आयकर अपीलीय अधीकरण, न्यायपीठ – "C(SMC)" कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL "C(SMC)" BENCH: KOLKATA
(समक्ष) श्री ऐ. टी. वर्की, न्यायीक सदस्य)
[Before Shri A. T. Varkey, JM]

I.T.A. No. 2410/Kol/2018
Assessment Year: 2015-16

Sunil Kumar Shaw (PAN: ASTPS5705P)	Vs.	Income-tax Officer, Wd-24(3), Hooghly.
Appellant		Respondent

Date of Hearing	19.03.2019
Date of Pronouncement	10.04.2019
For the Appellant	Shri R. P. Das, FCA
For the Respondent	Shri Rabin Choudhury, Addl. CIT, Sr. DR

ORDER

This appeal filed by assessee is against the order of Ld. CIT(A) - 6, Kolkata dated 09.10.2018 for AY 2015-16.

2. The assessee's sole g ound of appeal is as to whether on the facts and circumstances of the case, the ld CITA was justified in upholding the addition made by the AO u/s 68 of the Act in respect of sale proceeds of shares of Kailash Auto Finance Limited (KAFL) treating the same as income from undisclosed sources after rejecting the assessee's claim of Long Term Capital Gains (LTCG) on sale of those shares.

3. The brief facts of the issue as has been recorded by the AO in the Assessment Order are that the assessee claimed long term capital gains from sale of shares of M/s. Kailash Auto Finance Limited (KAFL). The AO noted that the assessee had purchased shares of M/s. Kailash Auto at a price of Rs.40,000/-. The said shares were later sold at a price of Rs.14,12,359/-, which according to assessee, resulted in Long Term Capital Gains and so

the assessee claimed exemption u/s 10(38) of the Act of Rs.13,72,359/-. However, the AO relying on the report of the Investigation Wing, Kolkata and an order by SEBI alleged that the claim of assessee of exempt income (LTCG) was bogus in nature. The AO further alleged that the transactions in the scrip of Kailash Auto Finance Ltd. (KAFL) were being manipulated by entry operators and the share prices were hiked artificially to earn LTCG. So, the AO did not accept the assessee's claim of LTCG and exemption thereof claimed by the assessee. Thereafter, the AO treated the same as cash credit u/s 68 of the Act and added the entire LTCG to the income of the assessee as unexplained income. On first appeal, the Ld. CIT(A) dismissed the grounds raised by the assessee against his claim of exemption u/s 10(38) of the Act and he also confirmed the additions made by the AO under section 68 of the Act. Aggrieved, the assessee is in appeal before this Tribunal.

4. I have heard rival submissions and gone through the facts and circumstances of the case. At the time of hearing it was brought to my notice by the Ld. AR that this Tribunal in the following cases have decided that the scrips of KAFL are not bogus and held that the LTCG claim of the assessee needs o be allowed:

i) Manish Kumar Baid Vs. ACIT, ITA Nos. 1236& 1237/Kol/2017 dated 18.08.2017
ii) Rukmini Devi Manpria Vs. DCIT, ITA No.1724/Kol/2017 dated 24.10.2018
iii) Jagmohan Agarwal Vs. ACIT, ITA No.604/Kol/2018 dated 05.09.2018.

It was also brought to our notice by the Ld. AR that AO was influenced by an interim order of SEBI dated 29.03.2016, which the SEBI has withdrawn by later order dated 21.09.2017 by virtue of it all the restrictions imposed upon by the earlier order dated 29.03.2016 has been withdrawn, since SEBI could not find any infirmity in the scrips of M/s. KAFL. So he pleaded that the claim of assessee for LTCG should be allowed.

5. On the other hand, the Ld. DR for the Revenue vehemently opposed the contentions of the assessee and took us through the AO's order and Ld. CIT(A) order and submitted that

scrips of M/s. KAFL was artificially rigged to provide LTCG to the assessee which cannot be allowed and supported the impugned order and relied on the order of Hon'ble Bombay High Court in the case of Binod Chand Jain in Tax Appeal No.18 of 2017 does not want me to interfere. We note that similar issue arose in Manish Kumar Baid, (supra) wherein, the Tribunal allowed the claim of assessee in respect of LTCG from sale of scrips of M/s. KAFL has held as under:

