

## 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. 2205/Kol/2018****Assessment Year: 2013-14**

Rohit Jalan (PAN: AEZPJ1210L)	Vs.	ITO, Ward-36(1), Kolkata.
Appellant		Respondent

Date of Hearing	20.02.2019
Date of Pronouncement	17.05.2019
For the Appellant	Shri S. M. Surana, Advocate
For the Respondent	Shri Robin Choudhury, ACIT, Sr. DR

**ORDER**

This is an appeal preferred by the Assessee against the order of Ld. CIT(A) – 10, Kolkata dated 19.09.2018 for Assessment Year 2013-14.

2. Though the assessee has raised the legal issue against validity of reopening u/s. 147 read with 148 of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), I note that the addition is based on the Long Term Capital Gains claim of the assessee in respect of sale of scrip of M/s. Tuni Textile Mills Ltd. as exempt u/s. 10(38) of the Act which was held by AO to be bogus and that action of AO was confirmed by the Ld. CIT(A) on appeal of the assessee. Therefore this appeal of assessee before this Tribunal.

3. Briefly stated facts are that the assessee filed his return of income declaring total income of Rs.8,11,164/-. The return was processed u/s. 143(1) of the Act and no scrutiny assessment was made. Thereafter, the AO issued notice u/s. 148 of the Act. The assessee is an individual who claimed LTCG to the tune of Rs.28,93,483/- on sale of shares of M/s. Tuni Textiles Ltd. The AO reopened the assessment on the basis of information received from Directorate of Income Tax (Inv.) that the assessee had transacted in penny stock shares. Thereafter, the AO made the assessment u/s. 147/143(3) of the Act treating the LTCG of Rs.28,93,483/- as unexplained cash credit u/s. 68 of the Act. The AO further made addition of Rs.14,467/- for alleged commission @ .5% paid to obtain the alleged

bogus LTCG u/s. 69C of the Act. Aggrieved, assessee preferred an appeal before the Ld. CIT(A) who confirmed the action of AO. Aggrieved, assessee filed appeal before the Tribunal.

4. I have heard rival submissions and gone through the facts and circumstances of the case. We note that though the assessee has raised the legal issue against validity of reopening u/s. 147 read with sec. 148 of the Act, it is noted that in the reassessment order the addition is in respect of the LTCG claim of the assessee in respect of sale of scrip of M/s. Tuni Textile Mills Ltd. as exempt u/s. 10(38) of the Act which was held by AO to be bogus and that action of AO has been confirmed by the Ld. CIT(A) on appeal of the assessee. However, we note that in a number of cases, this Tribunal has held that the scrip of M/s. Tuni Textile Mills is not bogus and has allowed the claim of assessee in respect of LTCG claim on the sale of this scrip i.e. M/s. Tuni Textile Mills Ltd. (in short M/s. TTML). We note that the issue is no longer *res integra* as the Tribunal in IT(SS) A Nos. 112 & 113/Kol/2018 Ramesh Chandra K. Shah Vs. ACIT for AYs 2011-12 and 2012-13 order dated 12.02.2019 wherein the Tribunal has held that the scrip of M/s. TTML is not a bogus scrip. We note that in this case the Tribunal has held as under:

“10. We have heard rival submissions and gone through the facts and circumstances of the case. First, we make it clear that as per the admitted facts enumerated in para 4 supra, both the assessment years before us are unabated assessments, since these assessment years were not pending before the AO on the date of search on 12.08.2015, so no addition can be made by the AO, without the aid of incriminating materials. With that background in mind, let us see whether there are any incriminating materials unearthed against the assessee during search, which can justify the addition made by the AO. In the said look-out, we note that the AO's assertion that incriminating material i.e. CJ-2 and CJ-13 were recovered during search which show that the assessee dealt with M/s. TTML which resulted in bogus LTCG, our opinion after examining carefully each documents which are placed from pages 32 to 69 are that they are nothing but bank statement, ledgers, accounts maintained by assessee of GCM securities[broker], ledger account of Bank of India, Burra Bazar Branch, contract notes of sale, summary of LTCG, Balance Sheet, Income Tax Return which documents according to us, can by no stretch of imagination be termed as incriminating material, rather we note that these were the very same documents the assessee had already disclosed before search and on the strength of which the assessee, in fact had claimed authentically to his transaction for claiming LTCG. So, we find that there is no incriminating material unearthed against the assessee during search as misunderstood by the AO and the Ld. CIT DR before us. Only other incriminating material according to Ld. DR before us is the statement of Shri Narendra Prabhudayal Sureka which has been recorded by the department. The AO has reproduced his statement in the assessment order itself. After carefully going through the contents of the statement we note that this statement was recorded by the department *before the search* i.e. on 02.06.2015 whereas search took place on 12.08.2015. So admittedly no incriminating statement was recorded during search under section 132(4) of the Act. As we noted this statement was recorded by the department *before the search* and the inference that can be drawn is that the search team leaders would be aware of the statement of Shri Narendra

Prabhudayal Sureka in respect of shares of M/s. TTML, so while conducting search, they would enthusiastically look for some material/diary/electronic entry/computer entry/print out to show the movement of cash from assessee's coffer to the purchase of shares from assessee (i.e. to the pre-arranged buyer at the Bombay Stock Exchange who bought assessee's share of M/s. TTML for astronomical price) or as to find out any correspondence/link/nexus to establish the assessee's relationship between Shri Narendra Prabhudayal Sureka or Shri Manish Baid. Though during hearing we asked the department to show some material leave along evidence to suggest any link of assessee with Shri Narendra Prabhudayal Sureka or Shri Manish Baid, they could not produce before us. So, undisputedly since the statement of Shri Narendra Prabhudayal Sureka has been recorded behind the back of assessee that too before search and does not directly implicate the assessee in any wrong doing cannot be termed as incriminating material against assessee. Moreover, we should hasten to add that Shri Narendra Prabhudayal Sureka's statement (in detail we will discuss later) is a general statement that M/s. TTML is a penny stock. However, we note that Shri Narendra Prabhudayal Sureka has attributed no knowledge about the beneficiaries and has put the entire blame on Shri Manish Baid, whose statement AO has not placed on record and so Shri Narendra Prabhudayal Sureka's statement in no way advances the case against the assessee, because Shri Narendra Prabhudayal Sureka is ignorant about any preferential share holders. So without any incriminating material against the assessee found during search in respect to shares of M/s. TTML, no addition can be made without incriminating material found during search. So, since both the AY's before us were not pending before AO on date of search, so without incriminating materials unearthed during search, no addition can be made as held by Hon'ble Delhi High Court in *Kabul Chawla* (supra) wherein their Lordships held as under:

*“Summary of legal position*

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

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

*property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.”*

11. The Hon'ble Jurisdictional Calcutta High Court in ITA No. 661 of 2008 Commissioner of Income Tax vs. Veerprabhu Marketing Ltd. has also held as under:

*“We agree with the view expressed by the Karnataka High Court that incriminating material is pre-requisite before power could have been exercised u/s 153(C) r.w Section 153(A). In the case before us, the AO has made a disallowance of the expenditure, which was held disclosed, for one reason or the other, but such disallowances made by the AO were upheld by the LD.CIT(A) but the Ld. Tribunal deleted these disallowance. We find no infirmity in the aforesaid Act of the Ld. Tribunal. The appeal is, therefore, dismissed”.*

12. In a similar case M/s. Kurele Paper Mills Pvt. Ltd. addition was made by the AO (in sec. 153A proceedings) without incriminating material unearthed during search, the share capital received by the assessee u/s. 68 of the Act was deleted by the Tribunal, which order has been upheld by Hon'ble Delhi High Court in Pr. CIT Vs. Kurele Paper Mills Pvt. Ltd. (2016) 380 ITR 571 (Del) which decision has not been disturbed by the Hon'ble Supreme Court (2016) 380 ITR (St.) 69-ed and was pleased to dismiss the SLP.

