

आयकर अपीलीय अधीकरण, न्यायपीठ – “A” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
 (समक्ष) Before श्री ए. टी. वर्की, न्यायीक सदस्य एवं/and श्री एम. बालागणेश, लेखा सदस्य)
 [Before Shri A. T. Varkey, JM & Shri M. Balaganesh, AM]

I.T.A. No. 834/Kol/2018
Assessment Year: 2014-15

Smt. Madhu Killa (PAN: AGOPK0403H)	Vs.	Assistant Commissioner of Income-tax, Circle-36, Kolkata.
Appellant		Respondent

Date of Hearing	25.09.2018
Date of Pronouncement	02.11.2018
For the Appellant	Shri S. M. Surana, Advocate
For the Respondent	Shri Sandeep Lakra, Addl. CIT, Sr. DR

ORDER

Per Shri A.T.Varkey, JM

This appeal preferred by the assessee is against the order of the Ld. CIT(A)-10, Kolkata dated 14.02.2018 for AY 2014-15.

2. The assessee an individual had claimed to have received Long Term Capital Gain (LTCG) which was exempt u/s. 10(38) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) by sale of shares of M/s. Nikki Finance Global Ltd. (M/s. NFGL) to the tune of Rs.1.84 cr. The assessee had purchased the shares in FY 2012-13 and has sold the same in FY 2013-14. However, the AO noted that the assessee had purchased these shares through off market and doubted the receipt of astronomical gain by selling of these shares after having taken note of the reports of SEBI and Investigation Wing of the Department was of the opinion that the entire transaction was bogus and, therefore, he was pleased to add the entire sale consideration of M/s. NFGL of Rs.2.16 cr. as income of the assessee. The AO also held that in order to raise such capital gain, the assessee must have incurred some cost towards commission, therefore, the AO estimated such commission @ 5% of sale

value and added a sum of Rs.10,82,460/- to the income of the assessee. Aggrieved, assessee preferred an appeal before the Ld. CIT(A) who was pleased to confirm the action of the AO. Aggrieved, the assessee is before us.

3. Before us the Ld. AR submitted that the addition made by the AO and upheld by the Ld. CIT(A) was based on presumption and suspicion alone and, therefore, perverse in the eyes of law. In the course of hearing of the case, the Ld. AR referred to various documentary evidences furnished in the paper book in support of the claim of the assessee to prove the genuineness of the transactions relating to LTCG on sale of shares. The Ld. AR drew our attention to the order of the AO wherein the AO has erroneously recorded at para 3.1 that the assessee had purchased the shares of M/s NFGL off market (not through established stock exchange) whereas the assessee had purchased the shares of M/s. NFGL through M/s. M. Prasad & Co. Ltd. which is a recognized stock broker of Bombay Stock Exchange (BSE), through whom the assessee had made several investments in various scrips/shares and drew our attention to page 5 of paper book wherein the details of investment made by the assessee for the previous AY 2013-14 is given which shows that assessee has dealt with 30 nos. of different shares of companies including Reliance, Infosys, L & T etc. and it was thus contended that this transaction with M/s. NFGL was not the single investment which assessee carried out through this broker. Thus, according to Ld. AR, the AO erred in finding that the assessee had purchased shares of M/s. NFGL in off market and not through established stock exchange. The Ld. AR drew our attention to page no. 6 of the paper book wherein we note that the assessee had purchased on 13.06.2012, 25000 shares at cost price of Rs.128.25 of M/s. NFGL wherein the assessee had remitted STT of Rs.4007.81 and that the transaction has happened through M/s. M. Prasad & Co. Ltd. which is a registered member of the Bombay Stock Exchange. The Ld. AR drew our attention to page 18 of the paper book which shows that the amount in question i.e. Rs.32,21,216/- has been transferred on 14.06.2012 from assessee's account to the registered broker's account i.e. of M/s. M. Prasad & Co.. The Ld. AR drew our attention to page 26 of the paper book which is the de mat transaction statement wherein we note that on 15th June, 2012 this 25000 shares have been deposited of M/s. NFGL by