> *"6. We have heard both the rival submissions and perused the materials available on record. We find lot of force in the arguments of the ld AR that the ld AO was not justified in rejecting the claim of the assessee on the basis of theory of surrounding circumstances, human conduct, and preponderance of probability without bringing on record any legal evidence against the assessee. We rely on the judgement of Special Bench of Mumbai Tribunal in the case of GTC Industries Ltd. (supra) for this proposition. The various facets of the arguments of the ld AR supra, with regard to impleading the assessee for drawing adverse inferences which remain unproved based on the vidences available on record, are not reiterated for the sake of brevity. The principles laid down in various case laws relied upon by the ld AR are also not reiterated for the sake of brevity. We find that the amalgamation of CPAL with KAFL has been approved by the order of Hon'ble High Court. The ld AO ought not to have questioned the validity of the amalgamation scheme approved by the Hon'ble High Court in May 2013 merely based on a statement given by a third party which has not been subject to cross –examination. Moroever, it is also pertinent to note that the assessee and / or the stock broker Ashita Stock Broking Ltd name is neither mentioned in the said statement as a person who had allegedly dealt with suspicious transactions nor they had been the beneficiaries of the transactions of shares of KAFL. Hence we 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.*
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> *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 lower authorities apart from placing the copy of SEBI's interim order supra. We find that the SEBI's orders relied on by the ld AO and referred to him as direct evidence against the assessee did not contain the name of the assessee and/or the name of Ashika Stock Broking Ltd. through whom the assessee sold the shares of KAFL as a beneficiary to the alleged accommodation entries provided by the related entities / promoters / brokers / entry operators. In the instant case, the shares of CPAL were purchased by the assessee way back on 20.12.2011 and pursuant to merger of CPAL with KAFL, the assessee was allotted equal number of shares in KAFL, which was sold by the assessee by exiting at the most opportune moment by making good profits in roder to have a good return on his investment. We find that the assessee and / or the broker Ashita Stock Broking Ltd was not the primary allottees of shares either in CPAL or in KAFL as could be evident from the SEBI's order. We find that the SEBI order did mention the list of 246 beneficiaries of persons trading in shares of KAFL, wherein, the assessee and / or Ashita Stock Broking Ltd's name is not reflected at all. Hence the allegation that the assessee and / or Ashita Stock Broking Ltd getting involved in price rigging of KAFL shares fails. We also find that even the SEBI's order heavily relied upon*

by the ld AO clearly states that the company KAFL had performed very well during the year under appeal and the P/E ratio had increased substantially. Thus we hold that the said orders of SEBI is no evidence against the assessee, much less to speak of direct evidence. The enquiry by the Investigation Wing and/or the statements of several persons recorded by the Investigation Wing in connection with the alleged bogus transactions in the shares of KAFL also did not implicate the assessee and/or his broker. 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. We also find that the various case laws of Hon'ble Jurisdictional High Court relied upon by the ld AR and findings given thereon would apply to the facts of the instant case. The ld DR was not able to furnish any contrary cases to this effect. Hence we hold that the ld AO was not justified in assessing the sale proceeds of shares of KAFL as undisclosed income of the asses ee u/s 68 of the Act. We accordingly hold that the reframed question no. 1 raised hereinabove is decided in the negative and in favour of the assessee."

6. Coming back to the instant case, I note that the assessee had purchased 40,000 shares @ Rs.1/- each of M/s. Panchshul Marketing Ltd. on 06.03.2013 merged with M/s. KAFL) for a consideration of Rs.40,000/-. The s id shares were later sold at a price of Rs.14,12,359/-, which according to assessee, resulted in Long Term Capital Gains and so the assessee claimed exemption u/s 10(38) of the Act of Rs.13,72,359/-. I note that the assessee has paid the amount of Rs.40,000/- through account payee cheque to M/s. Shivshakti Exports Pvt Ltd. The aforesaid 40,000 shares of M/s. Panchshul Marketing Ltd. were received in the DEMAT. The said company (M/s. Panchshul Marketing Ltd.) was later merged with M/s. Kailash Auto Finance Ltd. as per an order of the Hon'ble High Court of Allahabad dated 09.05.2013 and consequent to merger, the assessee had received 40,000 shares of M/s. KAFL. The assessee sold the said shares during the previous year relevant to assessment year under consideration and such sale was made through M/s. sbicap Securities, a registered share and stock broker (contract note placed at pages 10 of Paper Book) after duly paying the Security Transaction Tax (STT). The sale consideration the assessee received by account payee cheque in its State Bank of India account which is evident from the bank statement filed before us at page 11 of the paper book. Therefore, the long term

