

**IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH, "SMC" AT KOLKATA**

(समक्ष) श्री ऐ. टी. वर्की, न्यायीक सदस्य)

[Before Shri A. T. Varkey, JM]

**I.T.A. No. 1856/Kol/2018****Assessment Year: 2014-15**

M/s. Nicholson Vanijya Pvt. Ltd., C/o. RSVPC & Company [PAN: AABCN 0392 E]	Vs.	ITO, Ward 1(2), Kolkata
Appellant		Respondent

Date of Hearing	20.12.2018
Date of Pronouncement	08.03.2019
For the Appellant	Shri Anikesh Banerjee Advocate
For the Respondent	Smt. Madhumalati Ghosh, Addl. CIT

**ORDER****Per Shri A.T.Varkey, JM**

This is an appeal preferred by the Assessee against the order of Ld. CIT(A) – 1, Kolkata dated 10.07.2018 for Assessment Year 2014-15.

- The main grievance of the assessee is against the action of the Ld. CIT(A) confirming the addition of Rs. 18,46,180/-.
- The brief fact of the case is that the assessee had interest receipt of Rs. 30,99,300/-. The AO noted that the assessee had purchased the shares of M/s. Shree Shaleen Textiles Ltd. at an average price of Rs. 54/- per share and sold it at Rs. 18/- per share thus causing loss of Rs. 18,46,140/-. This claim of loss by the assessee according to the AO was to evade taxes on its income by setting it off with bogus Short Term Capital Loss / bogus Business Loss. According to the AO this was done by circular trading and price was rigged and loss was booked by collusive trading, therefore, the AO treated the loss as bogus and made the addition of Rs. 18,46,140/-. On appeal, the Ld. CIT(A) confirmed the same by holding it as colorable device to evade tax. Aggrieved the assessee is before us.
- Assailing the decision of the Ld. CIT(A), the ld. AR submitted that assessee in order to substantiate the claim of STCL on sale of shares of M/s. Shree Shaleen Textiles has

produced the following in the paper-book and drew our attention wherein we note the following documents:

- a. Demat A/c for the F.Y. 2013-14 in Paper Book on Page 67-68.*
- b. Share Broker's contract note on purchase of 30000 shares of Shaleen Textiles Pvt. Ltd. in Paper Book on Page 69.*
- c. Share Broker's contract note on purchase of 22000 shares of Shaleen Textiles Pvt. Ltd. in Paper Book on Page 70.*
- d. Share Broker's contract note on sale of 52000 shares of Shaleen Textiles Pvt. Ltd. in Paper Book on Page 71.*
- e. Annual Report for the F.Y. 2013-14, 2014-15, 2015-16 of Shree Shaleen Textiles Ltd. in Paper Book on Page 72-175.*
- f. Ledger Account for the F.Y. 2013-14 of the share broker in Paper Book on Page 176.*
- g. Price Movement and Trade Volume for the financial year 2013-14 of Shree Shaleen Textiles in Paper Book on Page 177-181.*
- h. Closing Stock details as on 31.03.2014 in Paper Book on Page 182.*

5. According to the learned AR, the AO has treated the transaction as bogus only on the basis of suspicion or surmises. According to him, the AO has made the addition with prejudiced mind after going through the investigation report of the Investigation Wing of the department and has not bother to find out if there is any collusion between the broker and the assessee in respect to the transaction in question to create bogus loss. It was also brought to our notice that suspension of shares of M/s. Shree Shaleen Textiles Ltd. was from 06.01.2015 whereas the assessee had sold the shares on 13.03.2014 which means the sale of shares was not suspended at the time when the assessee sold the shares. Therefore, according to the learned AR, the AO ought to have allowed the claim of loss on the listed equity of M/s. Shree Shaleen Textiles Ltd. to the tune of Rs. 18,46,140/-. According to the learned AR, the assessee purchased shares of M/s Shree Shaleen Textile Ltd for Rs. 64 and when price was dropping down sold it for Rs 18. So according to ld. AR this was a decision which any prudent businessman would take in such circumstances and purchase and sale are supported by documents as well as the transaction are by account payee cheques. Thereby the claim of loss to the tune of Rs. 18,46,140 /- need to be allowed. According to ld. AR without finding out any fault, the AO/Ld. CIT(A) has not accepted the claim of assessee