inter depository transaction (CBS). Thus, we find that the AO erred in recording a finding of fact that the assessee had made the purchase of M/s. NFGL not through Stock Exchange but it was an off market transaction. We find that the assessee had purchased the shares of M/s. NFGL through registered broker M/s. M. Prasad & Co. which was a registered stock broker of the Bombay Stock Exchange and on 13.06.2012 assessee purchased 25000 shares at Rs.128.25 per share on which STT was paid and the total transaction of Rs.32,21,213.10 was paid through account payee cheque to the registered broker and the shares were deposited in the demat account (D. P. Stock HLDG Corp of India Ltd.) The following other documents were also filed before the authorities below:

- i) Copy of balance sheet of the assessee as on 31.03.2013 (FY 2012-13 corresponding to AY 2013-14) along with details of investments (page nos 4 and 5 of paper book) wherein 25000 shares of M/s. NFGL of value of Rs 32,21,269.18 is reflected and we note that the assessee had made investment in 30 no. of different shares including that of L&T, Reliance, TISCO, Infosys, ICICI, Infotech etc. and had investments altogether of Rs.87,44,010.73 which has been duly reflected in page 4 of the paper book which is the Balance Sheet as on 31.03.2013 wherein the share investment of Rs.87,44,010.73 has duly been reflected and is tallying.
- ii) Contract Note for purchase of shares of M/s. NFGL is found placed at page 6 of the paper book.
- iii) Copy of the bank statement highlighted the payment of purchase of shares through bank (paper book page 18 & 19).
- iv) Copy of de mat holding statement and transaction statement highlighting the movement of shares from page 25 to 33 of the paper book.
- v) Copy of ledger of assessee in the books of the share broker pages 34 to 36 of the paper book.

Following documents were filed before the authorities below in support of the sale of the shares:

- i) copy of contract note for sale of shares of M/s. NFGL page 7 to 17 of the paper book.

- ii) Copy of bank statement highlighting the receipt of sale consideration pages 20 to 23 of paper book.
- iii) Copy of de mat holding statement and transaction of the statement which highlighting the movement of shares pages 24 to 33 of the paper book.

4. It was also pointed out by the Ld. AR that purchase of shares of M/s. NFGL in FY 2012-13 was duly recorded in the balance sheet and the return was processed by the department u/s. 143(1) of the Act thereby the department has accepted the purchase of shares of M/s. NFGL, however, when sales of the same scrips happened it was not accepted by the AO which action of the AO, according to Ld. AR, was unjustified and need to be set right. The Ld. AR further pointed out that the AO in his eagerness to somehow hold that transaction of M/s. NFGL bogus has erroneously made factual finding that purchases of these shares happened off market when the fact was that the purchase of M/s. NFGL shares were made through Bombay Stock Exchange. The Ld. AR pointed out that the evidence and documents furnished by the assessee before the authorities below were neither found to be false nor fabricated. The Ld. AR submitted that the AO doubted the genuineness of the sale transaction on the basis of some purported orders of the SEBI and/or the Investigation wing. However, the AO has merely mentioned the date of letter issued by the Director of Investigation. Save and except the date of the letter, according to Ld. AR, there is nothing brought on record by the AO as to how the investigation report concerned the assessee and/or the shares sold by the assessee. The Ld. AR submitted that the AO on pages 6-9 of the assessment order had merely stated that the Investigation Wing and SEBI conducted some inquiries in respect of some other Companies and as per the report prepared by them, certain patterns and features were identified by them and as per the AO such patterns and features were emerging in the case related to the shares of the Company (i.e. M/s. NFGL) which the assessee dealt with. However save and except making a passing remark or mere reference to so called patterns, there is nothing in the assessment order from which it can be found that the Assessee or the Company (M/s. NFGL) or the Brokers were adversely named/commented upon in the report of investigation. According to Ld. AR, the AO identified 10-11 adverse features on page 6-7 of the Assessment order, however he