capital earned in the process has been claimed as exempt income under section 10(38) of the Act. I also note that in support of the assessee's contention various documents had been filed during the course of assessment proceedings i.e. copies of purchase bills, which is available in paper book page 6 to7, copy of Bank statements showing payments made for purchase of shares, which is available in paper book page8, demat account with SBICAP Securities Ltd., which is available at paper book page 9, copies of contract notes in respect of sale of shares, which is available at page 10 of paper book, copy of bank statements showing receipts against sale of shares, which is available at page 11 of the paper.

7. I note that shares of M/s. KAFL were sold by assessee through recognized broker in a recognized Stock Exchange. The details of such sale and contract note have been submitted before AO/Ld. CIT(A). I take note that when the transactions happened in the Stock exchange, the seller who sells his shares on the stock exchange does not know who purchases shares. It is noted that the shares are sold and bought in an electronic mode on the computers by the brokers and ther is also no direct contact at any level even between the brokers. It is noted that as and when any shares are offered for sale in the stock exchange platform, any one of the housands of brokers registered with the stock exchange is at liberty to purchase i As far as our understanding the selling broker does not even know who is the purchasing broker. This is how the SEBI keeps a strict control over the transactions taken place in recognized stock exchanges. Unless there is a evidence to show that there is a breach in the aforesaid process which fact has been unearthed by meticulous investigation, I am of the opinion that the unscrupulous actions of few players exploiting the loopholes of the Stock Exchange cannot be the basis to paint the entire sale/purchase of a scrip like that of M/s. KAFL as bogus without bringing out adverse material specifically against the assessee.

8. The fact of holding the shares in the D-mat account cannot be disputed. Further, the Assessing Officer has not even disputed the existence of the D-mat account and shares

credited in the D-mat account of the assessee. Therefore, once, the holding of shares is D-mat account cannot be disputed, then the transaction cannot be held as bogus. The AO has not disputed the sale of shares from the D-mat account of the assessee and the sale consideration was directly credited to the bank account of the assessee, therefore, once the assessee produced all relevant evidence to substantiate the transaction of purchase, dematerialization and sale of shares then, in the absence of any contrary material brought on record the same cannot be held as bogus transaction merely on the basis of report of Investigation Wing, Kolkata wherein there is a general statement of providing bogus long term capital gain transaction to the clients without stating anything about the transaction of allotment of shares by the company to the assessee.

9. The Mumbai Special of the Tribunal in case of GTC Industries vs. ACIT (supra) had the occasion to consider the addition made by the AO on the basis of suspicion and surmises and observed in par 46 as under:-

> *"46. In situations like this case, one may fall into realm of 'preponderance of probability' where there are many probable factors, some in favour of the assessee and some may go against the assessee. But the probable factors have to be weighed on material facts so collected. Here in this case the material facts strongly indicate a probability that the wholesale buyers had collected the premium money for spending it on advertisement and other expenses and it was heir liability as per their mutual understanding with the aseessee. Another very strong probable factor is that the entire scheme of 'twin branding' and collection of premium was so designed that assessee company need not incur advertisement expenses and the responsibility for sales promotion and advertisement lies wholly upon wholesale buyers wh will borne out these expenses from alleged collection of premium. The probable factors could ha e gone against the assessee only if there would have been some evidence found from several searches either conducted by DRI or by the department that Assessee-Company was beneficiary of any such accounts. At least something would have been unearthed from such global level investigation by two Central Government authorities. In case of certain donations given to a Church, originating through these benami bank accounts on the behest of one of the employees of the assessee company, does not implicate that GTC as a corporate entity was having the control of these bank accounts completely. Without going into the authenticity and veracity of the statements of the witnesses Smt. Nirmala Sundaram, we are of the opinion that this one incident of donation through bank accounts at the direction of one of the employee of the Company does not implicate that the entire premium collected all throughout the country and deposited in Benami bank accounts actually belongs to the assessee-company or the assessee-company had direct control on these bank accounts. Ultimately, the entire case of the 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 presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee."

