IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH : KOLKATA

[Before Hon'ble Shri S.S. Godara, JM & Shri M.Balaganesh, AM]

I.T.A No. 61/Kol/2018

Assessment Years : 2014-15

M/s Bhansali Fincom Pvt. Ltd. -vs- DCIT, Central Circle-3(3), Kolkata
[PAN: AABCB 3060 B]
(Appellant) (Respondent)

For the Appellant : Shri S.M. Surana, Advocate

For the Respondent : Shri P.K. Srihari, CIT DR

Date of Hearing : 03.10.2018

Date of Pronouncement : 10.10.2018

ORDER

Per M.Balaganesh, AM

1.This appeal of the assessee arises out of the order passed the ld. Commissioner of Income Tax(Appeal)-21 Kolkata (in short the Ld. CIT(A)] in appeal nos. 10799/DCIT, CC-3(3)/CIT(A)-21/KOL/2017-18 dated 02.07.2018 against the order passed by the ACIT, CC-3(3), Kolkata [in short the ld AO] under section 153A / 143(3) of the Income Tax Act, 1961 (in short "the Act") dated 31.12.2017 for the Assessment Year 2014-15.

2. The issue involved in this appeal is as to whether in the facts and circumstances of the case, the ld CITA was justified in confirming the disallowance of trading loss on sale of shares of M/s First Financial Services Ltd and Comfort Fincap Ltd in the sum of Rs 30,26,421/- as bogus for the Asst Year 2014-15 in the assessment framed u/s 153A of the Act.

3. The brief facts of this issue are that the the assessee is a company carrying on business of dealing in shares and loan transactions. The assessee filed its return of income for the Asst Year 2014-15 on 22.9.2014 declaring total income of Rs 22,42,340/-. This return was processed u/s 143(1) of the Act on 17.6.2015 determining refund of Rs 20/-. The return was selected for scrutiny by issuance of notice u/s 143(2) of the Act on 28.8.2015 which was duly served on the assessee by speed post. There was a search and seizure operation conducted u/s 132 of the Act at the residential, office premises,bank lockers etc of the Patni Group of cases on 8.3.2016. A search warrant was executed in the name of the assessee. Consequent to the search, notice u/s 153A of the Act was issued on the assessee for the Asst Year 2014-15. In response to the said notice, the assessee filed its return of income on 21.10.2016 declaring total income of Rs 22,42,340/-. Hence as on the date of search the assessment for the Asst Year 2014-15 was pending would fall under the category of abated assessment and hence the total income could be determined by the ld AO in the assessment to be framed u/s 153A of the Act irrespective of the existence of the incriminating materials found during the course of search. The ld AO served another notice u/s 143(2) of the Act by email on 18.9.2017 on the assessee after the date of filing of return by the assessee in response to notice u/s 153A of the Act .

4. The break up of computation of total income of the assessee is as under:-

Income from Business or Profession	- Rs 22,42,340/-
Income from Other sources (exempt dividend- Rs 82,535)	- Rs 0/-
Total income under normal provisions of the Act	Rs 22,42,340/-

<u>Computation of book profits u/s 115JB of the Act</u>

Net Profit as per Profit and Loss Account	- Rs 22,38,994/-
Add: Contingent Provision against standard assets – 8,409	

Expenses disallowed u/s 14A	- 24,360	
Income taxes for earlier year	- 46,925	
TDS written off	- 3,263	
		- Rs 82,957/-
		Rs 23,21,951/-
Less: Dividend exempt u/s 10(34)		Rs 82,535/-
Book Profits u/s 115JB of the Act		Rs 22,39,416/-