wondered as to how these features were relating to the Company (M/s. NFGL) in the case of assessee was not at all demonstrated. Thus according to Id AR, there was no material whatsoever to hold that the Company (M/s. NFGL) dealt by the assessee was having such pattern or features. It was submitted that the AO disallowed the assessee's claim of LTCG on sale of shares on surmises, suspicion and presumptions alone. It was submitted that the lower authorities have not brought any material or evidence on record to falsify the claim of the assessee or to hold that the share transactions were bogus.

5. The Id AR drew our attention to the fact that the purchase and sale of shares was made on the online platform of the stock exchange; therefore according to Id AR, the assessee did not know the names of the buyers and has no connection and/or relations with any such persons. The transactions of sale of shares were online trading system through his broker from whom he received the sale consideration. The broker also received payments for all his transactions from Stock Exchange. The seller and the buyer cannot know the names of each other as well as that of their respective brokers, who were involved in the trading transactions in the secondary platform. In such a situation according to Id AR, it cannot be presumed that there could be any transfer of cash between the buyers and sellers to convert their unaccounted money of the beneficiaries as alleged by the AO. The Id AR referred to the judgement of *Hon'ble Bombay High Court in the case of CIT vs. Lavanya Land Pvt. Ltd. [2017] 83 taxmann.com 161 (Bom)* to contend 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. Similar view, according to Ld. AR, was taken in the following cases:-

(i) *Baijnath Agarwalla vs. ACIT [2010] 40 SOT 475 (Agra Third Member)*

(ii) *Ganeshmull Biijay Singh Baid HUF vs. DCIT – ITA No. 544/Kol/13 dated 4.12.2015
(Kolkata Tribunal)*

- (iii) *Malti Ghanshyambhai Patodia vs. ITO – ITA No. 3400/Ahd/2015 (Ahmedabad Tribunal)*
- (iv) *Pratik Suryakant Shah vs. ITO – [2017] 77 taxmann.com 260 (Ahmedabad Tribunal)*
- (v) *Padduchari Jeevan Prashant vs. ITO – ITA No. 452/Hyd/2015 (Hyderabad Tribunal)*
- (vi) *Anil Nand Kishore Goyal vs. ACIT – ITA Nos. 1256/PN/2012 (Pune Tribunal)*
- (vii) *CIT vs. Jamna Devi Agrawal – [2012] 20 taxmann.com 529 (Bom HC)*

6. The Id AR submitted that all the observations, conclusions and findings of the lower authorities are based on suspicion, surmises and hearsay. According to Id AR, 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) 37 ITR 288 (SC, , Umacharan Shaw 37 ITR 271 and Omar Salay Mohamed Sait 37 ITR 151*. The Id AR submitted 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 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. The Id AR referred to the judgement of *Special Bench of Mumbai Tribunal in the case of GTC Industries Ltd vs. ACIT [2017] 164 ITD 1 (Mumbai-Trib.)(SB)* The Tribunal observed as under:

46. Ultimately the entire case of Revenue hinges upon the presumption that assessee is bound to have some large share in so called secret money in the form of premium and its circulation. However, this presumption or suspicion how strong it may appear to be true but needs to be corroborated by some evidence to establish a link that GTC actually had some kind of a share in such secret money. It is quite a trite law that suspicion howsoever strong may be but cannot be the basis of addition except for some material evidence on record. The theory of 'preponderance of probability' is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumptions of facts that might go against the assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigations have been carried out, then nothing can be implicated against the assessee

7. The Id AR submitted that there is no direct evidence against the assessee brought on record by AO to hold that the assessee introduced his own unaccounted money by way of bogus LTCG. The Id AR submitted that although various investigations were carried out by different agencies, there is no evidence against the assessee and/or the brokers and/or the Companies in which the assessee dealt with to hold that the assessee was a beneficiary to the modus operandi adopted by different entities / brokers / entry operators. The Id AR submitted that, in view of the aforesaid judgement of Special Bench of Mumbai Tribunal, various case laws relied on by the AO against the assessee are irrelevant in as much as the said orders are based on conclusions drawn on the basis of circumstantial evidences only without any material evidence on record and cannot be applied in the case in hand because assessee has discharged the burden of proof by producing relevant legally admissible evidence, which the AO could not find fault with.