10. Therefore, when the Assessing Officer has not brought any material on record to show that the assessee has paid over and above the purchase consideration as claimed and evident from the bank account then, in the absence of any evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. The Hon'ble Jurisdiction High Court in case of CIT vs Smt. Pooja Agrawal (supra) has upheld the finding of the Tribunal on this issue n para 12 as under:-

"12. However, counsel for the respondent has taken us to the order of CIT(A) and also to the order of Tribunal and contended that in view of the finding reached, which was done through Stock Exchange and taking into consideration the revenue transactions, the addition made was deleted by the Tribunal observing as under:-

> *"Contention of the AR is considered. One of the main reasons for not accepting the genuineness of the transactions declared by the appellant that at the time of survey the appellant in his statement denied having made any transactions in shares. However, subsequently the acts came on record that the appellant had transacted not only in the shares which are disputed but shares of various other companies like Satyam Computers, HCL, IPCL, BPCL and Tata Tea etc. Regarding the transactions in question various details like copy of contract note regarding purchase and sale of shares of Limtex and Konark Commerce & Ind. Ltd., assessee's account with P.K. Agarwal & co. share broker, company's master details from registrar of companies, Kolkata were filed.*
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> *Copy of depository a/c or demat account with Alankrit Assignment Ltd., a subsidiary of NSDL was also filed which shows that the transactions were made through demat a/c. When the relevant documents are available the fact of transactions entered into cannot be denied simply on the ground that in his statement the appellant denied having made any transactions in shares. The payments and receipts are made through a/c payee cheques and the transactions are routed through Kolkata Stock Exchange. There is no evidence that the cash has gone back in appellants's account. Prima facie the transaction which are supported by documents appear to be genuine transactions. The AO has discussed modus operandi in some sham transactions which were detected in the search case of B.C. Purohit Group. The AO has also stated in the assessment order itself while discussing the modus operandi that accommodation*

entries of long term capital gain were purchased as long term capital gain either was exempted from tax or was taxable at a lower rate. As the appellant's case is of short term capital gain, it does not exactly fall under that category of accommodation transactions. Further as per the report of DCIT, Central Circle-3 Sh. P.K. Agarwal was found to be an entry provider as stated by Sh. Pawan Purohit of B.C. Purihit and Co. group. The AR made submission before the AO that the fact was not correct as in the statement of Sh. Pawan Purohit there is no mention of Sh. P. K. Agarwal. It was also submitted that there was no mention of Sh. P. K. Agarwal in the order of Settlement Commission in the case of Sh. Sushil Kumar Purohit. Copy of the order of settlement commission was submitted. The AO has failed to counter the objections raised by the appellant during the assessment proceedings. Simply mentioning that these findings are in the appraisal report and appraisal report is made by the Investing Wing after considering all the material facts available on record does not help much. The AO has failed to prove through any independent inquiry or relying on some material that the transactions made by the appellant through share broker P.K. Agarwal were non-genuine or there was any adverse mention about the transaction in question in statement of Sh. Pawan Purohit. Simply because in the sham transactions bank a/c were opened with HDFC bank and the appellant has also received short term capital gain in his account with HDFC bank does not establish that the transaction made by the appellant were non genuine. Considering all these facts the share transactions made through Shri P.K. Agarwal cannot be held as non-genuine. Consequently denying the claim of short term capital gain (6 of 6) [ITA-385/2011] made by the appellant before the AO is not approved. The AO is therefore, directed to accept claim of short term capital gain as shown by the appellant."

In view of the above facts and circumstances of the case, we are of the considered opinion that the addition made by the AO is based on mere suspicion and surmises without any cogent material to show that the assessee has brought back his unaccounted income in the shape of long term capital gain. On the other hand, the assessee has brought all the relevant material to substantiate its claim that transactions of the purchase and sale of shares are genuine. Even otherwise the holding of the shares by the assessee at the time of allotment subsequent to the amalgamation/merger is not in doubt, therefore, the transaction cannot be held as bogus. Accordingly we delete the addition made by the AO on this account."