5. The details of income and expenditure of the assessee are as under:-

Income		
Revenue from Operations		
Sale of Equity Shares	17,00,079	
Interest income from Loan	61,38,836	
		78,38,915
Other Income		
Dividend Received	82,535	
Interest on Income Tax Refund	11,090	
Profit Distribution from Development Fund	6,840	
		1,00,465
Total Revenue (A)		79,39,380
Expenses		
Purchase of Equity Shares (Stock in Trade)		47,26,500
Salary and Bonus		4,37,367
Interest on Loan		1,51,233
Depreciation and amortization expenses		10,022
Other Expenses		
Rates & Taxes	4,400	
Audit Fees	9,551	
Rent Paid	60,000	
Miscellaneous Expenses	2,45,979	

Income taxes for earlier year	46,925	
Contingent Provision against standard assets	8,409	
	----------	3,75,264

Total Expenses (B)		57,00,386

Net Profit (A) – (B)		22,38,994

6. The assessee purchased 4500 equity shares of M/s Comfort Fincap Ltd during the year for Rs 17,79,021/- and sold the same during the year for Rs 7 13,890/-. Similarly it purchased 132000 equity shares of M/s First Financial Services Ltd for Rs 29,47,479/- and sold the same during the year for Rs 9,86,189/-. Since the primary business of the assessee is dealing in shares, the loss incurred on sale of such shares of Rs 30,26,421/- was claimed as business loss and the same was set off with other income of the assessee in the return of income. The ld AO alleged that the assessee by booking this trading loss had practically set off the sam with the interest income which would be separately taxed otherwise, among others During the course of search and seizure operations, a statement was recorded u/s 132(4) of the Act from Shri Akhilesh Kr Jain, Director of the assessee company. On the basis of this statement, the ld AO came to a conclusion that the shares traded by the assessee are to be classified as penny stocks and the entire trading loss was pre-arranged one with a malign intention to evade tax on other income of the assessee. Accordingly, he proceeded to disallow the trading loss on sale of shares claimed in the sum of Rs 30,26,421/- in the assessment. This action of the ld AO was upheld by the ld CITA. Aggrieved, the assessee is in appeal before us for the Asst Year 2014-15.

7. We have heard the rival submissions. It is not in dispute that the entire purchase and sale of shares transactions have been routed through recognized stock broker and traded in recognized stock exchange and are duly supported by contract notes for purchase and

sale separately, transactions had duly suffered service tax, securities transaction tax (STT) , brokerage etc. The payments are made by the assessee by account payee cheques for purchases by the assessee through the recognized and registered share broker. The sale proceeds of the shares were received in account payee cheques from the registered share broker and through the stock exchange. We find that the revenue had placed heavy reliance on the statement recorded from Shri Akhilesh Kr Jain u/s 132(4) of the Act. But it is pertinent to note that the said statement has been subsequently retracted by him before the Hon'ble Magistrate and the same has been ignored by the ld AO and the ld CITA as an after thought and accordingly has got no evidentiary value. In this regard, without having any corroborative material to support the statement recorded during search, no addition could be made. Admittedly, no other corroborative evidences were found by the revenue to support the statement recorded from Shri Akhilesh Kr Jain. Moreover, once a statement given is retracted, it obviously loses its evidentiary value and the same cannot be relied upon by the revenue for framing an addition. In this regard, the instructions issued by the Central Board of Direct Taxes (CBDT in short) in F No. 286/2/2003-IT(Inv) dated 10.3.2003 would be relevant to be looked into wherein it is mentioned that while recording statement during the course of search and seizure and survey operations, no attempt should be made to obtain confession as to the undisclosed income. For the sake of convenience and clarity, the relevant instructions dated 10.3.2003 issued by CBDT is reproduced hereunder:-

To
All Chief Commissioners of Income tax (Cadre Contra) &
All Directors General of Income Tax Inv.

Sir,

Sub:- Confession of additional Income during the course of search & seizureand survey operation – regarding

Instances have come to the notice of the Board where assessees have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assessees while filing returns of income. In these circumstances, on confessions during the course of search& seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on' collection of evidence of income which leads to information on what has not been disclosed or is notlikely to be disclosed before the Income Tax Departments. Similarly, while recording statement during the course of search it seizures and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.