which is not legally tenable and want us to grant the claim of STCL. On the other hand, the Id. DR vehemently opposing the submission of Id. AR contended that sham transaction was setup to avoid tax on the interest receipt of Rs. 30,99,900/-, which has been correctly noticed by the AO/Ld. CIT(A) as a colorable devise and this claim is based on the colluded, pre-arranged transaction to book bogus claims in some cases LTCG or in other cases STCL. According to Id DR, these transactions were done systematically by circular trading and price was rigged and loss was booked by collusive trading, therefore, the AO/Ld CIT(A) treated the loss as bogus and made the addition of Rs. 18,46,140/-. According to the learned DR the Investigation Wing of the department has gone into the depth of this unscrupulous practice and has dug out the modus operandi and has identified the persons like assessee, who in order to avoid giving tax has booked the loss when he has interest income of Rs. 17,53,963/- and that the SEBI has suspended the sales of Shree Shaleen Textile Ltd. and the AO has also taken note of the observations made by the SIT to curb laundering of black-money by bogus claim of LTCG / loss. Therefore, he does not want us to interfere with the order of the Ld. CIT(A).

6. After giving our careful considerations to the contention and the documents placed before us which is running to 188 pages of Paper Book, we note that the assessee has declared interest income of Rs. 30,99,300/- and had claimed loss transaction of shares on listed equity of M/ Shree Shaleen Textile Ltd. to the tune of Rs. 18,46,140/-. According to the AO, the loss has been claimed by the assessee for bringing down the profit so that the assessee can avoid giving tax. The AO took note of the investigation carried out by the Investigation Wing of the department and observations of the SIT to draw a conclusion that the assessee's claim of loss on sale of shares of Shree Shaleen Textile Ltd. to the tune of Rs. 18,46,140/- as bogus claim and made the addition. On appeal, the Ld. CIT(A) confirmed the action of the AO. We note that the assessee has filed a Paper Book containing 188 pages from where we note that the assessee had filed the requisite documents called upon by the AO. The assessee had furnished the following documents:

- (i) Copy of Bank Statement
- (ii) Copy of DEMAT statement
- (iii) Details of share dealing during the year
- (iv) The contract notes of Shares traders

- (v) Ledger accounts of the share brokers
- (vi) Bank statement showing the transactions with brokers
- (vii) Price movement with volume for the period 2 months prior and 2 months after the purchase, as well for sale.

7. We note that the aforesaid documents filed by the assessee before the AO in order to substantiate sale of listed shares of Shree Shaleen Textile Ltd. has not been founded to be false, fabricated and fictitious. The assessee had furnished the copies of contract notes, Demat statement, Bank Statement, Ledger accounts of brokers. The transactions in listed shares took place through a registered share broker, namely M/s. Dhan Stock & Share Broker Pvt. Ltd. The purchase and sales took place on screen based trading platform of Bombay Stock Exchange. The transaction was settled by making / receiving payment by account payee cheques through proper banking channel. The assessee had paid securities transaction tax (STT) on both purchase and sales. The transaction took place at the price quoted on stock exchange on respective transaction dates. We also note that the assessee purchased the shares on 11.11.2013 @ Rs 64.19/- per share for Rs 19,25,707/- and Rs 8,77,585/- [ Total Rs 28,03,292/-] sold the shares of Shree Shaleen Textile Ltd. on 13.03.2014 @ Rs 18.41 for Rs 18 46,140/-whereas the sale of this scrip was suspended on 06.01.2015. So the sale of scrip of M/s. Shree Shaleen Textile took place before the suspension of this scrip is concerned. In the light of the documents filed as aforesaid, the assessee has discharged the onus to prove the genuineness of the loss suffered. There is no evidence to show that the documents filed by the assessee before the AO are false and fabricated. So, therefore, we are of the opinion that the assessee's claim had to be upheld, for doing so, we rely on the following judgment of the Hon'ble Jurisdictional High Court as well as the other High Courts and Coordinate Bench of this Tribunal as discussed below.