13. Before we part for completeness, we would like to analyze the statement of Shri Narendra Prabhudayal Sureka who according to revenue has given incriminating ocular evidence against the assessee in-respect of scrips of M/s TTML. From the statement of Shri Narendra Prabhudayal Sureka it reveals that he is the Managing Director of M/s. TTML. His statement has been recorded on 02.06.2015 (before search which happened on 12.08.2015) (appeal paper pages 72 to 81). From a perusal of the statement of Shri Narendra Prabhudayal Sureka we note that his company M/s. TTML was not a fly by night company. It has a running factory which is situated at B4/5, MIDC Mu bad, Thane and he was the Managing Director of the company since 06.07.1987 and this company was listed with the BSE in 1996 and it was in the business of manufacturing cloth from yarn. It is discerned that M/s. TTML was delisted due to non-compliance with the statutory requirement of BSE and the company incurred losses so, had applied with the BIFR in the year 2000 and was declared as a sick unit on 16.04.2002. Thereafter, he said that when the proceedings were going on at BIFR, since no financial institution was forthcoming to finance the company, he came into contact with Shri Manish Baid who suggested him the route of preferential shares to raise capital and he has replied to question no. 12 that he list of preferential allottees was given at annexure I (which is not annexed before us) and that he has raised capital of Rs.7,50,00,000/- at Rs. 10/- face value from 47 HUF/individual on 25.01.2010. According to Shri Narendra Prabhudayal Sureka these preferential shares were allotted to people who was known only to Shri Manish Baid and to question no. 31 he has answered that the amount received as investment through preferential share allotment was utilized for the business affairs of the M/s. TTML in the form of capital investment and a separate bank account was created with the Indian Overseas Bank, Nariman Point. The company was again listed with BSE on 13.03.2009. After saying all the aforesaid facts, to a question as to how the share price shot up to high price, Shri Narendra Prabhudayal Sureka has stated that it is a penny stock company and that the shares of the company have been used to provide entry for bogus LTCG to the Preferential allottees and on the same breath again has said that the entire scheme has been managed and controlled by Shri Manish Baid. From the reply of shri sureka, it transpires that M/s. TTML is a running cloth Mill and there are still employees working in his factory and also he does not know personally about the preferential shareholders and conveniently has stated that one Shri Manish Baid has brought these shareholders from whom Rs. 7.50 cr. was collected and it was infused as capital into his company M/s. TTML. It is also noted that though Shri Narendra Prabhudayal Sureka has stated that he does not know any of the preferential allottees, we note that the AO has not made any attempt to get the statement of Shri Manish Baid on board, which would have thrown light as to whether the assessee had any contact with Mr. Manish Baid who is supposed to have been main player, and would have cleared the air of suspicion. We note that the assessee has been allotted preferential shares vide letter dated 27.01.2010 of Rs. 2 lacs vide

company's share certificate dated 25.01.2010 which though casts doubt, but it cannot be the sole basis for terming the entire claim of assessee as bogus or that assessee's money was laundered in the modus operandi as suggested by the department, because as per his statement shri sureka when he was facing financial crisis went to shri Manish Baid and sought his help to raise the funds and by that process Rs 7.50 crores was collected by allotment of shares and that fund was infused as capital into his company M/s TTML and then M/s TTML was again listed in BSE. Thereafter, the share value purchased by assessee for Rs 10/- per share started rising, which according to shri Sureka was as per the scheme and plan of shri Baid and in order to riggle out of the question how the price of shares of M/s TTML suddenly rose to astronomical price has put the blame on shri Baid. So, if shri Sureka has to be believed, then it turns out that he was an accomplice along with shri Baid, for collection of Rs 7.5 cr by way of preferential share allotment, which paved the way for LTCG. Though we note that shri sureka has conveniently palmed off the wrong acts attributable to shri Baid alone and the department has not spelled out what action has been taken against Shri Narendra Prabhudayal Sureka in the light of his own statement or it has been examined as to whether his statement is self serving or not, could have been cleared only if statement of shri Manish Baid was recorded which clearly could have brought out the correct facts. So without the statement of Shri Manish Baid we cannot attribute any wrong doing on the part of assessee. From the aforesaid discussion we note that the statement of shri sureka does not in any manner directly implicate the assessee and so based on the statement of shri sureka alone, no adverse inference can be drawn against the assessee. Therefore, we made a finding supra that shri sureka statement reproduced in the assessment order as not incriminating qua the assessee.