Further, in respect of pending assessment proceedings also, assessing officers should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders Yours faithfully,
Sd/-
(S. R. Mahapatra]
Under Secretary (Inv. II)

7.1. We find lot of force in the arguments advanced on behalf of the assessee that retracted statements of third parties have been relied upon without giving any opportunity to the assessee to cross-examine such third parties. In response, the ld DR vehemently relied on the orders of the lower authorities by stating that extensive enquiries were made by the investigation wing of income tax department and disallowance has been made based on such reports and statements recorded from various parties. He argued that the retracted statements should not be given due cognizance as it is only an after thought. We find that the ld AO had placed reliance on the investigation report of DDIT and finding of SEBI in respect of scrips traded by the

assessee. There is absolutely no evidence brought on record linking the assessee with the alleged malafides. Hence the entire disallowance of trading loss was made only based on suspicion, surmises and conjectures without bringing on record with material evidences, the linkage of the assessee and by proving the connivance of the assessee with the stock brokers, stock exchange and the third parties from whom purchases were made and to whom sales were made. There is no evidence to prove that the assessee had received back the monies in cash from the concerned parties after making the purchases and similarly there is no evidence to prove that the assessee had passed on the cash to the concerned parties after receiving the sale proceeds of shares by cheque. In this regard, we would like to place reliance on the decision of *Hon'ble Jurisdictional High Court in the case of PCIT vs M/s BLB Cables & Conductors Pvt Ltd in ITAT No. 78 of 2017 GA No. 747 of 2017 dated 19.6.2018* wherein the relevant operative portion of the said order is reproduced as under:-

> *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. Here in the case the transactions of the commodity exchanged have not only been explained but also substantiated from the confirmation of the party. Both the parties are confirming the transactions which have been duly supported with the books of accounts and bank transactions. The ld AR has also submitted the board resolution for the trading of commodity transaction. The broker was expelled from the commodity exchange cannot be the criteria to hold the transaction as bogus. In view of above, we reverse the order of the lower authorities and allow the common grounds of assessee's appeal. This is essentially a finding of the Tribunal on fact. No material has been shown to us which would negate the Tribunal's finding that off market transactions are not prohibited. As regards veracity of the transactions, the Tribunal has come to its conclusion on analysis of relevant materials. That being the position, Tribunal having analysed the set of facts in coming to its findingm we do not think there is any scope of interference with the*

order of the Tribunal in exercise of our jurisdiction under section 260A of the Income Tax Act, 1961. No substantial question of law is involved in this appeal. The appeal and the stay petition , accordingly, shall stand dismissed.

There shall be no order as to costs.

7.2. We find that the statement recorded u/s 132(4) of the Act cannot be considered as an evidence or material found during the course of search and in this regard would like to place reliance on the decision of *Hon'ble Delhi High Court in the case of PCIT vs Best Infrastructure (India) Pvt Ltd reported in 397 ITR 82 (Del).* The *Hon'ble Delhi High Court further in the case of CIT vs Harjeev Aggarwal reported in 290 CTR 263 (Del)* had held as under:-

> ***23.*** *It is also necessary to mention that the aforesaid interpretation of Section 132(4) of the Act must be read with the explanation to Section 132(4) of the Act which expressly provides that the scope of examination under Section 132(4) of the Act is not limited only to the books of accounts or other assets or material found during the search. However, in the context of Section 158BB(1) of the Act which expressly restricts the computation of undisclosed income to the evidence found during search, the statement recorded under Section 132(4) of the Act can form a basis for a block assessment only if such statement relates to any incriminating evidence of undisclosed income unearthed during search and c nnot be the sole basis for making a block assessment.*
>
> ***24.*** *If the Revenue s contention that the block assessment can be framed only on the basis of a statement recorded under Section 132(4) is accepted, it would result in ignoring an important check on the power of the AO and would expose assessees to arbitrary assessments based only on the statements, which we are conscious are sometimes extracted by exerting undue influence or by coercion. Sometimes statements are recorded by officers in circumstances which can most charitably be described as oppressive and in most such cases, are subsequently retracted. Therefore, it is necessary to ensure that such statements, which are retracted subsequently, do not form the sole basis for computing undisclosed income of an assessee.*

