

**IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH 'B', LUCKNOW**

(THROUGH VIRTUAL HEARING)

**BEFORE SHRI A. D. JAIN, VICE PRESIDENT AND
SHRI T. S. KAPOOR, ACCOUNTANT MEMBER**

I.T.A. No.498/Lkw/2019
Assessment Year:2014-15

Smt. Sabreen, 95/95 Vishwanath Ka Hata, Parade, Kanpur. PAN:APZPS5157G (Appellant)	Vs.	Income Tax Officer-3(4), Kanpur. (Respondent)
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Stay Application No.38/Lkw/2019
(in I.T.A. No.498/Lkw/2019)
Assessment Year:2014-15

Smt. Sabreen, 95/95 Vishwanath Ka Hata, Parade, Kanpur. PAN:APZPS5157G (Appellant)	Vs.	Income Tax Officer-3(4), Kanpur. (Respondent)
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Appellant by	Shri Surendra Kohli, Advocate
Respondent by	Shri Harish Gidwani, D. R.
Date of hearing	14/07/2021
Date of pronouncement	20/07/2021

ORDER

PER T. S. KAPOOR, A.M.

This is an appeal filed by the assessee against the order of learned CIT(A)-I, Kanpur dated 11/07/2019 pertaining to assessment year 2014-2015. In this appeal the assessee has taken the following grounds:

- "1. That the learned CIT(A) erred in law as well as facts in confirming the addition of Rs.19709875/- which is contrary to law, facts and circumstances of the case.*
- 2. That the learned CIT(A) erred in denial of exemption u/s 38 of Section 10 as well as finding and observations in paras 4 and 5 of the appellate order are based upon presumption and surmises simply concluding that the case was within the ambit of 'Penny Stocks' not having any place under the provisions of tax laws.*
- 3. That the learned CIT(A) /A.O. failed to appreciate that the transaction of purchase / sale were genuine and all the requisite prescribed conditions were in existence and hence the addition / disallowance has no legs to stand and deserves to be held ab initio null & void.*
- 4. That the authorities below failed to appreciate that the appellant is simply a genuine customer and the transaction was made through proper D-Mat account and the sale purchase effected per approved share brokers and cannot be held to be accountable simply on the basis of 'quite unusual and unbelievable' based upon imagination and baseless grounds.*
- 5. That the revenue authorities failed to appreciate that for losses the entire burden is on the appellant's shoulders and to the contrary the gains are held 'non genuine' which is against the principle of equity, justice and good conscience.*
- 6. That the Ex Parte order based u/s 144 of the IT. Act 1961 is a straight denial of a reasonable and sufficient opportunity viz. absence of cross examination of witnesses a right the appellant legally deserves under the provisions of law leading to a hasty decision simply to adhere limitation.*
- 7. That the authorities below simply based the decisions on judgments which were not relevant to the appellant's case and at the same time failed to give any weightage to decisions cited during the assessment/appellate levels.*
- 8. That the appellant does not deserves to be held 'in default' and should not be held responsible for the so called defaults at Kolkata level, if any at that point of time."*

2. At the time of hearing, Learned counsel for the assessee did not argue on ground nos.5,6,8 & 9 and argued only remaining grounds. Inviting our attention to the facts of the case, Learned counsel for the assessee submitted that the assessee had earned Long Term Capital Gain of Rs.1,97,09,875/- on the sale of a scrip of M/s Sulabh Engineering and Services Ltd. which the assessee had claimed as exempt u/s 10(38) of the Act and which the authorities below have denied by relying on the report of the investigation wing of Kolkata wherein the report has said that through a racket of many persons, which included operators, exit providers and promoters of a few companies, various persons are given Long Term Capital Gain/ Short Term Capital Gain/capital loss through managed transactions. Learned counsel for the assessee submitted that while denying the benefit to the assessee, the authorities below have not considered that the report is a vague document and the share brokerage of the assessee through whom she had carried out transactions, were not examined and all the transactions were through banking channel and shares were sold through online transactions and the payment for purchase of shares was made through banking channel and also the sale proceeds of sale of shares were credited to the bank account of the assessee. The assessee had paid Security Transaction Tax, Service Tax, brokerage charges and stamp duty on the transactions and the transactions have been carried out through the SEBI registered stock broker which can be verified from the stock exchange. It was submitted that the authorities below were not justified in taking adverse view against the assessee on the ground of abnormal price rise and alleged price rigging as Hon'ble Delhi High Court in the case of Pr. CIT vs. Smt. Krishna Devi in I.T.A. No.130/2020, under similar facts and circumstances, has dealt with the issue of abnormal rise in price and after considering the case law of Hon'ble Supreme Court in the case of Sumati Dayal Vs CIT [1995] 214 ITR 801, [which has been relied on by learned CIT(A)], has

dismissed the theory of preponderance and has relied on the theory of evidence and has dismissed the appeal of the Revenue. It was submitted that various benches of the Tribunal including the Lucknow Bench, under similar facts and circumstances, have already decided the issue in favour of the assessee in the following cases:

- i) Shri Deepak Kumar Agarwal Vs. ACIT Central Circle - 3(1), IN IT(SS)A Nos. 125&I26 /KOL/2018 dated 10-05-2019 A.Y 2013-14 & 2014-15 decided by the ITAT 'B' Bench Kolkata relating to M/S Sulabh Engineering Services Ltd (SESL).
- ii) Sanjay Kumar Agarwal (HUF) Vs. ITO Ward 48(4) Kolkata in ITA No. 2378/Kol/2018 dated 07-08-2019 decided by the ITAT "SMC" Bench Kolkata relating to M/S Sulabh Engineering Services Ltd.(SESL).
- iii) Suman Kothari Vs. ITO Ward 36(2) Kolkata in ITA No. 2467/Kol/201 Tdated 10-05-2019 decided by ITAT "B" Bench Kolkata relating to M/S Sulabh Engineering Services Ltd.(SESL).
- iv) Vasudha Jain Vs. ITO Ward 36(4) Kolkata in ITA No. 1018/KoI/2018 dated 15-02-2019 decided by ITAT "SMC" Bench Kolkata relating to M/S Sulabh Engineering Services Ltd. (SESL).
- v) Reshu Goel Vs. ITO Ward 3(4) New Delhi dated 07-10-2019 relating to A.Y 2013-14 decided by the ITAT Delhi Bench "F" Bench New Delhi in ITA No. 1691/Del./2019.
- vi) Shri Achal Gupta Vs. ITO 3(1) Kanpur in ITA No. 501/Lkw/2019 dated 16-12-2020 for the A.Y. 2015-16 decided by the Hon'ble ITAT Lucknow Bench 'A' Lucknow.

2.1 It was further submitted that as regards the reliance placed by learned CIT(A) on certain case laws, the said case laws are not applicable to the facts and circumstances of the assessee as in those cases, the issue was receipt of share capital and share premium whereas in the present case the issue is exemption of Long Term Capital Gain on transactions which has been done on the platform of Mumbai Stock Exchange and for which the

entire evidence is available. It was submitted that the entire evidence was filed before the Assessing Officer and in this respect our attention was invited to pages 12 & 13 of the assessment order where the Assessing Officer has noted about the fact of assessee having filed various documents in support of claim of Long Term Capital Gain. Learned counsel for the assessee in this respect invited our attention to pages 1 to 25 of the paper book where the copies of such evidences, including contract notes of sub-brokers, DEMAT account of the assessee and bank account of the assessee were placed. In view of the above facts and circumstances, it was prayed that the appeal filed by the assessee may be allowed.

3. Learned D. R., on the other hand, heavily relied on the orders of the authorities below and submitted that various assessees have been taking Long Term Capital Gain through managed transactions with the help of exit providers, operators of various scrips and in this respect our attention was invited to the investigation report wherein the investigation was carried out by the Kolkata wing and 84 companies were identified which were used for creating artificial Long Term Capital Gain.

4. We have heard the rival parties and have gone through the material placed on record. We find that there is no dispute about the documentary evidence which the assessee had filed before the Assessing Officer for claiming exemption u/s 10(38) of the Act. In support of the claim for purchase of shares from Anant Fin Consultancy (P) Limited, the assessee had filed a copy of sale bill in favour of the assessee wherein the said broker had sold 15,000 shares to the assessee for Rs.21/- per share, a copy of such sale bill is placed at page 24 of the paper book and a copy of ledger account of the assessee appearing in the books of Anant Fin Consultancy (P) Limited, placed at page 25 of the paper book wherein it has been confirmed

that an amount of Rs.3,15,000/- was received from the assessee against the sale of 15,000 shares to the assessee. Such amount of Rs.3,15,000/- was debited to the bank account of the assessee maintained with United Mercantile Co-operative Bank Ltd., a copy of which is placed at page 23 of the paper book. Such 15,000 shares purchased by the assessee became 1,50,000 shares of face value of Rs.1/-, the evidence of split of the shares from Rs.10/- each share to Rs.1/- each share is placed at pages 17 & 18 of the paper book. Such 1,50,000 shares were credited to the DEMAT account of the assessee maintained with Bonanza Portfolio Limited, the evidence of which is placed at page 19 of the paper book. The assessee sold such 1,50,000 shares between the period 05/08/2013 to 12/09/2013, the copy of contract notes issued by Indiabulls Securities Limited is placed at pages 5 to 14 of the paper book. Such contract notes show that brokerage, Service Tax and Security Transaction Tax was paid by the assessee and the proceeds of sales, after deduction of such expenses, was credited to the bank account of the assessee maintained with IDBI Bank, a copy of which is placed at pages 15 & 16 of the paper book. All these documentary evidences, which have been generated through the transactions made by the assessee on the electronic exchange of Mumbai, prove that assessee did sell 1,50,000 shares after holding for a period of more than one year and earned a Long Term Capital Gain. The authorities below have disallowed the claim of the assessee solely on the basis of a report from investigation department of Revenue. However, in that investigation report, neither the name of the assessee nor the name of broker of the assessee has been mentioned. Though the authorities below have relied on the statement of certain broker and other persons, the name of the broker of the assessee do not appear in that list and neither the broker of the assessee was examined. The authorities below, on the basis of report of investigation, have held that assessee had managed to obtain Long Term Capital Gain through exit

providers as the finances of the company do not suggest that it can rise so quickly and so many times in a short period. While denying the claim and confirming the order of the Assessing Officer, the learned CIT(A) has relied on certain case laws. Going through the facts of those case laws, it is found that those case laws related to the issue of share capital/share premium received by various assessees and where the assessees were not able to demonstrate the creditworthiness and genuineness of the investors and that is why the Hon'ble courts have decided the issue in favour of the Revenue. The learned CIT(A) has further relied on the case law of Sumati Dayal vs. CIT (supra) wherein the human probability of preponderance of the transaction has been decided in favour of the Revenue. Similarly, learned CIT(A) has relied on the case law of Sanjay Bimalchand Jain vs. Pr. CIT, decided by Hon'ble Bombay High Court. As regards the decision of Sumati Dayal vs CIT (supra), the Hon'ble Delhi High Court in a recent judgment in the case of Pr. CIT vs. Smt. Krishna Devi, under similar facts and circumstances, has disregarded the principle of preponderance and has held that evidence produced by the assessee over power the principle of preponderance. In the case law decided by Hon'ble Delhi High Court in the case of Krishna Devi, the Tribunal allowed relief to the assessee on Long Term Capital Gain on the scrip of Goldline International Finvest Ltd. which appear at Sl.No.24 of the investigation report. The findings of Hon'ble Delhi High Court are reproduced below:

“3. The present appeals under Section 260A of the Income Tax Act, 1961 [hereinafter referred to as the ‘Act’] are directed against the common order dated 6th August, 2019 [hereinafter referred to as the ‘Impugned Order’] passed in ITA No. 1069/DEL/2019 (for AY 2014-15), 2772/DEL/2019 (for AY 2015-16) and other appeals for the same AYs, by the Income Tax Appellate Tribunal [hereinafter referred to as the ‘ITAT’]. However, the Impugned Order records the factual position only in respect of ITA No. 1069/DEL/2019. 4. The Revenue urges

identical questions of law in all the afore-noted appeals with the only difference being the figures relating to the additions made under Section 68 read with Section 115BBE of the Act. Accordingly, the same are being decided by way of this common order. 5. It is not in dispute, as noted in the Impugned Order, that the factual background in all the three appeals is quite similar. However, for the sake of convenience, the facts in respect of ITA 125/2020 are being noted and discussed elaborately. Briefly stated, the Respondent-Assessee is an individual who has derived income from interest on loan, FDR, NSC and bank interest under the head of 'income from other sources' in respect of A.Y. 2015-16. She filed her return of income, declaring total income of Rs. 13,96,116/-. After claiming deduction of Rs. 1,60,000/- under Chapter VI-A, the total taxable income of Respondent was declared to be Rs. 12,36,120/-. The return was processed under Section 143(1) of the Act and thereafter the case was selected for scrutiny. During the scrutiny proceedings, the AO noticed that for the relevant year under consideration, the Respondent had claimed exempted income of Rs. 96,75,939/- as receipts from Long Term Capital Gain [hereinafter referred to as 'LTCG'] under Section 10(38) of the Act. He inter alia concluded that the assessee had adopted a colorable device of LTCG to avoid tax and accordingly framed the assessment order under Section 143(3) of the Act at the total income of Rs. 1,09,12,060/-, making an addition of Rs. 96,75,939/- under Section 68 read with 115BBE of the Act on account of bogus LTCG on sale of penny stocks of a company named M/s Gold Line International Finvest Limited. The appeal before the CIT(A) was dismissed and additions were confirmed with the observation that the Respondent had introduced unaccounted money into the books without paying taxes. Further appeal filed by the Respondent before the learned ITAT was allowed in her favour, and the additions were deleted vide the Impugned Order, relevant portion whereof reads as under: "21. A perusal of the assessment order clearly shows that the Assessing officer was carried away by the report of the Investigation Wing Kolkata. It can be seen that the entire assessment has been framed by the Assessing Officer without conducting any enquiry from the relevant parties or independent source or evidence but has merely relied upon the statements recorded by the Investigation Wing as well as information received from the Investigation Wing. It is apparent from the Assessment Order that the Assessing Officer has not conducted any independent and separate enquiry in the case of the assessee. Even, the statement recorded by the Investigation Wing has not

been got confirmed or corroborated by the person during the assessment proceedings. xx xx xx

23. It is provided u/s. 142 (2) of the Act that for the purpose of obtaining full information in respect of income or loss of any person, the Assessing Officer may make such enquiry as he considers necessary. In our considered view the Assessing Officer ought to have conducted a separate and independent enquiry and any information received from the Investigation Wing is required to be corroborated and affirm during the assessment by the Assessing Officer by examining the concerned persons who can affirm the statements already recorded by any other authority of the department. Facts narrated above clearly show that the Assessing Officer has not made any enquiry and the entire assessment order and the order of the first Appellate Authority are devoid of any such enquiry. 24. The report from the Directorate Income Tax Investigation Wing, Kolkata is dated 27.04.2015 whereas the impugned sales transactions took place in the month of March, 2014. The xparte ad interim order of SEBI is dated 29.06.2015 wherein at page 34 under para 50 (a) M/s. Esteem Bio Organic Food Processing Ltd was restrained from accessing the securities market and buying selling and dealing in securities either directly or indirectly in any manner till further directions. A list of 239 persons is also mentioned in SEBI order which are at pages 34 to 42 of the order the names of the appellants do not find any place in the said list. At pages 58 and 59 the names of pre IPO transferee in the scrip of M/s. Esteem Bio Organic Food Processing Ltd is given and in the said list also the names of the appellants do not find any place. At page 63 of the SEBI order-trading by trading in M/s. Esteem Bio Organic food Processing Ltd – a further list of 25 persons is mentioned and once again the names of the appellants do not find place in this list also. 25. As mentioned elsewhere the brokers of the assessee namely ISG Securities Limited and SMC Global Securities Limited are stationed at New Delhi and their names also do not find place in the list mentioned here in above in the SEBI order. There is nothing on record to show that the brokers were suspended by the SEBI nor there anything on record to show that the two brokers of the appellants mentioned here in above were involved in the alleged scam. The Assessing Officer has not even considered examining the brokers of the appellants. It is a matter of the fact that SEBI looks into irregular movements in share prices on range and warn investor against any such unusual increase in shares prices. No such warnings were issued by the SEBI.