8. The Id AR vehemently submitted that the assessee has furnished all evidences in support of the claim of the assessee that it earned LTCG on transactions of his investment in shares. The purchase of shares had been accepted by the AO in the year of its acquisition and thereafter until the same were sold. The transactions were all through account payee cheques and reflected in the books of accounts. The purchase and sale of shares and the sale of shares were also reflected in Demat account statements. The sale of shares suffered STT, brokerage etc. In the facts and circumstances of the case, it cannot be held that the transactions were bogus. The Id AR referred to the following judgments of Jurisdictional High Court:-

(i) **M/s Classic Growers Ltd. vs. CIT [ITA No. 129 of 2012] (Cal HC)** – In this case the Id 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 Id 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.

(ii) **CIT V. Lakshmarangh 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.

(iii) **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.

(iv) **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 AO did not accept the explanation of the assessee in respect of his transactions in alleged penny stocks. The Tribunal found that the 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 AO did not doubt the genuineness of the documents submitted by the assessee. The Tribunal held that the AO's conclusions are merely based on the information received by him. The appeal filed by the revenue was dismissed.

(v) **CIT V. Andaman Timbers Industries Limited [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 AO failed to bring on record any evidence to suggest that the sale of shares by the Assessee were not genuine.

(vi) **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 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 chain 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.

9. The Id AR submitted before us that where 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 AR, 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) *Ganeshmull Bijay 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)*

10. The ld AR further submitted before us 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.

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

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

11. The Id AR further submitted 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. 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)*

12. The Id AR also submitted that the AO was not justified in disallowing the assessee's claim of exemption under section 10(38) of the Act by concluding that the transactions of the assessee resulting in LTCG on sale of shares were bogus relying on the statements of various unknown persons recorded by Investigation Wing wherein these persons accepted to have provided accommodation entries of various natures including LTCG to different persons. The Id AR submitted that in the statement of third parties, the name of the assessee was not implicated. Even otherwise, no adverse inference could be taken against the assessee on the basis of untested statements without allowing opportunity of cross-examination. The Id AR referred to and relied on the following judgements in support of the aforesaid submissions:-

(i) *Andman Timber Industries vs. CCE – [2015] 62 taxmann.com 3 (SC)*

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

(iii) *ACIT vs. Amita Agarwal & Others – ITA No. 247/(Kol) of 2011 (Kol ITAT)*

- (iv) *ITO vs. Bijaya Ganguly - ITA Nos. 624 & 625/Kol/2011 (Kol ITAT)*
- (v) *Ganeshmull Bijay Singh Baid HUF vs. DCIT – ITA Nos. 544/Kol/2013 (Kolkata ITAT)*
- (vi) *Rita Devi & Others vs. DCIT – IT(SS))A Nos. 22-26/Kol/2p11 (Kol ITAT)*
- (vii) *Malti Ghanshyambhai Patadia vs. ITO - ITA No.3400/Ahd/2015 (Ahmedabad ITAT)*
- (viii) *Pratik Suryakant Shah vs. ITO – [2017] 77 taxmann.com 260 (Ahmedabad ITAT)*
- (ix) *Sunita Jain vs. ITO - ITA No. 201 & 502/Ahd/2016 (Ahmedabad ITAT)*
- (x) *Atul Kumar Khandelwal vs. DCIT – ITA No. 874/Del/2016 (Delhi ITAT)*
- (xi) *Farah Marker vs. ITO – ITA No. 3801/Mum/2011 (Mumbai ITAT)*