7.3. We also find that similar issue had been analysed and dealt in detail by the co-ordinate bench of this tribunal in the case of M/s Consistent Vyapaar Pvt Ltd vs DCIT in ITA No. 65/Kol/2018 (Asst Year 2013-14) and ITA No. 66/Kol/2018 (Asst Year 2014-15) dated 14.9.2018 , wherein it was held as under:-

"*6.1. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-*

The assessee, in this case has supported these transactions by submitting copies of contract notes for purchase and sale of shares, daily market quotations on the date of purchase, bank statements showing payments of consideration for purchase of shares, copy of Demat Accounts etc. These evidences, have not been controverted or found to be false by the Assessing Officer. In fact no contrary evidence to prove that these documents have no evidentiary value has been collected by the Assessing Officer. The entire addition has been made on the basis that the prices of shares have been rigged by certain individuals. No evidence is brought on record to connect the assessee with the alleged rigging of prices of shares. No evidence is brought on record to demonstrate that the assessee was involved in the rigging of shares in the stock market or was closely involved with the persons who are allegedly connected in rigging of the prices of shares. The entire addition has been made on probabilities, human behaviour, the alleged unnatural fluctuation in prices of the shares etc., but not based on any evidence connecting the assessee with such allegations. The addition have thus been made on conjectures and surmises.

6.2. The Hon'ble Jurisdictional High Court in the case of Commissioner Of Income Tax vs M/S. Alpine Investments ITA No. 620 of 2008, GA No.2589 of 2008, judgment dt. 26th 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."*

Similarly, in the case of *CIT vs. Carbo Industrial Holding Ltd. [2000] 244 ITR 422 (Calcutta),* the Hon'ble Jurisdictional High Court, *held as follows*:-

*"**9.** We also notice a share transaction of the shares of Escorts Ltd. where the assessee claimed Rs. 60,490 loss. The relevant date of contract is 15-12-1983. The assessee received 4,600 shares on 11-1-1984, and it sold these shares on 18-1-1984 and the assessee received the payment against that sale on 24-1-1984. Therefore, seeing these details, it cannot be said that the purchase and sale are on the same date. It is true that the transactions are with some brokers, but in the share transactions the purchase and sale are normally through some broker. Payment by account payee cheque has not been disputed. Payment on purchase and sale and payment received by account payee cheque was on two different dates. If the share broker, even after issue of summons, does not appear, for that reason, the claim of the assessee should not be denied, specially in cases when the existence of the broker is not in dispute nor the payment is in dispute. Merely because some broker failed to appear, the assessee should not be punished for the default of a broker and we are in full agreement with the Tribunal that on mere suspicion the claim of the assessee should not be denied.*

***10.** In the result, we answer the question in the affirmative, i.e., in favour of the assessee and against the revenue."*

Recently, the Kolkata 'C' Bench of the Tribunal in the case of Navneet Agarwal,-vs-ITO, Ward-35(3), Kolkata; I.T.A. N 2281/Kol/2017; Assessment Year: 2014-15, held as follows:-