14. Coming to the merits of the case we note that the assessee has applied for allotment of 2,00,000 equity shares at face value @ Rs. 10 each on 4.01.2010 in M/s. TTML. The company issued and allotted 2,00,000 equity shares on preferential basis on 25.01.2010 and informed assessee on 27.01.2010 with condition that the shares shall be held in for a lock in period for one year. Copies of application for allotment, allotment letter & photocopy of share certificate are available in paper book pages 70 -72. The assessee had paid the purchase consideration of Rs.20,00,000/- vide account payee cheque issued upon Bank of India on 14/01/2010, which was cleared on 15/01/2010. Copy of Bank Statement is available at page enclosed at page-73 of the paper book. Such investment of Rs.20,00,000/- made in M/s. TTML was duly reflected in the Balance Sheet of the assessee as on 31/03/2010. Copy of Balance Sheet and P&L account is seen placed at pages 74-75 of the paper book. The shares were de-matted with NSDL and kept in the de-mat account opened with depository participatory M/s Eureka Stock & Share Broking Services Limited (DPID: IN302105). Copy of De-mat request form is seen placed at page 76 of the paper book. The shares were released after completion of the lock-in period i.e. after 25/01/2011 and thereafter the assessee sold some of his holding through the Bombay Stock Exchange at various dates from 02/02/2011 through SEBI registered broker (No. INB 010793439), M/s GCM Securities Limited (BSE Code 6250). In this process 1,09,000 shares were sold till 30/03/2011 against contract notes, for total consideration of Rs.2,46,83,694, which was inclusive of Security Transaction Tax (SIT) of Rs.35,523. Copy of contract notes evidencing sale of shares are found placed at pages 77-85 of paper book. We note that the assessee received the money into his bank account maintained with Bank of India within the time period as prescribed under Stock Exchange Regulations and the copy of Bank Statement reflecting receipt is available at pages 86-91 of paper book. We note that the shares were debited in the de-mat account in various dates as per the various dates in consonance with the contract notes. Copy of De-mat transaction statement is found placed at paper book page 92. Since assessee purchased shares of this scrips of 1,09,000 at Rs.10,90,000 and sold the shares for Rs. 2,46,83,694, he made a capital gain of Rs.2,35,93,694. Copy of long term capital gain statement is available at page 93 of paper book. Since the sale was made after one year of holding and after payment of STT and transactions took place in the floor of the recognized stock exchange (BSE), the income was computed by assessee under long term capital gain which is exempted from tax u/s. 10(38) of the Act. The assessee produced all relevant documents in support of the transaction including purchase bills, sale contract notes, bank statement and D-mat statement reflecting purchase