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

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

*There is no law that the off market transactions should be informed to stock exchange. All the transactions are duly recorded in the accounts of both the parties and supported with the account payee cheques. The ld. AR has also submitted the IT return, ledger copy, letter to AO and PAN of the broker in support of his claim which is placed at pages 72 to 75 of the paper book. The ld. AR produced the purchase & sale contracts notes which are placed on pages 28 to 69 of the paper book. The purchase and sales registers were also submitted in the form of the paper book which is placed at pages 76 to 87. The Board resolution passed by the company for the transactions in commodity was placed at page 88 of the paper book. On the other hand the ld. DR relied in the order of the lower authorities.*

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

8. We note that in order to create a tax liability in a case of this nature, the AO has to prove and establish the cash trail and the allegations, particularly in respect of the appellant, which is yet to be proved in the instant case. Similar view has been pronounced by Hon'ble Delhi High Court in the case of Pr. CIT vs Jatin Investment (P) Ltd. wherein it was observed "*A transaction cannot be treated as fraudulent if the appellant has furnished the documentary proof and proved the identity of the purchaser and no discrepancy is found. The AO has to exercise his powers u/s 131 & 133(6) of the Act to verify the genuineness of the claim and cannot proceed on surmises. The AO must establish that cash has changed hands. There is no material or evidence even to suggest that the cheques directly or indirectly emanated from the appellant so that it could be said that the appellants' own money was brought back in the guise of sale proceeds*".

9. In the case of CIT vs. Lavanya Land Pvt Ltd. the Hon'ble Bombay High Court ruled that the allegations made by the authorities have to be supported by actual cash passing hands or actually has changed hands.

10. In the case of DOLARRAI HEMANI vs. ITO, this Tribunal held that the fact that the stock is thinly traded & there is unusually high gain, is not sufficient to treat the LTCG as bogus when all the paperwork is in order. The revenue has to bring material on record to support its findings that there has been collusion/connivance between the Broker & the Appellant for the introduction of unaccounted money.

11. In the case of DCIT Vs. Sunita Khemka, ITAT Kolkata ruled that the AO cannot treat a transaction as bogus only the basis of suspicion or surmises. He has to bring material on record to support his findings that there has been a collusion/connivance between the Broker and the Appellant for the introduction of its unaccounted money. A transaction of purchase and sale of shares, supported by Contract Notes and d-mat statements and account payee cheques cannot be treated as bogus.

12. In the case of KAMALA DEVI S DOSHI VS. ITO ITAT MUMBAI, vide it's order dated 22.5.2017 held that statement u/s 131 of the Act implicating Appellant is not sufficient to draw adverse inference where documents in the form of Contract Notes, bank statements, STT payment etc. proves the genuineness of purchase and sale of Penny Stock. Failure to provide cross examination is a fatal error.

13. So, as the facts of the case are very similar, the AO has failed to establish any link and therefore the order is based on surmises, predetermined, solely relying upon the investigation report which is general in nature and no concrete material has been brought on record proving otherwise.

14. We note that the AO in his order has mentioned that SEBI has given adverse report on so many scrips including that of Kailash Auto. Further, we note that SEBI, in its two reports on the said scrip, has named and banned/suspended the beneficiaries in particular. However, we note that the appellant's name does not appear in this list. And that the SEBI did not stop/suspend the trade of sale of M/s. KAFL when assessee sold the scrip. We note that M/s. KAFL was very much listed on the stock exchange and trading in the said scrip was permissible on the stock exchange. Moreover SEBI report against certain beneficiaries of Kailash Auto was in public much after the appellant has sold the shares, and we note that on 29.03.2016 SEBI has revoked the ban on such entities which implies that there was no evidence against them.

15. We note that at Para -18 of the assessment order AO mentions about the role of brokers in allowing entry operators to register their bogus companies as their client and also

certain admission made by some brokers about their involvement in so called Jama kharchi companies. In the said para some names of few brokers and Jama Kharchi operators have been mentioned. However, we note that the name of assessee's broker, M/s. Guinness Securities Ltd., through whom the assessee sold his shares, does not appear at all in that report.