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

13. The issue for consideration before us is whether, in such cases, the legal evidence produced by the assessee has to guide our decision in the matter or the general observations based on statements, probabilities, human behavior and discovery of the modus operandi adopted in earning alleged bogus LTCG and STCG, that have surfaced during investigations, should guide the authorities in arriving at a conclusion as to whether the claim in 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 quesiton was part of this scam. The chain of events and the

live link of the assesee'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 allegation that cash had changed hands, has to be proved with evidence, by the revenue. Evidence gathered by the Director Investigation's office by way of statements recorded etc. has to also be brought on record in each case, when such a statement, evidence etc. is relied upon by the revenue to make any additions. Opportunity of cross examination has to be provided to the assesee, if the AO relies on any statements or third party as evidence to make an addition. If any material or evidence is sought to be relied upon by the AO, he has to confront the assessee with such material. The claim of the assessee cannot be rejected based on mere conjectures unverified by evidence under the pretentious garb of preponderance of human probabilities and theory of human behavior by the department.

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

15. In our view modus operandi, generalisation, preponderance of human probabilities cannot be the only basis for rejecting the claim of the assessee. Unless specific evidence is brought on record to controvert the validity and correctness of the documentary evidences produced, the same cannot be rejected by the assessee. The Hon'ble Supreme Court in the case of Omar Salav Mohamed Sait reported in (1959) 37 ITR 151 (S C) had held that no addition can be made on the basis of surmises, suspicion and conjectures. In the case of CIT(Central), Kolkata vs. Daulat Ram Rawatmull reported in 87 ITR 349, the Hon'ble Supreme Court held that, the onus to prove that the apparent is not the real is on the party who claims it to be so. The burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidences, which would directly prove the fact of bogusness or establish circumstance unerringly and reasonably raising an interference to that effect. The Hon'ble Supreme

Court in the case of Umacharan Shah & Bros. Vs. CIT 37 ITR 271 held that suspicion however strong, cannot take the place of evidence.

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

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

"Adverting to the various probabilities which weighed with the Income-tax Officer we may observe that the notoriety for smuggling food grains and other commodities to Bengal by country boats acquired by Sahibgunj and the notoriety achieved by Dhulian as a great receiving centre for such commodities were merely a background of suspicion and the

appellant could not be tarred with the same brush as every arhatdar and grain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf. The cancellation of the food grain licence at Nawgachia and the prosecution of the appellant under the Defence of India Rules was also of no consequence inasmuch as the appellant was acquitted of the offence with which it had been charged and its licence also was restored. The mere possibility of the appellant earning considerable amounts in the year under consideration was a pure conjecture on the part of the Income-tax Officer and the fact that the appellant indulged in speculation (in Kalai account) could not legitimately lead to the inference that the profit in a single transaction or in a chain of transactions could exceed the amounts, involved in the high denomination notes,---this also was a pure conjecture or surmise on the part of the Income-tax Officer. As regards the disclosed volume of business in the year under consideration in the head office and in branches the Income-tax Officer indulged in speculation when he talked of the possibility of the appellant earning a considerable sum as against which it showed a net loss of about Rs. 45,000. The Income-tax Officer indicated the probable source or sources from which the appellant could have earned a large amount in the sum of Rs. 2,91,000 but the conclusion which he arrived at in regard to the appellant having earned this large amount during the year and which according to him represented the secreted profits of the appellant in its business was the result of pure conjectures and surmises on his part and had no foundation in fact and was not proved against the appellant on the record of the proceedings. If the conclusion of the Income-tax Officer was thus either perverse or vitiated by suspicions, conjectures or surmises, the finding of the Tribunal w s equally perverse or vitiated if the Tribunal took count of all these probabilities and without any rhyme or reason and merely by a rule of thumb, as it were, came to the conclusion that the possession of 150 high denomination notes of Rs. 1,000 each was satisfactorily explained by the appellant but not that of the balance of 141 high denomination notes of Rs. 1,000 each".

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

18. We now consider the various propositions of law laid down by the Courts of law. That cross-examination is one part of the principles of natural justice has been laid down in the following judgments:
a) Ayaaubkhan Noorkhan Pathan vs. The State of Maharashtra and Ors.