and sale of shares the LTCG claim of assessee cannot be brushed aside without adverse material to suggest it as bogus. We note that the Balance 91,000 shares were continued to be reflected in the de-mat statement. In the computation of income, income under various heads, were stated including income from long term capital gain. Further the LTCG was shown in the income side of the Income-Expenditure A/c for FY 2010-11. Computation of income for AY 11-12 & I & E a/c is found placed at page 94 of the paper book. Balance investment in M/s. TTML for 91,000 at a cost of Rs.9,10,000 was continued to be reflected in the Balance sheet as on 31/03/2011. Copy of Balance Sheet as on 31/03/2011 is found placed at page 95 of paper book. We also note that the assessee has submitted an extract of price data of BSE to substantiate that the shares were sold at prevailing market price. Copy of the BSE price data during the period of sale is found placed at pages 96 and 97 of paper book. We note that the AO did not find any defect/ discrepancy about the documents which were produced to establish the genuineness of the share transaction. Before us the Ld. AR submitted that the AO's show cause notice was replied denying any relation with the parties referred in the investigation report. Copy of the reply is found placed at pages 98 to 100 of the paper book. We note that the AO based on the general investigation report of the department discarded all the above evidences. Further the AO taking note of the price rise, high volume, low fundamentals etc. held that the share transaction as bogus. It was brought to our notice that the AO did not provide during the assessment proceedings, any copies of the material, investigation reports, statements purportedly recorded behind the back of the assessee to create a smoke screen of suspicion and doubt against the assessee. And AO based on third party evidence which were not supplied to the assessee brushed aside the aforesaid documents which substantiated the LTCG and held the transaction to be bogus, which according to Ld. AR, is not fair just and reasonable and so wants the claim of assessee allowed as done in similar case.

15. We note that for claiming exemption u/s 10(38) of Act three requirement needs to be fulfilled. Firstly, the share purchased should be held for more than 1 year. Secondly the shares should be listed & sold on recognized stock exchange. Thirdly on the said sale, necessary security transaction tax (STT) has been paid. In the present case, the shares of M/s. TTML was acquired by assessee on 25/01/2010 from the Company on preferential basis. After the lock-in period of one year, the shares were placed in the De-mat Account. Some shares were sold in BSE on various dates starting from 02/02/2011 onwards after payment of all statutory levies including STT & brokerage. Thus, after the shares were held for more than 1 year, the same was sold on recognized stock exchange and necessary STT paid. Hence the assessee is legally eligible to avail the exemption u/s. 10(38) of the Act and the AO only can deny the claim on cogent grounds with material to substantiate his conclusion that assessee indulged along with persons' statement recorded (which is supported by some material to suggest) that assessee was beneficiary to the whole stage managed claim of exempt gain.

16. AO invoked section 68 of the Act treating the share transaction as sham and added the LTCG of Rs.2,35,93,694 invoking section 68 of the Act. Section 68 of the Income Tax Act, reads as under:

*"Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year."*

17. From the above it may be seen that the primary liability, u/s 68 of the Act, is that of the assessee in whose books the cash credit entry is found. This liability arises only when the assessee fails to prove satisfactorily the source from where it received the amount and the nature of the amount so received that is, it has to show how the said amount is not an income-receipt.

18. From the aforesaid documents discussed in detail herein above at para 14 (supra) it can be seen that the assessee had explained the nature & source of transaction in detail in order to discharge its onus/primary liability. The assessee as we had taken note has sold the equity shares of M/s. TTML as long term capital assets and received payment from the Bombay Stock Exchange through the SEBI registered broker M/s GCM Securities Limited. The AO, we note has not spelled out specifically any defects in the documents covering the transaction neither in the share allotment letter for acquisition nor in respect of contract notes for sale, bank statement showing payment for purchase & receipt for sales, De-mat statement showing movement of shares, Balance Sheet reflecting investment & corresponding booking of capital gains in the P&L a/c for corresponding sale of shares in different years. It is trite that once the assessee has discharged its onus/primary liability, it will be AO's burden to bring on record any cogent material in support of the contrary contention that the transaction encompassing the sale was sham. However, in the background of the facts discussed above, the AO failed to bring on record any material to substantiate the fact that the share transaction in question was bogus. The statement of Shri Narendra Prabhudayal Sureka to the department/investigation wing reproduced in the assessment order might show their complicity in indulging in the nefarious activity of providing accommodation entry for beneficiaries to claim LTCG on sale of shares of M/s. TTML, but these are general statements explaining the modus operandi and few names but the department has not brought out any direct statement of this person to implicate the assessee as an accomplice in their purported stage managed illegal activity. Without which we are afraid we cannot justify the action of AO/Ld. CIT(A). In this respect, we take note of the observation made by the Coordinate bench of this Tribunal in the case of Navneet Agarwal Vs. ITO, Kolkata, ITA No. 2281/Kol/2017 dated 20.07.2018:

*“The Hon'ble Supreme Court in the case of Omar Salav Mohamed Sait reported in (1959) 37 ITR 151 (S C) had held that no addition can be made on the basis of surmises, suspicion and conjectures. In the case of CIT (Central), Kolkata vs. Daulat Ram Rawatmull reported in 87 ITR 349, the Hon'ble Supreme Court held that, the onus to prove that the apparent is not the real is on the party who claims it to be so. The burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidences, which would directly prove the fact of bogusness or establish circumstance unerringly and reasonably raising an inference to that effect. The Hon'ble Supreme Court in the case of Umacharan Shah & Bros. Vs. CIT 37 ITR 271 held that suspicion however strong, cannot take the place of evidence.*

*In this connection we refer to the general view on the topic of conveyance of immovable properties. The rates/sale price are at variance with the circle rates fixed by the Registration authorities of the Government in most cases and the general impression is that cash would have changed hands. The courts have laid down that judicial notice of such notorious facts cannot be taken based on generalizations. Courts of law are bound to go by evidence.”*

19. Section 68 of the Act requires the assessee to explain the nature and source of such credit. On the issue of burden of proof, the Hon'ble Calcutta High Court, in the case of CIT vs. Precision Finance Pvt. Ltd. (1994) 208 ITR 465 (Cal) laid down that the assessee is required to establish:

- a) Identity of payer,
- b) Genuineness of transaction and
- c) Creditworthiness of payer

20. As explained, the transaction was made in the Bombay Stock Exchange through a SEBI registered broker. As per the established process, on execution of the ordered transaction, the exchange shall handover the payment to the broker and in turn the broker shall arrange for payment to the seller i.e. the assessee. In this case, M/s GCM Securities Limited, having SEBI registration no.INB 010793439, BSE membership no. 6250 had executed the

transaction. Thus the identity of the broker is established from M/s. GCM Security Ltd. the broker.

21. From the records, the assessee received the sale consideration after sale of scrips of M/s. TTML. Since M/s. GCM Securities Limited is a SEBI registered broker having membership both in NSE & BSE, there cannot be any question about the worthiness of the same as the same is covered under the KYC norms of the exchanges. It is noted that the broker had all along complied with the requirement to maintain the margin money as per Exchange norms and SEBI had never put any restriction on M/s. GCM Securities Limited for capital market operations.

22. To substantiate the genuineness of the transaction, the assessee had placed complete documents before the AO. In respect of acquisition of shares in M/s. TTML, the assessee submitted allotment letter of the company & bank statement showing payment of Rs.20,00,000/- as consideration. Such purchase was also reflected in the De-mat statement of the assessee as a genuine holder of shares. For sale, the assessee placed contract note issued by broker, bank statement showing receipt of consideration & de mat statement reflecting the movement of shares. In the balance sheet of the assessee, investments made in the shares of M/s. TTML were reflected and in the Profit & Loss account, the LTCG as earned by the assessee, was disclosed. The AO has not found fault with the genuineness of such documents. In fact the sale transaction was executed through several independent bodies like the depository participant, the banker, the stock exchange etc.

23. The assessee sold the shares on the BSE through his stock broker M/s GCM Securities Limited. In support of the sale of shares contract note in the prescribed form was issued by the broker. The contract note included relevant information such as date and time of transaction, contract note number, settlement number, details of service tax paid, details of brokerage and details of STT paid. No material was brought on record by the AO that the information contained in contract note was false or that the sale of shares actually never happened. On the contrary the information shows that the assessee carried out sale through BSE, the sale was made at the prevailing price at the Exchange and the consideration was received through BSE via banking channel after delivery of shares from the de-mat account.