16. We note that M/ s Guinness Securities Ltd was not named in the assessment order / D.I. report as a broker who was involved in price rigging of penny stocks. On the other hand, we note that M/s. Guinness Securities Ltd is a SEBI registered stock broking company having registration no. INB 011146033 and also is a member of Bombay Stock Exchange having membership no. 3027; Neither during the time of execution of the contract in FY 2013-14 nor even today, this stock-broking company was suspended by SEBI or BSE on any charge of irregularities like price rigging etc as alleged by the AO. We note that AO failed to bring on record any material to connect the assessee to any of the alleged entry operators/ brokers who are a part of this so called price rigging group or LTCG Generator Group.

17. We note that in an identical/similar case, wherein the AO made addition of the LTCG claim made on sale of M/s. KAFL scrips on similar reasoning based on the SEBI interim report, investigation report of the Wing of the Department and certain statements recorded by the Department in the case of Sanjiv Shroff Vs. ACIT in ITA No. 1197/Kol/2018 Dated 02.01.2019 wherein the same Bench observed as under and gave relief to the assessee:

“We note that shares of M/s. KAFL were sold by assessee through recognized broker in a recognized Bombay Stock Exchange. The details of such sale and contract note have been submitted before AO/Ld. CIT(A). We 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. According to our knowledge, the shares are sold and bought in an electronic mode on the computers by the brokers and there is also no direct contact at any level even between the brokers. We note that as and when any shares are offered for sale in the stock exchange platform, any one of the thousands of brokers registered with the stock exchange is at liberty to purchase it. As far as our understanding, the selling broker does not even know who the purchasing broker is. This is how the SEBI keeps a strict control over the transactions taking 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, we are 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.

17. The fact of holding the shares of M/s. KAFL 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 in 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 statement of Shri Sunil Dokani, Shri Bidyoot Saral, Shri Narendra Basin and Shri Amit Dokani recorded by the 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.

18. The assessee has requested the cross examination of Shri Sunil Dokani, Shri Bidyoot Saral, Shri Narendra Basin and Shri Amit Dokani which was not provided to the assessee by the AO. Thus, in view of the decision of Hon'ble Supreme Court in case of [CCE vs. Andaman Timber Industries](#) 127 DTR 241(SC) the assessment based on statement without giving an opportunity to assessee to cross examine the maker of the adverse statements relied on by the AO, is not sustainable in law. We find that the statement cannot be used by the AO without giving an opportunity to cross examination of Shri Sunil Dokani, Shri Bidyoot Saral, Shri Narendra Basin and Shri Amit Dokani. Therefore, the statement of witness cannot be sole basis of the assessment without given an opportunity of cross examination and consequently it is a serious flaw which renders the order a nullity. 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 their liability as per their mutual understanding with the assessee. 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 who will borne out these expenses from alleged collection of premium. The probable factors could have 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."*

19. Since, 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 Rajasthan High Court dated 11-09-2017 in case of [CIT vs. Smt. Pooja Agrawal](#) [ ITA no 385/2011 ] has upheld the finding of the Tribunal on this issue in 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 facts 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 Lintex 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.*

*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."

20. We note that the sale of shares of M/s. KAFL which was dematerIALIZED 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 15 (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/infirmary with the same. We 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.

21. 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 is brought on record by the AO.

22. 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 parties statements recorded behind the back of the assessee and the assessee has not been allowed to cross examine those persons, 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.

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

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

*"The fact that the assesseees 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 assesseees on the respective dates and the company has confirmed to have handed over the shares purchased by the assesseees. 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 assesseees were in conformity with the market rates prevailing on the respective dates as is seen from the*

documents furnished by the assesseees. 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 assesseees 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 assesseees. Moreover, in the light of the documentary evidence adduced to show that the shares purchased and sold by the assesseees 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 assesseees. 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 present appeal does not raise any question of law, much less any substantial question of law.’”

25. 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 sales, 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 .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 simpliciter 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”

26. 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 dealers 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 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 the 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.

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. The 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 accommodation 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."