"23. A Constitution Bench of this Court in State of M.P. v. Chintaman Sadashiva Vaishampayan AIR 1961 SC 1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice. (See also: Union of India v. T.R. Varma, AIR 1957 SC 882; Meenglas Tea Estate v. Workmen, AIR 1963 SC 1719; M/s. Kesoram Cotton Mills Ltd. v. Gangadhar and Ors ,AIR 1964 SC 708; New India Assurance Co. Ltd. v. Nusli Neville Wadia and Anr. AIR 2008 SC 876; Rachpal Singh and Ors. v. Gurmit Singh and Ors.AIR 2009 SC 2448; Biecco Lawrie and Anr. v. State of West Bengal and Anr. AIR 2010 SC 142; and State of Uttar Pradesh v. Saroj Kumar Sinha AIR 2010 SC 3131).

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

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

29. In Rajiv Arora v. Union of India and Ors. AIR 2009 SC 1100, this Court held: Effective cross-examination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved.

The principles analogous to the provisions of the Indian Evidence Act as also the principles of natural justice demand that the maker of the report should be examined, save and except in cases where the facts are admitted or the witnesses are not available for cross-examination or similar situation. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the Appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review.

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

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

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

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

6. As mentioned above, the Appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for

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

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

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

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

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

This is essentially a finding of the Tribunal on fact. No material has been shown to us who would negate the Tribunal's finding that off market transactions are not prohibited. As regards veracity of the transactions, the Tribunal has come to its conclusion on analysis of relevant materials. That being the position, Tribunal having analyzed the set of facts in coming to its

finding, we do not think there is any scope of interference with the order of the Tribunal in exercise of our jurisdiction under Section 260A of the Income Tax Act, 1961. No substantial question of law is involved in this appeal. The appeal and the stay petition, accordingly, shall stand dismissed."

b) The JAIPUR ITAT in the case of VIVEK AGARWAL [ITA No. 292/JP/2017] order dated 06.04.2018 held as under vide Page 9 Para 3:
"We hold that the addition made by the AO is merely based on suspicion and surmises without any cogent material to controvert the evidence filed by the assessee in support of the claim. Further, the AO has also failed to establish that the assessee has brought back his unaccounted income in the shape of long term capital gain. Hence we delete the addition made by the AO on this account."

c) The Hon'ble Punjab and Haryana High Court in the case of PREM PAL GANDHI [ITA-95-2017 (O&M)] dated 18.01.2018 at vide Page 3 Para 4 held as under:

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

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

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

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

"In the light of the documents stated i.e. (I to xiv) in Para 6(supra) we find that there is absolutely no adverse material to implicate the assessee to have entered gamut of unfounded/unwarranted allegations leveled by the AO against the assessee, which in our considered opinion has no legs to stand and therefore has to fall. We take note that the ld. DR could not controvert the facts supported with material evidences which are on record and could only rely on the orders of the AO/CIT (A). We note that in the absence of material/evidence the allegations that the assessee/brokers got involved in price rigging/manipulation of shares must therefore also fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the transactions relevant to the purchase and sale of shares resulting in long term capital gain. These evidences were neither found by the AO nor by the ld. CIT (A) to be false or fict tious or bogus. The facts of the case and the evidence in support of the evidence clearly support the claim of the assessee that the transactions of the assessee were genuine and the authorities below was not justified in rejecting the claim of the assessee that income from LTCG is exempted u/s 10(38) of the Act."