24. After disposal of shares, delivery of shares was made through assessee's de-mat account with M/s Eureka Stock & Share broking services Limited. The entries in the de-mat account showed that delivery of shares was recorded in the NSDL's record and the shares were delivered to the de-mat account of M/s. GCM Securities Limited. These facts were neither controverted nor disproved by the AO.

25. On the contrary, we note that despite specific request made by assessee during assessment proceedings the AO did not conduct any investigation in relation to the alleged chain of transactions leading to ultimate destination of the cash which could have shed light on the assessee's connivance if he had indulged in the pre-planned sham transaction. Further, we note that the AO neither examined the broker nor the stock exchange authority or provide the referred report of the Investigation Wing to the assessee which was relied heavily while framing the assessment and prejudices the mind of AO. So, he brushed aside all the documents produced by the assessee without any reason.

26. The AO viewed that because of various adverse reports as well as unnatural price movement, the transactions made in M/s. TTML were bogus, the coordinate Bench of this Tribunal had occasion to deal with the issues raised for the shares of M/s. TTML in the case of Kiran Kothari. HUF vs. ITO, ITA No. 443/Kol/2017, where the shares were sold at a high price. Allowing the assessee's appeal, the Tribunal held:

*"9. We have heard the rival submissions and perused the records. We note that in the present case, the appellant had purchased 13500 shares of M/s. Tuni Textile Mills Private Limited on*

06.04.2011 from a stock broker in off-market transactions from M/s Badri Prasad & Sons, who was a member of Calcutta Stock Exchange. These shares were held in the demat account of the assessee maintained with M/s. C. D Equisearch Pvt. Ltd, a member of Mumbai Stock Exchange and ultimately these shares were sold through M/s. C.D Equisearch and on such sale, Security Transaction Tax was duly paid. Payments were duly received in the bank account of the assessee. We take note that the purchase of shares by off-market transactions for purchase of shares is not illegal as was held by the Coordinate Bench of this Tribunal in the case of Dolarrai Hemani vs ITO in ITA NO. 19/Kol/2014 dated 02.12.2016. The transactions were all through a registered broker (pages 18 and 19 of the paper book), backed by a contract note (page 22 of the paper book) and shares were credited in the demat accounts (page 25 of the paper book) and duly reflected in the books of account. In the light of these evidences on record we are of the opinion that the purchase of shares per-se cannot be held to be bad.

9.2. We find force in the contentions of the Ld. AR that the AO and CIT(A) was not justified in rejecting the claim of the assessee on the basis of theory of surrounding circumstance, human conduct and preponderance of probability without bringing on record any relevant legally admissible evidence against the assessee. For the said proposition we rely on the judgment of the Special Bench of Mumbai Bench in the case of GTC Industries Ltd. (supra). The various facets of the contention of the AO, to rope in the assessee for drawing adverse inferences which remain unproved based on the evidence 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 further find that neither the reports relied on by the AO has not been brought on record nor is there any reference of finding of such report to impute the assessee is there on record. The AO has merely carved out certain features/modus operandi of companies indulging in practices not sanctioned by law and as mentioned in such report. However, we note that neither any investigation was carried out against the assessee nor against the brokers to whom the assessee dealt with the purchase and sale of shares in question. Thus the AO has failed to bring on record any material contained in the purported reports which are having so called adverse impact on the assessee

9.3. In the light of the documents stated i.e. (i to v) in Page14(supra) we find that there is absolutely no adverse material to implicate the assessee to the entire gamut of unfounded/unwarranted allegations leveled by the AO against the assessee, which in our considered opinion has no legs to stand and therefore has to fail. We take note that the ld. DR could not controvert the facts which are supported with material evidences furnished by the assessee which are on record and could only rely on the orders of the AO/LD. CIT(A). We note that the allegations that the assessee/brokers got involved in price rigging/manipulation shares must therefore consequently fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the transactions relevant to the purchase and sale of shares resulting in long term capital gain. Neither these evidences were found by the AO nor by the Ld. CIT(A) to be false or fictitious or bogus. The facts of the case and the evidence in support of the evidence clearly support the claim of the assessee that the transactions of the assessee were genuine and the authorities below was not justified in rejecting the claim of the assessee exempted u/s. 10(38) the Act on the basis of suspicion, surmises and conjectures. It is to be kept in mind that suspicion howsoever strong, cannot partake the character of legal evidence.”