Thus, it is clear that the Tribunal in the said case has analyzed an identical issue wherein the shares allotted in the private placement @ Rs. 10 at par of face value which were dematerialized and thereafter sold by the assessee and accordingly the Tribunal after placing reliance on the decision of Hon'ble Supreme Court in case of CCE vs. Andaman Timber Industries (supra) as well as the decision of Hon'ble jurisdiction High court in case of CIT vs. Smt. Pooja Agarwal (supra) as held that when the Assessing Officer has not brought any material on record to show that the assessee has paid over and above purchase consideration as claimed and evident from the bank account then, in the absence of any evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. Similar in the case in hand the assessee has produced the relevant record to show the allotment of shares by the company on payment of consideration by cheque and therefore, it is not a case of payment of consideration by in cash. But the transaction is established from the evidence and record which cannot be manipulated

as all the entries are part of the bank account of the assessee and the assessee dematerialized the shares in the D-mat account which is also an independent material and evidence cannot be manipulated. Therefore, the holding of the shares by the assessee cannot be doubted and the finding of the AO is based merely on the suspicion and surmises without any cogent material to show that the assessee has introduction his unaccounted income in the shape of long term capital gain. We find that the ld. CIT(A) has also referred to SEBI enquiry against the M/s Anand Rathi Share and Stock Brokers Ltd. However, we note that the said enquiry was regarding financial irregularities and use of fund belonging to the clients for the purpose other than, the purchase of shares on behalf of the clients. Therefore, the subject matter of the enquiry has no connection with the transaction of bogus long term capital gain. The decisions replied upon the ld. DR in case of Sanjay Bimalchand Jain vs. Pr. CIT (supra) is not applicable in the facts of the present case as the said decision is in respect penny stock purchase by the assessee from a persons who was found to be indulged in providing bogus capital gain entries whereas in the case of the assessee the shares were allotted to the assessee by the company at par of face value. Hence, in view of the facts and circumstances when we hold that the order of the Assessing Officer treating the long term capital gain as bogus and consequential addition made to the total income of the assessee is not sustainable. Hence, we delete the addition made by the AO on this account."

11. I note that the sale of shares of M/s. KAFL which was dematerlized in Demat account has taken place through recognised stock exchange and assessee received money through banking channel. So, assessee has explained the nature and source of the money with supporting documents and thus has discharged the onus casted upon him by producing the relevant documents mentioned in para 6 (supra), accordingly, the question of treating the said gain as unexplained cash credit under section 68 of the Act cannot arise unless the AO is able to find fault/infirmity with the same. I note that the source of the receipt of the amount has been explained and the transaction in respect of which the said amount has been received by assessee has not been cancelled by the stock exchange/SEBI. So, it is difficult to countenance the action of AO/Ld. CIT(A) in the aforesaid facts and circumstances explained above.

12. Even assuming that the brokers may have done some manipulation then also the assessee cannot be held liable for the illegal action of the brokers when the entire transactions have been carried out through banking channels duly recorded in the Demat

accounts with a Government depository and traded on the stock exchange unless specific evidence emerges that the assessee was in hand in gloves with the broker for committing the unscrupulous activity to launder his own money in the guise of LTCG.

13. There is also nothing on record which could suggest that the assessee gave his own cash and got cheque from the alleged brokers/buyers. The assessment is based upon some third party statements recorded behind the back of the assessee and the assessee has not been allowed to cross examine those persons by the assessee, so the statements even if adverse against the assessee cannot be relied upon by the AO to draw adverse inference against the assessee in the light of the documents to substantiate the claim of LTCG, which has not been found fault with by the AO.

14. Let us look at certain judicial decisions on similar facts:-

15. The case of the assessee's is similar to the decision of Hon'ble Bombay High Court, Nagpur Bench in CIT vs. Smt. J mnadevi Agrawal & Ors. dated 23rd September, 2010 reported in (2010) 328 ITR 656 wherein it was held that:

> *"The fact that the asses ees in the group have purchased and sold shares of similar companies through the same broker cannot be a ground to hold that the transactions are sham and bogus, especially when documentary ITA Nos. 93 to 99/RPR/2014 & C.O. Nos. 12 to 18/RPR/2014 . A Y. 2004-05 10 produced to establish the genuineness of the claim. From the documents produced, it is seen that the shares in question were in fact purchased by the assessees on the respective dates and the company has confirmed to have handed over the shares purchased by the assessees. Similarly, the sale of the shares to the respective buyers is also established by producing documentary evidence. It is true that some of the transactions were off-market transactions. However, the purchase and sale price of the shares declared by the assessees were in conformity with the market rates prevailing on the respective dates as is seen from the documents furnished by the assessees. Therefore, the fact that some of the transactions were off-market transactions cannot be a ground to treat the transactions as sham transactions. The statement of the broker P that the transactions with the H Group were bogus has been demonstrated to be wrong by producing documentary evidence to the effect that the shares sold by the assessees were in consonance with the market price. On perusal of those documentary evidence, the Tribunal has arrived at a finding of fact that the transactions were genuine. Nothing is brought on record to show that the findings recorded by the Tribunal are contrary to the documentary evidence on record. The Tribunal has further recorded a finding of fact that the cash credits in the,bank accounts of some of the buyers of shares*