26. *There is no dispute that the statements which were relied by the Assessing Officer were not recorded by the Assessing Officer in the assessment proceedings but they were pre-existing statements recorded by the Investigation Wing and the same cannot be the sole basis of assessment without conducting proper enquiry and examination during the assessment proceedings itself. In our humble opinion, neither the Assessing Officer conducted any enquiry nor has brought any clinching evidences to disprove the evidences produced by the assessee. The report of Investigation Wing is much later than the dates of purchase / sale of shares and the order of the SEBI is also much later than the date of transactions transacted and nowhere SEBI has declared the transaction transacted at earlier dates as void. xx xx xx 30. Considering the vortex of evidences, we are of the considered view that the assessee has successfully discharged the onus cast upon him by provisions of section 68 of the Act as mentioned elsewhere, such discharge of onus is purely a question of fact and therefore the judicial decisions relied upon by the DR would do no good on the peculiar plethora of evidences in respect of the facts of the case in hand and hence the judicial decisions relied upon by both the sides, though perused, but not considered on the facts of the case in hand.”* 6. Aggrieved by the aforesaid findings, the Revenue has filed the instant appeals contending that, notwithstanding the tax effect in the appeals falling below the threshold prescribed under Circular No. 23 dated 6 th September, 2019, the appeals are maintainable in view of the Office Memorandum dated 16th September, 2019 issued by the CBDT, which clarifies that the monetary limits prescribed in the aforementioned circular shall not apply where an assessee is claiming bogus LTCG through penny stocks, and the appeals be heard on merits. 7. Mr. Zoheb Hossain, learned senior standing counsel for the revenue (Appellant herein), contends that the learned ITAT has completely erred in law in deleting the addition, and thus the Impugned Order suffers from perversity. He submits that there are certain germane factual errors, inasmuch as the learned ITAT has wrongly recorded that there was no independent enquiry conducted by the AO, when in fact the AO had issued notices to the companies in question under Section 133(6) of the Act. He points out that the observations recorded in para 25 of the Impugned Order are factually incorrect, and in conflict with para 4 of the order of the CIT(A) dated 24th December, 2018 which reads as follows: “4. Even the broker through whom the shares were dematerialized and sold i.e. SMC Global Securities Ltd. was also a part of the scam. This is a Delhi based broker whose regional office was also surveyed. The sub

brokers were also surveyed and also statements recorded which confirmed the payment of cash commission by the beneficiaries for being part of the syndicate.” 8. Mr. Hossain argues that in cases relating to LTCG in penny stocks, there may not be any direct evidence in the hands of the Revenue to establish that the investment made in such companies was an accommodation entry. Thus the Court should take the aspect of human probabilities into consideration that no prudent investor would invest in penny scrips. Considering the fact that the financials of these companies do not support the gains made by these companies in the stock exchange, as well as the fact that despite the notices issued by the AO, there was no evidence forthcoming to sustain the credibility of these companies, he argues that it can be safely concluded that the investments made by the present Respondents were not genuine. He submits that the AO made sufficient independent enquiry and analysis to test the veracity of the claims of the Respondent and after objective examination of the facts and documents, the conclusion arrived at by the AO in respect of the transaction in question, ought not to have been interfered with. In support of his submission, Mr Hossain relies upon the judgment of this Court in Suman Poddar v. ITO, [2020] 423 ITR 480 (Delhi), and of the Supreme Court in Sumati Dayal v. CIT, (1995) Supp. (2) SCC 453.

9. Mr. Hossain further argues that the learned ITAT has erred in holding that the AO did not consider examining the brokers of the Respondent. He asserts that this holding is contrary to the findings of the AO. As a matter of fact, the demat account statement of the Respondent was called for from the broker M/s SMC Global Securities Ltd under Section 133(6) of the Act, on perusal whereof it was found that the Respondent was not a regular investor in penny scrips. 10. We have heard Mr. Hossain at length and given our thoughtful consideration to his contentions, but are not convinced with the same for the reasons stated hereinafter. 11. On a perusal of the record, it is easily discernible that in the instant case, the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites, the AO observes that the quantum leap in the share price is not justified; the trade pattern of the aforesaid company did not move along with the sensex; and the financials of the company did not

show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an agreement to convert unaccounted money by claiming fictitious LTCG, which is exempt under Section 10(38), in a preplanned manner to evade taxes. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income Tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of providing entries of bogus LTCG. However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued under Sections 133(6)/131 of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh. Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. The conclusion drawn by the AO that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from de-mat account and the consideration has been received through banking channels." The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any

evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material that could support the case put forth by the Appellant, the additions cannot be sustained. 12. Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent. With regard to the claim that observations made by the CIT(A) were in conflict with the Impugned Order, we may only note that the said observations are general in nature and later in the order, the CIT(A) itself notes that the broker did not respond to the notices. Be that as it may, the CIT(A) has only approved the order of the AO, following the same reasoning, and relying upon the report of the Investigation Wing. Lastly, reliance placed by the Revenue on Suman Poddar v. ITO (supra) and Sumati Dayal v. CIT (supra) is of no assistance. Upon examining the judgment of Suman Poddar (supra) at length, we find that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. On such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the factua matrix at hand. Similarly, the case of Sumati Dayal v. CIT (supra) too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue. 13. The learned ITAT, being the last fact-finding authority, on the basis of the evidence brought on record, has rightly come to the conclusion that the lower tax authorities are not able to sustain the addition without any cogent material on record. We thus find no perversity in the Impugned Order. 14. In this view of the matter, no question of law, much less a substantial question of law arises for our consideration. 15. Accordingly, the present appeals are dismissed."

5. In the above noted judgment, the Hon'ble court has held that startling spike in the share price and other factors may be enough to show circumstances that might create suspicion but the Court has to decide an

issue on the basis of evidence and proof, and not on suspicion alone. The Hon'ble court further distinguished the judgment in the case of Suman Podar which was in favour of Revenue. The Hon'ble court further held that case of Sumati Dayal u/s CIT was also not applicable to the assessee. The Hon'ble court further held that reliance placed by the Assessing Officer on the investigation report of Investigation Wing without further corroboration on the basis of cogent material does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries.