13. The Id AR also submitted that the AO was not justified in invoking the provisions of section 68 of the Act to hold that the sale proceeds of shares are unexplained cash credits in the hands of the assessee. According to him, there is no evidence on record to disbelieve that the assessee sold shares through registered share and stock broker with Bombay Stock Exchange. The assessee produced all evidences to explain the source of the amounts received by the assessee from the broker, therefore according to Id AR, the AO was not justified in assessing the sale proceeds of shares as unexplained cash credit under section 68 of the Act.

14. The Id AR submitted that there is no direct evidence against the assessee brought on record by AO to hold that the assessee introduced his own unaccounted money by way of bogus LTCG. The Id AR submitted that although various investigations were carried out by different agencies, there is no evidence against the assessee and/or the brokers and/or the Company in which the assessee dealt with to adversely hold that the assessee was a beneficiary to the modus operandi adopted by different entities / brokers / entry operators. The Id AR submitted that, in view of the aforesaid judgement of Special Bench of Mumbai Tribunal, various case laws relied on by the AO against the assessee are irrelevant in as much as the said orders are based on conclusions drawn on the basis of circumstantial evidences only without any material evidence on record and cannot be applied in the case in

hand because assessee has discharged the burden of proof by producing relevant legally admissible evidence, which the AO could not find fault with. On the other hand, the Ld. DR vehemently supported the impugned order of Ld. CIT(A)/AO and does not want us to interfere in the impugned order.

15. We have heard both the parties and perused the records. It was brought to our notice by the Ld. AR in the assessment order at para 3.13 the AO has stated in sub-para 'c' that "*the assessee purchased shares at Rs.865.97 per share*". It was pointed out by the Ld. AR that the assessee has purchased share of M/s. NFLG for Rs.128.25 per share which is reflected in page 6 of the paper book which is the contract note. According to Ld. AR this is nothing but cut paste of some other case and has nothing to do with the assessee's case and it exposes non-application of mind of the AO. We find that the AO has stated that the assessee has purchased the share at Rs.865 per share whereas the assessee had purchased the shares at Rs.128.25, therefore, we note that the AO erred in making the erroneous finding of the purchase value of the shares. We note that in this case the assessee was investing in different shares of the companies (30 different shares of companies) as evident from perusal of page 5 of paper book and the purchase and sale of shares in M/s. NFGL is one among the 30 odd shares the assessee dealt with as an investment through a registered stock broker of Bombay Stock Exchange "M. Prasad & Co. Ltd." The assessee had purchased 25000 shares of M/s NFGL on 13.06.2012 at a cost price of Rs.128.25 per share and remitted Security Transaction Tax (STT) of Rs.4007.81 and at a total cost price of Rs.32,16,000/- (see contract note placed at page 6 of paper book). Thus we find that the AO erred in finding that the assessee had made the purchase not through Stock Exchange but it was an off market transaction. We find that the assessee had purchased through registered broker M/s. M. Prasad & Co. who was registered stock broker of the Bombay Stock Exchange and on 13.06.2012 assessee purchased 25000 shares at Rs.28.25 per share on which STT was paid and the total transaction of Rs.32,21,213.10 was paid through account payee cheque to the registered broker and the shares were deposited in the demat account (D. P. Stock HLDG Corp of India Ltd.)