cannot be linked to the assessees. Moreover, yn the light of the documentary evidence adduced to show that the shares purchased and sold by the assessees were in conformity with the market price, the Tribunal recorded a finding of fact that the cash credits in the buyers' bank accounts cannot be attributed to the assessees. No fault can be found with the above finding recorded by the Tribunal. Therefore, the decision of the Tribunal is based on finding of facts. No substantial question of law arises from the order of the Tribunal.—Asstt. CIT vs. Kamal Kumar S. Agrawal (Indl.) & Ors. (2010) 41 DTR (Nag) (Trib) 105: (2010) 133 TTJ (Nag) 818 affirmed; Sumati Dayal vs. CIT (1995) 125 CTR (SC) 124: (1995) 80 Taxman 89 (SC) distinguished."

12. The Hon'ble High Court of Rajasthan in CIT vs. Smt. Pushpa Malpani - reported in (2011) 242 CTR (Raj.) 559; (2011) 49 DTR 312 dismissed the appeal of department observing 'Whether or not there was sale of shares and receipt of consideration thereof on appreciated value is essentially a question of fact. CIT(A) and Tribunal have both given reasons in support of their findings and have found that at the time of transactions, the broker in question was not banned by SEBI and that assessee had produced copies of purchase bills, contract number share certificate, application for transfer of share certificate to demat account along with copies of holding statement in demat account, balance sheet as on 31st March, 2003, sale bill, bank account, demat account and official report and quotations of Calcutta Stock Exchange Association Ltd. on 23rd July, 2003. Therefore, 'the prese itdppeal does not raise any question of law, much less any substantial question of law."

16. The Hon'ble High Court of Punjab and Haryana in the case of Anupam Kapoor 299 ITR 0179 has held as under:-

"The Tribunal on the basis of the material on record, held that purchase contract note, contract note for sates, distinctive numbers of shares purchased and sold, copy of share certificates and the quotation of shares on the date of purchase and sale were sufficient material to show that the transaction was not bogus but a genuine transaction. The purchase of shares was made on 28th April, 1993 i.e.. asst. yr. 1993-94 and that assessment was accepted by the Department and there was no challenge to the purchase of shares in that year. It was also placed before the relevant AO as well as before the Tribunal that the sale proceeds have been accounted for in the accounts of the assessee and were received through account payee cheque. The Tribunal was right in rejecting the appeal of the Revenue by holding that the assessee was simply a shareholder of the company. He had made investment in a company in which he was neither a director nor was he in control of the company. The assessee had taken shares from the market, the shares were listed and the transaction took place through a registered broker of the stock exchange. There was no material before the AO, which could have lead to a conclusion that the transaction was simplicitier a device to camouflage activities, to defraud the Revenue. No such presumption could be drawn by the AO merely on surmises and conjectures. In the absence of any cogent material in this regard, having been placed on record, the AO could not have reopened the assessment. The assessee had made an investment in a company, evidence whereof was with the AO. --Therefore, the AO could not have added income, which was rightly deleted by the CIT(A) as well as the Tribunal. It is settled law that suspicion, howsoever strong cannot take the place of legal proof. Consequently, no question of law, much less a substantial question of law, arises for adjudication.— C. Vasantlal & Co. vs. CIT (1962) 45 ITR 206 (SC), M.O. Thomakutty vs. CIT (.1958) 34 ITR 501 (Ker)) and Mukand Singh vs. Sales Tax Tribunal (1998) 107 STC 300

(Punjab) relied on; Umacharan Shaw &Bros. vs. CIT (1959) 37 ITR 271 (SC) Applied; Jaspal Singh vs. CIT (2006) 205 CTR (P & H) 624 distinguished"