6. As regards the reliance placed by Learned CIT(A) on the case of Sanjay Bimalchand Jain decided by Hon'ble Bombay High Court, we find that the above said case law has been distinguished by Hon'ble I.T.A.T. Kolkata Bench in ITA No. 2243/Kol/2017 where the Hon'ble Tribunal vide para 31 held as under:

"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."

7.1 The above case law of Hon'ble Bombay High Court has further been distinguished by Mumbai Bench of the Tribunal in the case of Geeta Khare in ITA No. 2243/Kol/2017 where the Hon'ble Tribunal has held as under:

"7.8 It would be pertinent to address the case law relied upon by the Id DR before us on the decision of Hon'ble Bombay High Court (Nagpur Bench) in the case of Sanjay Bimalchand Jain vs Pr. CIT (Nagpur) reported in (2018) 89 taxmann.com 196 (Bombay) dated 10.4.2017 on the impugned issue. From the facts of Sanjay Bimalchand Jain supra, we find that (i) in that case, the broker company through which the shares were sold did not respond to AO's letter regarding the names and address and bank account of the person who purchased the shares sold by the assessee; (ii) Moreover, at the time of acquisition of shares of both the companies by the assessee, the payments were made in cash; (iii) The address of both the companies were interestingly the same; (iv) The authorized signatory of both the companies were also the same person; (v) The purchase of shares of both the companies was done by that assessee through broker, GSSL and the address of the said broker was incidentally the address of the two companies. Based on these crucial facts, the Hon'ble Bombay High Court rendered the decision in favour of the revenue. None of these factors were present in the facts of the assessee before us. Hence it could be safely concluded that the decision of Hon'ble Bombay High Court supra is factually distinguishable."

7.2 As regards the reliance placed by Learned CIT(A) on the order of Udit Kalra (supra), we find that the above case law has been held to be distinguishable by Hon'ble Delhi Tribunal in the case of Karuna Garg in I.T.A. No.1069/Lkw/2019 and further in the case of Swati Luthra vs. Income Tax Officer in I.T.A. No.6480/Lkw/2019, dated 28/06/2019. In these two cases the Hon'ble Tribunal has again allowed relief to the assessee though from a different script but in the decisions they have held that the judgment of Hon'ble Delhi High Court in Udit Kalra was distinguishable as in that case the Hon'ble High Court has only dismissed the appeal as the Hon'ble High Court found that the issue involved was only a question of fact. In this

respect, para 28 of the Tribunal order in the case of Karuna Garg is relevant which is reproduced below:

"28. The DR heavily relied upon the judgment of Hon'ble High Court of Delhi in the case of Udit Kalra Vs. ITO in ITA No.220/2019. We have carefully perused the order of the Hon'ble High Court and on going through the said judgment we find that no question of law was formulated by the Hon'ble High Court of Delhi in the said case and there is only dismissal of appeal in limine as the Hon'ble High Court found that the issue involved is a question of fact."

6.4 Similarly in the case of Swati Luthra (supra), the Hon'ble Tribunal while dealing with the case law of Udit Kalra vide para 14 has held as under:

"14. That the Id DR during the course of hearing placed heavy reliance on judgment of Hon'ble High Court of Delhi in the case of Udit Kalra vs ITO in ITA No. 220/2019. Relevant extracts of said judgment are extracted as below:

"The assessee is aggrieved by the concurrent findings of the tax authorities - including the lower appellate authorities rejecting its claim for a long term capital gain reported by it, to the tune of Rs.13,33,956/- and Rs.14,34 501/- in respect of 4,000 shares of M/s Kappac Pharma Ltd. The assessee held those shares for approximately 19 months; the acquisition price was Rs.12/- per share whereas the market price of the shares at the time of their sale, was Rs.720/-. It is contended that the assessee was not granted fair opportunity.

Mr. Rajesh Mahna, learned counsel appearing for the assessee relied upon the orders of the co-ordinate Bench of the tribunal, in respect of the same company i.e. M/s Kappac Pharma Ltd., and pointed out that the tax authority's approach in this case was entirely erroneous and inconsistent.

The main thrust of the assessee's argument is that he was denied the right to cross-examination of the two individuals whose statements led to the inquiry and

ultimate disallowance of the long term capital gain claim in the returns which are the subject matter of the present appeal.

This court has considered the submissions of the parties. Aside from the fact that the findings in this case are entirely concurrent - A.O., CIT(A) and the ITAT have all consistently rendered adverse findings - what is intriguing is that the company (M/s Kappac Pharma Ltd.) had meagre resources and in fact reported consistent losses. In these circumstances, the astronomical growth of the value of company's shares naturally excited the suspicions of the Revenue. The company was even directed to be delisted from the stock exchange. Having regard to these circumstances and principally on the ground that the findings are entirely of fact, this court is of the opinion that no substantial question of law arises in the present appeal.

This appeal is accordingly dismissed."

15. On going through the aforesaid judgment, we find that no question of law was formulated by Hon'ble High Court of Delhi in the said case and there is only dismissal of appeal in limine and the Hon'ble High Court found that the issue involved is a question of fact as held by Hon'ble Apex Court in Kunhayyammed vs State of Kerala reported in 245 ITR 360 and also in CIT vs. Rashtradoot (HUF) reported in 412 ITR 17. Even on merits and facts, the said judgment in the case of Udit Kalra vs ITO (supra) is distinguishable as in that case the scrips of the company were delisted on stock exchange, whereas, in the instant case, the interim order of SEBI in the cases of M/s Esteem Bio and M/s Turbotech have been cooled down by subsequent order of SEBI placed by assessee in its paper book. Thus, the case of Udit Kalra vs ITO relied by Id. DR is clearly distinguishable on facts and is not applicable to the facts of assessee. Thus, we hold that the case of assessee is factually and materially distinguishable from the facts of the case of Udit Kalra vs ITO so relied by Id DR."