27. The assessee has furnished all evidences in support of the claim of the assessee that it earned LTCG on transactions of his investment in shares. The purchase of shares had been accepted by the AO in the year of its acquisition and thereafter until the same were sold. The off market transaction for purchase of shares is not illegal as was held by the decision of *Coordinate Bench of this Tribunal in the case of Dolarrai Hemani vs. ITO in ITA No. 19/Kol/2014 dated 2.12.2016* and *the decision by Hon'ble Calcutta High court in PCIT Vs. BLB Cables & Conductors Pvt. Ltd. in ITAT No. 78 of 2017 dated 19.06.2018 wherein all the transactions took place off market and the loss on commodity exchange was allowed in favour of assessee.* The transactions were all through account payee cheques and reflected in the books of accounts. The purchase of shares and the sale of shares were also reflected in Demat account statements. The sale of shares suffered STT, brokerage etc. In the facts and circumstances of the case, it cannot be held that the transactions were bogus. The following judgments of Hon'ble Jurisdictional High Court:-

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

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

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

69 of the paper book. The purchase and sales registers were also submitted in the form of the paper book which is placed at pages 76 to 87. The Board resolution passed by the company for the transactions in commodity was placed at page 88 of the paper book. On the other hand the ld. DR relied in the order of the lower authorities.

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

**ii) M/s Classic Growers Ltd. vs. CIT [ITA No. 129 of 2012] (Cal HC)** – In this case the ld AO found that the formal evidences produced by the assessee to support huge losses claimed in the transactions of purchase and sale of shares were stage managed. The Hon’ble High Court held that the opinion of the AO that the assessee generated a sizeable amount of loss out of prearranged transactions so as to reduce the quantum of income liable for tax might have been the view expressed by the ld AO but he miserably failed to substantiate that. The High Court held that the transactions were at the prevailing price and therefore the suspicion of the AO was misplaced and not substantiated.

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

**iv) CIT V. Shreyashi Ganguli [ITA No. 196 of 2012] (Cal HC)** – In this case the Hon’ble Calcutta High Court held that the Assessing Officer doubted the transactions since the selling broker was subjected to SEBI’s action. However the transactions were as per norms and suffered STT, brokerage, service tax, and cess. There is no iota of evidence over the transactions as it were reflected in demat account. The appeal filed by the revenue was dismissed.

**v) CIT V. Rungta Properties Private Limited [ITA No. 105 of 2016] (Cal HC)** – In this case the Hon’ble Calcutta High Court affirmed the decision of this tribunal, wherein, the tribunal allowed the appeal of the assessee where the AO did not accept the explanation of the assessee in respect of his transactions in alleged penny stocks. The Tribunal found that the AO disallowed the loss on trading of penny stock on the basis of some information received by him. However, it was also found that the AO did not doubt the genuineness of the documents submitted by the assessee. The Tribunal held that the AO’s conclusions are merely based on the information received by him. The appeal filed by the revenue was dismissed.

**vi) CIT V. Andaman Timbers Industries Limited [ITA No. 721 of 2008] (Cal HC)** – In this case the Hon’ble Calcutta High Court affirmed the decision of this Tribunal wherein the loss suffered by the Assessee was allowed since the AO failed to bring on record any evidence to suggest that the sale of shares by the Assessee were not genuine.

**vii) CIT V. Bhagwati Prasad Agarwal [2009- TMI-34738 (Cal HC) in ITA No. 22 of 2009 dated 29.4.2009]** – In this case the Assessee claimed exemption of income from Long Term Capital Gains. However, the AO, based on the information received by him from Calcutta Stock Exchange found that the transactions were not recorded thereat. He therefore held that the transactions were bogus. The Hon’ble Jurisdictional High Court, affirmed the decision of the Tribunal wherein it was found that the chain of transactions entered into by the assessee have

been proved, accounted for, documented and supported by evidence. It was also found that the assessee produced the contract notes, details of demat accounts and produced documents showing all payments were received by the assessee through banks. On these facts, the appeal of the revenue was summarily dismissed by High Court.