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

28. 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, yn 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 fac that he 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 (Incl.) & 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/itdppel does not raise any question of law, much less any substantial question of law.'"*

29. 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 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”*

30. 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 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.

*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.”

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:- 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. Lakshmanagarh 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.

31. 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) *Bajjnath 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. Himan M Vakil – [2014] 41 taxmann.com 425 (Gujarat HC)*
- (xiv) *CIT vs. Maheshchandra G. Vakil – [2013] 40 taxmann.com 326 (Gujarat HC)*
- (xv) *CIT vs. Sumitra Devi [2014] 49 Taxmann.com 37 (Rajasthan HC)*
- (xvi) *Ganeshmull Bijay Singh Baid HUF vs. DCIT – ITA Nos. 544/Kol/2013 (Kolkata ITAT)*
- (xvii) *Meena Devi Gupta & Others vs. ACIT – ITA Nos. 4512 & 4513/Ahd/2007 (Ahmedabad ITAT)*
- (xviii) *Manish Kumar Baid ITA 1236/Kol/2017 (Kolkata ITAT)*
- (xix) *Mahendra Kumar Baid ITA 1237/Kol/2017 (Kolkata ITAT)*

32. 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 LTCEG 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)*

33. 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)*

34. 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 share 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.

35. It is clear from the above that the facts of the case of the assessee are identical with the facts in the case of Kiran Kothari HUF (supra), 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 TTML. So we respectfully following the same, 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.

36. The next issue in confirming the addition of Rs.1,17,791/- 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.1,17,791/- is hereby directed to be deleted. We accordingly hold that the issue is allowed in favour of the assessee.”

Respectfully following the decision cited supra, I set aside the order of Ld. CIT(A) and allow the claim of the assessee. Therefore, this ground of appeal of the assessee is allowed.

5. The next ground of appeal of assessee is against the action of Ld. CIT(A) in confirming the addition of Rs.14,467/- being commission expenditure incurred.

6. Briefly stated facts are that according to AO, since it has been proved beyond doubt that the assessee had taken accommodation entry, the aspect of payment of commission

cannot be ruled out. In the case of the assessee, the amount calculated @ 0.5% comes to Rs.14,467/- which represents unexplained expenditure of the assessee and hence the AO added the same to the total income of the assessee u/s. 69C of the Act. Aggrieved, assessee preferred an appeal before the Ld. CIT(A), who confirmed the action of the AO. Aggrieved, assessee is before this Tribunal. Since we have already allowed the claim of LTCG on sale of scrip of M/s. TTML as exempt u/s. 10(38) of the Act, and held it as a genuine transaction, consequently, the addition of Rs.14,467/- as unexplained expenditure is directed to be deleted.

7. Since on merits the assessee succeeds, the legal issue raised before us is not adjudicated.

8. In the result, the appeal of assessee is partly allowed.

Order is pronounced in the open court on 17th May, 2019

Sd/-

(Aby. T. Varkey)  
Judicial Member

Dated : 17th May, 2019

JD (Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – Shri Rohit Jalan, 3<sup>rd</sup> floor, Stephen House , 4, B.B.D. Bag, Kolkata-700 001.
- 2 Respondent – ITO, Ward-36(1), Kolkata.
3. The CIT(A)-10, Kolkata. (Sent through e-mail)
4. CIT , Kolkata
5. DR, ITAT, Kolkata. (Sent through e-mail)

/True Copy,

By order,

Assistant Registrar  
ITAT, Kolkata