Therefore, the above case laws relied on by learned CIT(A) is not applicable to the facts and circumstances of the present case.

8. Besides the reliance placed by Learned counsel for the assessee on the order of Hon'ble Delhi High Court in the case of Smt. Krishna Devi, Learned counsel for the assessee has also relied on various case laws wherein under similar facts and circumstances and in the same scrip of Sulabh Engineers, various Benches of the Tribunal have allowed relief to the assessee. The Lucknow Bench of the Tribunal in the case of Uma Shanker Dhandhanian vs. Income Tax Officer (1)5, Kanpur in ITA Nos. 475 & 681/LKW/2019 wherein the scrip was same as is in the case of the assessee and wherein Lucknow Bench of the Tribunal has allowed relief to the assessee by holding as under:

“8. We have heard the rival parties and have gone through the material placed on record. We find that there is no dispute between the parties regarding the evidences which the assessee had produced before the authorities below for claiming that assessee indeed was allotted one lac shares @ Rs.20/- each and which were sold partly during AY 2014-15 and partly during AY 2015-16. There is also no dispute regarding contract notes issued by the brokers and proceeds paid by them through banking channels. The only dispute between the parties is that Assessing Officer on the basis of a report from investment wing of the Department has held the capital gain to be bogus and has held the amount of capital gain as assessee's own money being unaccounted money converted into accounted money by managing the capital gains. The assessee, on the other hand, produced before the authorities below evidences for allotment of shares and for making payment to the company directly through banking channels. Copy of allotment letter from the company is placed at paper book pg.1 whereby the company had acknowledged the receipt of Rs.20.00 lacs and had allotted one lac shares to the assessee. The payment to the company was made from the bank account of the assessee, a copy of which is placed in paper book Pg. 2 to 8. A part of the shares were sold by India Infoline Ltd. in the two years and the contract notes issued by India Infoline are placed in paper book Pgs. 9 to 14 and 11 to 15 in the two years respectively. Copy of Demat Account of the assessee where the

shares allotted by company were credited and from where the shares were sold is placed at paper book pgs. 33 to 40 and 24 to 31 respectively in the two years. The copy of bank account wherein the proceeds were credited is placed at pgs. 2 to 8 and 2 to 10 respectively for both years. From the contract notes issued by the broker India Infoline Ltd. we find that assessee had paid service tax and STT and shares were sold through screen based transactions wherein the exact time and order numbers are mentioned. The copy of Demat statement of assessee shows credit of ten lac shares and on sale of 1,11,700 during the AY 2014-15 the balance is reflected at 8,88,300 shares as on 31/03/2014 (PB-26) and on sale of 30,000 shares during AY 2015-16, balance shares are reflected at 8,58,300 as on 31/03/2015 (PB-27). These balance shares of 8,58 300 are reflected in the Demat statements upto 31/03/2019. From the Demat statement, we further observe that assessee was holding certain other scrips also. The assessee, therefore, had filed sufficient evidences to prove the genuineness of the transactions but authorities below has rejected the claim of the assessee on the basis of an investigation report of the Depa ment whereby the scrip was held to be penny stock which was being used for providing bogus long term gains. We find that the Kolkata Tribunal in ITA 2467/Kol/2017, vide order dated 10.5 2018 has considered a similar issue of the same scrip M/s Sulabh Engineers and Services Ltd. and has allowed relief to the assessee by holding as under:

“7. We have heard both the parties and perused the material available on record. We note that the assessee has submitted before us the statement showing purchases and sale of long term capital gain on sale of equity shares (PB-1). The assessee submitted allotment advice for 75 000 shares of M/s Sulabh Engineers and Services Ltd. (PB-2). The assessee submitted the bank detail for payment (vide PB-3 to 5). The assessee submitted before us NSDL statement showing preferential allotment of 75000 shares of M/s Sulabh Engineering and Services Ltd. We note that the assessee also submitted extract of resolution passed and screenshot of money control showing splitting of face value from Rs.10 to Rs. 1 of M/s Sulabh Engineering and Services Ltd. (PB-11 to 13). The assessee submitted the NSDL statement showing allotment of 7,50,000 shares of M/s Sulabh Engineers and Services Ltd. at fair value of Rs. 1 (PB-14 to 17). The balance sheet and profit & loss account along with investment schedule showing 7,50,000 shares of M/s Sulabh Engineers and Services Ltd. for assessment year 2013-14 (PB-18 to 23) were also submitted. The assessee also submitted the sale bill along with contract note from broker for sale of 1,25,000 shares of M/s Sulabh Engineers and Services Ltd. (PB-23 to 46). The broker’s statement showing payment made for the sale has also been submitted by the assessee,(vide PB-47 to 59). The bank statement reflecting receipt of sale consideration for

sale of 1,25,000 shares of M/s Sulabh Engineers and services ltd is placed in paper book vide,(PB-60 to 63). The Profit & loss account and computation of income for assessment year 2014-15 (PB-64 to 69) were also placed in the paper book. With help of these plethora documents and evidences, the ld Counsel claimed that long term capital gain on sale of equity shares of Sulabh Engineering and Services Ltd. of Rs. 1,12,13,010/- during the current financial year, is genuine.