16. The sale of M/s. NFGL shares took place through the same registered stock broker of Bombay Stock Exchange from 05.08.2013 to 30.12.2013 for sale price ranging from Rs.820/- to Rs.921/- per scrip (see contract note placed from pages 7 – 17 of paper book). We note from perusal of pages 18-19 of paper book, which reveals that the payment for purchase of shares were made through Axis Bank of assessee and payment has been made on 14.06.2012 vide cheque no. 138919 for an amount of Rs.32,21,213.10 to the recognized stock broker of Bombay Stock Exchange M. Prasad & Co. We also note from perusal of pages 20-23 of paper book which is the extract of pass book of assessee in Punjab National Bank wherein we note that assessee had received sale consideration through bank transaction and we verified the contract note of sale placed at pages 7 to 17 and tallied the entries of sale consideration received by the assessee in her bank account and find it to be correct. We on perusal of page 24, which is the transaction cum holding statement of Stock Holding Corporation of India Ltd. find that the share of M/s. NFGL was held in De-mat account. We note from a perusal of page 26, which is the transaction statement of Demat account shows that M/s. NFGL's shares of Rs.25,000/- by inter depositing transfer on 15.06.2012. A perusal of page 30 of paper book, which is the transactional statement of Demat account corroborate the sale of scrips of M/s. NFGL (from 07.08.2013 – 30.10.2013). A perusal of pages 34-36 of paper book, which is the ledger of assessee in the books of share broker (01.04.2014 to 31.03.2014) corroborates the sale transaction of scrips of M/s. NFGL.

17. The assessee had sold the shares on 05.08.2013 5000 shares at the value of Rs.820/- per share and paid STT and received a consideration of Rs.40,82,079/- which the assessee received by account payee cheque which is reflected in page 21 of the paper book received on 24.08.2013. Like wise, the other sale transactions are reflected from pages 8 to 17 of the paper book for different rates from Rs. 845/- per share, Rs.865/- per share, Rs.920/- per share, Rs.921/- per share etc. and the assessee has received the said consideration through account payee cheque. It was pointed out by the Ld. AR that when a show cause notice was given by the AO on 09.12.2016 wherein the assessee was asked to explain why the sale consideration of Rs.2,16,49,202/- shall not be added back u/s. 68 of the Act as well as

Rs.10,82,460/- being 5% of the said sum be added u/s. 69C of the Act, the assessee promptly replied to it. The AO acknowledges that the assessee had replied vide letter dated 22.12.2016 which the AO has stated to have been placed on record. However, it was brought to our notice that the AO has not made any adverse finding in respect to the submissions made by the assessee in justifying the LTCG claim. It was brought to our notice that no attempt has been made by the AO to issue summons u/s. 131 or 133(6) of the Act to any of the parties involved in all these transactions to record any adverse inference against the assessee, and without doing so, the AO has simply concluded on the basis of the presumption and assumption and circumstantial evidence and on preponderance of probabilities has debunked the entire evidence submitted before the AO to saddle the entire sale consideration and to allege commission given @ 5% which comes to Rs.10,82,460/- against the assessee. Thus we note that the assessee had furnished all primary evidences in the form of bills, contract notes, de Mat statements and bank accounts to prove the genuineness of the transaction relating to purchase and sale of shares resulting in LTCG. By adducing these evidences, the assessee had discharged the onus on her to prove the genuineness of the transaction which yielded her LTCG. Once the assessee had discharged her onus, then the onus shifted to the shoulders of AO then the AO has to examine the veracity of the documents produced by the assessee and if it is found to be correct and valid then in all fairness the AO should accept the claim of LTCG. In case if the AO on verification finds that the documents produced by the assessee is false or fabricated, then the AO should bring his adverse findings to the notice of the assessee and confront her with the adverse material/findings. Then again the onus will shift to the assessee to prove the genuineness of the transaction. Here, in the present case is concerned, the AO after going through the documents, failed to return a finding that documents produced by assessee to substantiate the yield of LTCG was false or fabricated. The facts of the case as discussed, and the evidence adduced by the assessee, support that the transaction made by the assessee through registered stock broker through Bombay Stock Exchange, after remitting STT and all payments were transacted through bank and the shares were held in De mat account, has to be accepted in the absence of any other material to suggest an adverse view. The AO/Ld. CIT(A) erred in rejecting legally admissible evidence and wrongly took adverse view

