102), copy of HDFC Bank (PB-104 to 114), copy of Oriental Bank of Commerce (PB-115-116) again copy of Oriental Bank of Commerce (PB-117 to 119) and copy of Punjab National Bank (PB-120 to 124). The assessee also submitted the copy of demat statement accounts vide PB 122 to 153. Therefore, we note that the required documents were submitted and transactions which were done through banking channels and which are getting reflected in the demat statement accounts also. The price of scrip was determined by the market forces and there is no any human intervention. By submitting this plethora documents and statements, the Id. Counsel claimed that the long term capital gain generated by the assessee is genuine. We note that in the assessee`s case under consideration, a search and seizure action was conducted by the department on 03.03.2015. That is, search and seizure was conducted in the previous year 01.04.2014 to 31.03.2015, hence the assessment year for the search is A.Y. 2015-16, whereas assessee`s both appeals under consideration pertain to assessment year 2013-14 and 2014-15, which are unabated assessment years. In the case of unabated assessment years, the addition can not be made without incriminating material. We note that the search team did not find any incriminating material, hence addition should not be made in case of unabated assessment years (that is, concluded proceeding). We note that assessing officer mainly made addition based on theory of "Suspicious Transactions", on the basis of report of Investigation Wing. We note that the Ld. A.O. was required to convert the suspicion into the legal evidence by way of bringing concrete and conclusive findings and material on records. Since, the Ld A.O. took no step whatsoever the suspicion remains intact and suspicion whatsoever strong cannot take the position of legal evidences. We note that the Assessing officer as well as the Commissioner (Appeals) has been guided by the report of the investigation wing prepared with respect to bogus capital gains transactions. However, the Assessing Officer as well as the Commissioner (Appeals), have not brought out any part of the investigation wing report in which the assessee has been

investigated and /or found to be a part of any arrangement for the purpose of generating bogus long term capital gains. We note that Mr. Deepak Kumar Agarwal has retracted from his statement which was taken by the DDIT (Inv). Wing Kolkata on 05.06.2015, by filing an affidavit. We note that statement recorded under section 132(4) of the Act can form basis for an assessment only if such statement relates to any incriminating evidence of undisclosed income unearthed during search. We note that in assessee`s case under consideration, the search team did not find any incriminating material therefore, addition merely on the statement recorded under section 132(4) of the Act should not be made. Therefore, based on the above facts and circumstances, we delete the addition of Rs.3,39,46,071/-

25. The next issue is in relation to confirming the addition of Rs.1,69,730/- as unexplained expenditure towards commission charges of sale of such shares by the operator. We have already held that the transactions relating to LTCG were genuine and not the accommodation entries as alleged by the AO. Consequently, the addition of Rs.1,69,730/- is hereby directed to be deleted. We accordingly hold that the issue is allowed in favour of the assessee.

26. In the result both the appeals of the assessee IT(SS) A Nos.125 & 126/K/2018 are allowed.

**Order pronounced in the Court on 10.05.2019**

**Sd/-**  
**(S.S. GODARA)**  
**न्यायिकसदस्य / JUDICIAL MEMBER**

**Sd/-**  
**(A.L.SAINI)**  
**लेखासदस्य / ACCOUNTANT MEMBER**

कोलकाता /Kolkata;

दिनांक/ Date: 10/05/2019

(SB, Sr.PS)

Copy of the order forwarded to:

1. Shri Deepak Kumar Agarwal
2. ACIT, CC-3(1), Kolkata

*Shri Deepak Kumar Agarwal*  
*IT(SS)A Nos.125 & 126/Kol/2018*  
*Assessment Years:2013-14 & 2014-15*  
4. C.I.T.- Kolkata.

3. C.I.T(A)-
5. CIT(DR), Kolkata Benches, Kolkata.
6. Guard File.

True copy

By Order

Assistant Registrar  
ITAT, Kolkata Benches

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