8. We note that the assessee has earned long term capital gain on sale of equity shares of Sulabh Engineering and Services Ltd. of Rs. 1,12,13,010/- during the current financial year. During assessment proceedings details and evidences in support of purchase and sale of shares as asked for have been submitted before the learned Assessing Officer from time to time. However, the ld. Assessing Officer has treated the transaction in equity shares of M/s Sulabh Engineering and Services Ltd. as bogus and added Rs. 1,12,13,010/ being Long Term Capital Gain on sale of such equity shares only on the basis of his suspicion without bringing any adverse material on record in support of his contention in spite of the fact that the sale transactions have been done through recognized exchange through the authorized broker and all relevant supporting documents have been submitted before the learned Assessing Officer. Further, learned Assessing Officer has also added Rs. 56,065/- on account of undisclosed commission payment @ 0.5% of the Long Term Capital Gain that had been assumed to be incurred to arrange bogus Long Term Capital Gain amounting to Rs. 1,12,13,010/-.

We note that the scripts / equity shares of M/s Sulabh Engineering and Services Ltd. has been dealt with by the SMC Bench of this Tribunal in the case of Vasudha Jain, in ITA No.1018/Kol/2018, for A.Y. 2015-16, order dated 15.02.2019, wherein the SMC Bench of this Tribunal held that addition has been made by AO mainly on the basis of 'suspicion' and 'probability'. No price rigging established by AO. The ld AO as well as ld CIT(A), were guided by the report of the Investigation Wing, which is general in nature and no specific findings for the assessee, and hence based on these facts the SMC Bench deleted the addition, observing the following.

"13. The ld 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 Krishnan and Agnihotri vs. The State of Madhya Pradesh [1977] 1 SCC 816 (SC). In this case the Hon'ble Apex Court held that the burden of showing that a particular transaction is benami and the appellant owner is not the real owner always rests on the person asserting it to be so and the burden has to be strictly discharged by adducing evidence of a definite character which would directly prove the fact of

benami or establish circumstances unerringly and reasonably raising inference of that fact. The Hon'ble Apex Court further held that it is not enough to show circumstances which might create suspicion because the court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence. The ld AR submitted that similar view has been taken in the following judgments while deciding the issue relating to exemption claimed by the assessee on LTCG on alleged Penny Socks.

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

14. Moreover it was submitted before us by ld 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 ld 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)*

15. We note that the ld. D.R. had heavily relied upon the decision of the Hon'ble Bombay High Court in the case of Bimal Chand Jain in Tax Appeal No. 18 of 2017. We note that in the case relied upon by the ld. 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 ld. DR, the dispute was whether the profit earned on sale of shares was capital gains or business profit.

16. It is clear from the above that the facts of the case of the assessee are similar 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 such sale of shares Therefore, respectfully following the same ratio, I am inclined to set aside the order of Ld. CIT(A) and direct the AO not to treat the long term capital as bogus and order to allow the claim of LTCG on sale of share of M/s. SESL and delete the consequential addition.”

9. As the issue is squarely covered in favour of the assessee by the decision of the SMC bench of ITAT Kolkata, and there is no change in facts and law and the Revenue is unable to produce any material to controvert the aforesaid findings of the SMC Bench in the case of Vasudha Jain (supra), we find no reason to interfere in the said order of the SMC Bench of this Tribunal and the same is hereby upheld. Therefore, we delete the addition of Rs.1,12,13,010/- and we also delete the consequential addition on account of unexplained expenditure towards commission at Rs.56,065/-.

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

9. Similarly the Chennai Bench of ITAT in ITA 384 vide order dated 18.06.2019 in the case of same scrip of M/s Sulabh Engineering Ltd. has allowed relief to the assessee. Similar is the position of SMC bench Kolkata, whereby in ITA No. 2378 vide order dated 07.08.2019, the Tribunal allowed relief to the assessee. Again SMC Kolkata Bench in ITA 1018 vide order dated 15.02.2019 allowed relief to the assessee on the same scrip and similar is the position of B bench of Kolkata wherein vide order dated 10.05.2019 in ITA Nos 125 and 126 the same scrip of Sulab Engineering and Services Ltd. was considered and relief was granted to the assessee.

9.1 We further find that in a recent judgment by the Hon'ble Delhi High Court vide order dated 15.01.2021 in an appeal filed by Revenue against the order of Tribunal the Hon'ble Court in a consolidated order in three appeals dismissed the appeals of the Revenue. In I.T.A. No.125, on the basis of same investigation report, the Assessing Officer and CIT(A) had not allowed claim of the assessee of long term capital gain on the scrip M/s Gold Line International Finvest Ltd. In I.T.A. No. 130 and 131 similar claim was made on scrip of M/s Eastern Bio Organic Food Processing Ltd. and on scrip of Rander Corporation Ltd. The authorities below had not allowed claim of the assessee on the basis of same investigation report on the basis of which claim of the assessee has been rejected.