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

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

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

> *"…….. We find that there is absolutely no adverse material to implicate the assessee to the entire gamut of unfounded/unwarranted allegations leveled by the AO against the assessee, which in our considered opinion has no legs to stand and therefore has to fall. We take note that the ld. DR could not controvert the facts which are supported with material evidences furnished by the assessee which are on record and could only rely on the orders of the AO/CIT(A). We note that the allegations that the assesse/brokers got involved in price rigging/manipulation of shares must therefore consequently fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the*

transactions relevant to the purchase and sale of shares resulting in long term capital gain. Neither these evidences were found by the AO nor by the ld. CIT(A) to be false or fictitious or bogus. The facts of the case and the evidence in support of the evidence clearly support the claim of the assessee that the transactions of the assessee were genuine and the authorities below was not justified in rejecting the claim of the assessee exempted u/s 10(38) of the Act on the basis of suspicion, surmises and conjectures. It is to be kept in mind that suspicion how so ever strong, cannot partake the character of legal evidence.
It further held as follows:

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

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

"We therefore hold that there is absolutely no adverse material to implicate the assessee to the entire gamut of unwarranted allegations leveled by the ld AO against the assessee, which in our considered opinion, has no legs to stand in the eyes of law. We find that the ld DR could not controvert the arguments of the ld AR with contrary material evidences on record and merely relied on the orders of the ld AO. We find that the allegation that the assessee and / or Brokers getting involved in price rigging of SOICL shares fails. It is also a matter of record that the assessee furnished all evidences in the form of bills, contract notes, demat statements and the bank accounts to prove the genuineness of the transactions relating to purchase and sale of shares resulting in LTCG. These evidences were neither found by the ld AO to be false or fabricated. The facts of the case and the evidences in support of the assessee's case clearly support the claim of the assessee that the transactions of the assessee were bonafide and genuine and therefore the ld AO was not justified in rejecting the assessee's claim of exemption under section 10(38) of the Act."

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

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

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

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

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

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

j) The Hon'ble Supreme Court in the case of PCIT vs. Teju Rohitkumar Kapadia order dated 04.05.2018 upheld the following proposition of law laid down by the Hon'ble Gujrat High Court as under:
" It can thus be seen that the appellate authority as well as the Tribunal came to concurrent conclusion that the purchases already made by the assessee from Raj Impex were duly supported by bills and payments were made by Account Payee cheque. Raj Impacts also confirmed the transactions.There was no evidence to show that the amount was recycled back to the assessee.Particularly, when it was found that the assessee the trader had also shown sales out of purchases made from Raj Impex which were also accepted by the Revenue, no question of law arises."

7. Applying the proposition of law laid down in the above judgments to the facts of this case, on merits it has to be concluded that the addition made, cannot be sustained for both the impugned Assessment Years.

Be it as it may, we find that no such addition has been made in the orders passed u/s 153A r.w.s. 143 3) of the Act, on 30/12/2017 in the case of Shri Akhilesh Kumar Jain, for the Assessment Years 2010-11 to 2017-18, though the revenue relies mainly on the statements recorded from Shri Akhilesh Kumar Jain, the assessee therein, for the addition."

7.4. The aforesaid detailed reasoning mutatis mutandis applies to the given set of facts and circumstances of the case before us. Respectfully following the same, we direct the ld AO to delete the disallowance of trading loss of Rs 30,26,421/- for the Asst Year 2014-15. Accordingly, the grounds raised by the assessee are allowed for the Asst Year 2014-15.

8. The Ground No. 4 raised by the assessee is with regard to chargeability of interest u/s 234A and 234B of the Act which is consequential in nature and does not require any specific adjudication.

9. The Ground Nos. 5 & 6 raised by the assessee are general in nature and does not require any specific adjudication.

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

Order pronounced in the Court on 10.10.2018

Sd/- Sd/-

[S.S. Godara] [M.Balaganesh]
Judicial Member Accountant Member

Dated : 10 .10.2018
SB, Sr. PS

Copy of the order forwarded to:
1. M/s Bhansali Fincom Pvt. Ltd., Unit 3C, Trinity Building, Minto Park, 226/1, A.J.C. Bose Road, Kolkata-700020.
2. DCIT,CC-3(3), Kolkata, 110, Shantipally, E.M.Bye Pass, Near Ruby Hospital, Income Tax Building, Poorva Kolkata-700107.
3..C.I.T(A).- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

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