against the claim of assessee based on surmises, suspicion and conjecture. This action of AO/Ld. CIT(A) is akin to convert "Proof into no proof." We note that AO while describing the modus operandi adopted by unscrupulous elements in the financial markets has made a vague statement that some accommodation entry provider has admitted that M/s. NFGL also indulged in wrong practices, however, we sought the Ld. DR's help to throw some light on this specific allegation made by the AO. However, other than the bald statement, nothing adverse could be found against the shares of M/s. NFGL. Even if for argument sake if there was such an adverse admission made by an accommodation provider against M/s. NFGL, then the AO in all fairness had to confront the assessee with the adverse material and given an opportunity to the assessee to meet it and the assessee should have been given an opportunity to explain it; and in case the assessee desires, she should have been allowed to cross examine the accommodation provider or else the adverse material cannot be acted upon to draw adverse inference against the assessee as held by the Hon'ble Apex Court in *Andaman Timber Industries Vs. Commissioner of Central Excise* 62 Taxman.com 3. It should be kept in mind that assessee cannot be kept in dark as to the material against her and it has to be given to the assessee if AO proposes to use it against the assessee and these are the basic natural justice principles the AO has to keep in mind while framing an assessment. Though AO/Ld. CIT(A) have been swayed by the report of SEBI/Investigation Wing of the department, both the authorities could not point out what was the role of the assessee in any wrong doing which is prohibited by law. We note that neither the purported adverse reports relied on by the AO has been brought on record nor is there any reference to any finding of such report which directly accuses the assessee in any wrongful actions. The AO has merely carved out certain features/modus-operandi of companies indulging in practices not sanctioned by law and as mentioned in such report. We note that neither any investigation were carried out against the assessee, nor against the brokers to whom the assessee dealt with or the companies in which the assessee dealt with the purchase and sale of shares in question were done by the AO. The transaction in question and the fact that the shares in question were quoted and transaction happened on the floor of the stock exchange in public view which action has not been interdicted by the securities watchdog SEBI. In such a scenario, to paint the entire share transaction of M/s. NFGL which yielded high

capital gain as bogus is not correct without materials to support such an adverse finding. We note in the light of the aforesaid relevant evidences, the action of the AO and CIT(A) was not justified in rejecting the claim of the assessee on the basis of theory of surrounding circumstances and human conduct and preponderance of probability against the assessee. For that we rely on the decision of the Special Bench of Mumbai Tribunal in the case of GTC Industries Ltd. Vs ACIT (supra) for this proposition. The various facets of the contention of the ld. AR(supra), to rope in the assessee and for drawing adverse inferences, which remain unproved based on the evidence available on record are not reiterated for the sake of brevity.

18. At the cost of repetitions, we find that the transactions of the sale of shares by the assessee was duly supported by relevant evidences including contract notes, demat statement, bank account reflecting the transactions, stock brokers have confirmed the transactions, the stock exchange have confirmed the transactions, the shares have been sold on the online platform of the stock exchange and each trade of sale of shares were having unique trade number and trade time. It is not the case of the AO that the shares which were sold on the date mentioned in the contract note were not the traded price on that particular date. The AO doubted the transactions due to the high rise in the stock price and for that the assessee cannot be blamed unless there was any material/ evidence to prove that the assessee or any one on his behalf has rigged or manipulated the stock price. It should be noted that the stock exchange of SEBI are the statutory authority appointed by the Government of India to ensure that there is no stock rigging or manipulation. The AO has not brought any evidence on record to show that these agencies have alleged any stock manipulation against the assessee or the brokers or the companies in question. In absence of any relevant evidences it cannot be said that merely because the stock price moved sharply, the assessee was to be blamed for bogus transactions. It is pertinent to note that the assessee has purchased the stocks through registered brokers and thereafter the assessee has sold the shares through the registered share/stock brokers with Calcutta Stock Exchange, and both have confirmed the transactions and have issued valid contract notes as per law; and the Hon''ble Calcutta High Court in the case of Principal CIT vs Rungta Properties in ITA