17. The Co-ordinate Bench of Ahmedabad in ITA Nos. 501 & 502/Ahd/2016 had the occasion to consider a similar issue which was wherein the assessment was framed on the strength of the statement of a broker. The relevant part reads as under:-

"14. The entire assessment is based upon the statement of Shri Mukesh Choksi. It is an undisputed fact that neither a copy of the statement was supplied to the assessee nor any opportunity of cross-examination was given by the Assessing Officer/CIT(A). The Hon'ble Supreme Court in the case of Andaman Timber Industries in Civil Appeal No. 4228 of 2006 was seized with the following action of the Tribunal:-

> *"6. The plea of no cross examination granted to the various dealers would not help the appellant case since the examination of the dea ers would not bring out any material which would not be in the possession of the appellant themselves to explain as to why their ex factory prices remain static. Since we are not upholding and applying the ex factory prices, as we find them contravened and not normal price as envisaged under section 4(1), we find no reason to disturb the Commissioners orders."*

15. The Hon'ble Apex Court held as under:-

> *"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 he 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 exfactory 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.*
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> *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 17.03.2005 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.

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.

We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal."

16. On the strength of the aforementioned decision of the Hon'ble Supreme Court, the assessment order has to be quashed.
17. Even on facts of the case, the orders of the authorities below cannot be accepted. There is no denying that consideration was paid when the shares were purchased. The shares were thereafter sent to the company for the transfer of name. The company transferred the shares in the name of the assessee. There is nothing on record which could suggest that the shares were never transferred in the name of the assessee. There is also nothing on record to suggest that the shares were never with the assessee. On the contrary, the shares were thereafter transferred to demat account. Th demat account was in the name of the assessee, from where the shares were sold. In our understanding of the facts, if the shares were of some fictitious company which was not listed in the Bombay Stock Exchange/National Stock Exchange, the shares could never have been transferred to demat account. Shri Mukesh Choksi may have been providing accomm dation entries to various persons but so far as the facts of the case in hand suggest that the transactions were genuine and therefore, no adverse inference should be drawn.

18. In the light of the decisions of the Hon'ble Supreme Court in the case of Andaman Timber Industries (supra) and considering the facts in totality, the claim of the assessee cannot be denied on the basis of presumption and surmises in respect of penny stock by disregarding the direct evidences on record relating to the sale/purchase transactions in shares supported by broker's contract notes, confirmation of receipt of sale proceeds through regular banking channels and the demat account.

19. Accordingly, we direct the A.O. to treat the gains arising out of the sale of shares under the head capital gains- "Short Term" or "Long Term" as the case may be. The other grievance of the assessee becomes infructuous."

18. The ld. D.R. had heavily relied upon the decision of the Hon'ble Bombay High Court in the case of Bimalchand Jain in Tax Appeal No. 18 of 2017. I note that in the case relied

upon by the ld. D.R, I find that the facts are different from the facts of the case in hand. Firstly, in that case, the purchases were made by the assessee in cash for acquisition of shares of companies and the purchase of shares of the companies was done through the broker and the address of the broker was incidentally the address of the company. The profit earned by the assessee was shown as capital gains which was not accepted by the A.O. and the gains were treated as business profit of the assessee by treating the sales of the shares within the ambit of adventure in nature of trade. Thus, it can be seen that in the decision relied upon by the ld. DR, the dispute was whether the profit earned on sale of shares was capital gains or business profit.

19. It is clear from the above that the facts of the case of the assessee are identical with the facts in the above case wherein the co-ordinate bench of the Tribunal has deleted the addition in the case of Smt. Pooja Aggarwal (supra) in respect of sale of shares of M/s KAFL. I, therefore, respectfully following the same set aside the order of Ld. CIT(A) and direct the AO not to treat the long term capital on sale of shares of M/s KAFL as bogus and delete the consequential additi n

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

Order pronounced in the open court on 10th April, 2019

Sd/-

(A. T. Varkey)
Judicial Member

Dated: 10th April, 2019

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1 Appellant –Shri Sunil Kumar Shaw, Bandel Bazar, H/O K. P. Shaw, Balikata, Bandel, Hooghly-712123.
2 Respondent – ITO, Ward-24(3), Hooghly.
3 CIT(A)-6 , Kolkata. (sent through e-mail)
4 CIT , Kolkata
5 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy, By order,

Assistant Registrar