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

- (i) *Baijnath Agarwal vs. ACIT – [2010] 40 SOT 475 (Agra (TM))*
- (ii) *ITO vs. Bibi Rani Bansal – [2011] 44 SOT 500 (Agra) (TM)*
- (iii) *ITO vs. Ashok Kumar Bansal – ITA No. 289/Agra/2009 (Agra ITAT)*
- (iv) *ACIT vs. Amita Agarwal & Others – ITA Nos. 247/(Kol)/ of 2011 (Kol ITAT)*
- (v) *Rita Devi & Others vs. DCIT – IT(SS)A Nos. 22-26/Kol/2p11 (Kol ITAT)*
- (vi) *Surya Prakash Toshniwal vs. ITO – ITA No. 1213/Kol/2016 (Kol ITAT)*
- (vii) *Sunita Jain vs. ITO – ITA No. 201 & 502/Ahd/2016 Ahmedabad ITAT*
- (viii) *Ms. Farrah Marker vs. ITO – ITA No. 3801/Mum/2011 (Mumbai ITAT)*
- (ix) *Anil Nandkishore Goyal vs. ACIT – ITA Nos. 1256/PN/2012 (Pune ITAT)*
- (x) *CIT vs. Sudeep Goenka – [2013] 29 taxmann.com 402 (Allahabad HC)*
- (xi) *CIT vs. Udit Narain Agarwal – [2013] 29 taxmann.com 76 (Allahabad HC)*
- (xii) *CIT vs. Jamnadevi Agarwal [2012] 20 taxmann.com 529 (Bombay HC)*
- (xiii) *CIT vs. Himani M. Vakil – [2014] 41 taxmann.com 425 (Gujarat HC)*
- (xiv) *CIT vs. Maheshchandra G Vakil – [2013] 40 taxmann.com 326 (Gujarat HC)*
- (xv) *CIT vs. Sumitra Devi [2014] 49 Taxmann.com 37 (Rajasthan HC)*
- (xvi) *Ganeshmull Bijay Singh Baid HUF vs. DCIT – ITA Nos. 544/Kol/2013 (Kolkata ITAT)*
- (xvii) *Meena Devi Gupta & Others vs. ACIT – ITA Nos. 4512 & 4513/Ahd/2007 (Ahmedabad ITAT)*
- (xviii) *Manish Kumar Baid ITA 1236/Kol/2017 (Kolkata ITAT)*
- (xix) *Mahend a Kumar Baid ITA 1237/Kol/2017 (Kolkata ITAT)*

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

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

30. Moreover it was submitted before us by Id AR that the AO was not justified in taking an adverse view against the assessee on the ground of abnormal price rise of the shares and

alleging price rigging. It was submitted that there is no allegation in orders of SEBI and/or the enquiry report of the Investigation Wing to the effect that the assessee, the Companies dealt in and/or his broker was a party to the price rigging or manipulation of price in CSE. The Id AR referred to the following judgments in support of this contention wherein under similar facts of the case it was held that the AO was not justified in refusing to allow the benefit under section 10(38) of the Act and to assess the sale proceeds of shares as undisclosed income of the assessee under section 68 of the Act :-

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

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

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

33. The next issue in confirming the addition of Rs.1,83,020/- as unexplained expenditure towards commission charges of sale of such shares by the operator. We have already held that the transactions relating to LTCG were genuine and not the accommodation entries as alleged by the AO. Consequently the addition of Rs.1,83,020/- is hereby directed to be deleted. We accordingly hold that the issue is allowed in favour of the assessee.”

18. From the facts discussed in para 7 and 8 supra, and the ratio decidendi of the Hon'ble jurisdictional High court and other Hon'ble High Courts, and particularly the Hon'ble jurisdictional High Court decision in the case of M/s. Blb Cables And Conductors,(supra) we, therefore, respectfully following the same, allow the claim of loss as claimed by the assessee.

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

Order is pronounced in the open court on 8th March, 2019

Sd/-

(Aby. T. Varkey)  
Judicial Member

Dated : 8th March, 2019  
Biswajit (Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – Nicholson Vanijya Pvt. Ltd., C/o. RSVPC & Company, 41A, A.J.C. Bose Road, Suite No. 613, 6<sup>th</sup> Floor, Kolkata – 700 017.
- 2 Respondent – ITO, Ward 1(2), Kolkata.
3. The CIT(A),
4. CIT ,
5. DR,

/True Copy,

By order,

Assistant Registrar/H.O.O  
ITAT, Kolkata

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