No.105 of 2016 dated 08 May, 2017 wherein it was held that “*on the last point, the tribunal held that the AO had not brought relevant material to show that the transactions in shares of the company involved were false or fictitious. It is the finding of the AO that the scripts of this company was executed by a broker and the broker was suspended for some time. It is the assessee’s contention that even though there are allegations against the broker, and for that reason the assessee cannot be held liable on this point, the tribunal held that –*

“As a matter of fact the AO doubted the integrity of the broker and the broker firm and also AO observed that the assessee had not furnished any explanation in respect of any discussion of trading of shares. The AO relied the loss of Rs.25,30,396/- only on the basis of information submitted by stock as fictitious. The AO has also not doubted the genuineness of the documents placed by the assessee on record. The AO’s observation and conclusion are merely based on information. Therefore on such basis, no disallowance can be made and accordingly we find no infirmity in the order of the Id. CT(A), who has rightly allowed the claim of the assessee. This ground no.1 of the revenue is dismissed.”

We agree with the reasoning of the tribunal on this point also. We do not find any reason to interfere with the impugned order. The suggested question, in our opinion do not raise any substantial question of law.

19. In the light of the documents furnished i.e. (i to v & i to iii) in Para 3(supra) we find that there is absolutely no adverse material to implicate the assessee to have entered into any illegal actions/ modus-operand prohibited by law as alleged by the AO against the assessee, which in our opinion has no legs to stand and therefore has to fall. We take note that the Id. DR could not controvert the facts supported with material evidences which are on record and could only rely on the orders of the AO/CIT(A). We note that in the absence of material/evidence the allegations that the assessee/brokers got involved in price rigging/manipulation of shares must therefore also fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the transactions relevant to the purchase and sale of shares resulting in long term capital gain. These evidences were neither found by the AO nor by the Id. CIT(A) to be false or fictitious or bogus. The facts of the case and the evidence in support of the evidence clearly support the claim of the

assessee that the transactions of the assessee were genuine and the authorities below was not justified in rejecting the claim of the assessee that income from LTCG is exempted u/s 10(38) of the Act. For coming to such a conclusion 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 26th 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.”

20. We note that the Id. 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 Id. AR (supra) and have been duly considered by us to arrive at our conclusion. The Id. DR could not bring to our notice any case laws to support the impugned decision of the Id. CIT(A)/AO. In the aforesaid facts and circumstances of the case, we hold that the Id. CIT(A) was not justified in upholding the addition of sale proceeds of the shares as undisclosed income of the assessee u/s 68 of the Act. We note that though the department was aware that the assessee had purchased the 25000 shares of M/s. NFGL in AY 2013-14, for Rs.32,21,269/- has not reduced the same from the total sale consideration of Rs.2.16 cr. It is elementary that income can be computed only after defraying the cost. So the action of AO to add the entire sale consideration of Rs.2.16 cr. itself is arbitrary exercise of power and cannot be sustained. Therefore, the action of the Ld. CIT(A) in confirming the addition of entire sale consideration of M/s. NFGL is perverse and is directed to be deleted.

Consequently, the addition of 5% as commission to the tune of Rs.10,82,460/- cannot be also sustained and ordered to be deleted. The assessee's appeal succeeds.

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

Order is pronounced in the open court on 02/11/2018

Sd/-
(M. Balaganesh)
Accountant Member

Sd/-
(A. T. Varkey)
Judicial Member

Dated: 2nd November, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

- 1 Appellant – Smt. Madhu Killa, FE-461, Salt Lake City, Kolkata-700 091.
- 2 Respondent – ACIT, Circle-36, Kolkata
- 3 CIT(A)-10, Kolkata. (sent through e-mail)
- 4 CIT , Kolkata
- 5 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Sr. Pvt. Secretary