These scrips are mentioned at Sl. No. 24, 19 and 49 in the list of penny stocks prepared by investigation team. The Tribunal however allowed relief to the assessee by separate orders which were confirmed by Hon'ble Delhi High Court. The relevant findings of Hon'ble court are reproduced below:

“3. The present appeals under Section 260A of the Income Tax Act, 1961 [hereinafter referred to as the ‘Act’] are directed against the common order dated 6th August, 2019 [hereinafter referred to as the ‘Impugned Order’] passed in ITA No. 1069/DEL/2019 (for AY 2014-15), 2772/DEL/2019 (for AY 2015-16) and other appeals for the same AYs, by the Income Tax Appellate Tribunal [hereinafter referred to as the ‘ITAT’]. However, the Impugned Order records the factual position only in respect of ITA No. 1069/DEL/2019. 4. The Revenue urges identical questions of law in all the afore-mentioned appeals with the only difference being the figures relating to the additions made under Section 68 read with Section 115BBE of the Act. Accordingly, the same are being decided by way of this common order. 5. It is not in dispute, as noted in the Impugned Order, that the factual background in all the three appeals is quite similar. However, for the sake of convenience, the facts in respect of ITA 125/2020 are being noted and discussed elaborately. Briefly stated, the Respondent-Assessee is an individual who has derived income from interest on loan, FDR, NSC and bank interest under the head of ‘income from other sources’ in respect of A.Y. 2015-16. She filed her return of income, declaring total income of Rs. 13,96,116/-. After claiming deduction of Rs. 1,60,000/- under Chapter VI-A, the total taxable income of Respondent was declared to be Rs. 12,36,120/-. The return was processed under Section 143(1) of the Act and thereafter the case was selected for scrutiny. During the scrutiny proceedings, the AO noticed that for the relevant year under consideration, the Respondent had claimed exempted income of Rs. 96,75,939/- as receipts from Long Term Capital Gain [hereinafter referred to as ‘LTCG’] under Section 10(38) of the Act. He inter alia concluded that the assessee had adopted a colorable device of LTCG to avoid tax and accordingly framed the assessment order under Section 143(3) of the Act at the total income of Rs. 1,09,12,060/-, making an addition of Rs. 96,75,939/- under Section 68 read with 115BBE of the Act on account of bogus LTCG on sale of penny stocks of a company named M/s Gold Line International Finvest Limited. The appeal before the CIT(A) was dismissed and additions were confirmed with the observation that the Respondent had introduced unaccounted money into the books without paying

taxes. Further appeal filed by the Respondent before the learned ITAT was allowed in her favour, and the additions were deleted vide the Impugned Order, relevant portion whereof reads as under: "21. A perusal of the assessment order clearly shows that the Assessing officer was carried away by the report of the Investigation Wing Kolkata. It can be seen that the entire assessment has been framed by the Assessing Officer without conducting any enquiry from the relevant parties or independent source or evidence but has merely relied upon the statements recorded by the Investigation Wing as well as information received from the Investigation Wing. It is apparent from the Assessment Order that the Assessing Officer has not conducted any independent and separate enquiry in the case of the assessee. Even, the statement recorded by the Investigation Wing has not been got confirmed or corroborated by the person during the assessment proceedings. xx xx xx

23. It is provided u/s. 142 (2) of the Act that for the purpose of obtaining full information in respect of income or loss of any person, the Assessing Officer may make such enquiry as he considers necessary. In our considered view the Assessing Officer ought to have conducted a separate and independent enquiry and any information received from the Investigation Wing is required to be corroborated and affirm during the assessment by the Assessing Officer by examining the concerned persons who can affirm the statements already recorded by any other authority of the department. Facts narrated above clearly show that the Assessing Officer has not made any enquiry and the entire assessment order and the order of the first Appellate Authority are devoid of any such enquiry. 24. The report from the Directorate Income Tax Investigation Wing, Kolkata is dated 27.04.2015 whereas the impugned sales transactions took place in the month of March, 2014. The ex parte ad interim order of SEBI is dated 29.06.2015 wherein at page 34 under para 50 (a) M/s. Esteem Bio Organic Food Processing Ltd was restrained from accessing the securities market and buying selling and dealing in securities either directly or indirectly in any manner till further directions. A list of 239 persons is also mentioned in SEBI order which are at pages 34 to 42 of the order the names of the appellants do not find any place in the said list. At pages 58 and 59 the names of pre IPO transferee in the scrip of M/s. Esteem Bio Organic Food Processing Ltd is given and in the said list also the names of the appellants do not find any place. At page 63 of the SEBI order-trading by trading in M/s. Esteem Bio Organic food Processing Ltd – a further list of 25 persons is mentioned

and once again the names of the appellants do not find place in this list also. 25. As mentioned elsewhere the brokers of the assessee namely ISG Securities Limited and SMC Global Securities Limited are stationed at New Delhi and their names also do not find place in the list mentioned here in above in the SEBI order. There is nothing on record to show that the brokers were suspended by the SEBI nor there anything on record to show that the two brokers of the appellants mentioned here in above were involved in the alleged scam. The Assessing Officer has not even considered examining the brokers of the appellants. It is a matter of the fact that SEBI looks into irregular movements in share prices on range and warn investor against any such unusual increase in shares prices. No such warnings were issued by the SEBI.

26. There is no dispute that the statements which were relied by the Assessing Officer were not recorded by the Assessing Officer in the assessment proceedings but they were pre-existing statements recorded by the Investigation Wing and the same cannot be the sole basis of assessment without conducting proper enquiry and examination during the assessment proceedings itself. In our humble opinion, neither the Assessing Officer conducted any enquiry nor has brought any clinching evidences to disprove the evidences produced by the assessee. The report of Investigation Wing is much later than the dates of purchase / sale of shares and the order of the SEBI is also much later than the date of transactions transacted and nowhere SEBI has declared the transaction transacted at earlier dates as void. xx xx xx 30. Considering the vortex of evidences, we are of the considered view that the assessee has successfully discharged the onus cast upon him by provisions of section 68 of the Act as mentioned elsewhere, such discharge of onus is purely a question of fact and therefore the judicial decisions relied upon by the DR would do no good on the peculiar plethora of evidences in respect of the facts of the case in hand and hence the judicial decisions relied upon by both the sides, though perused, but not considered on the facts of the case in hand.” 6. Aggrieved by the aforesaid findings, the Revenue has filed the instant appeals contending that, notwithstanding the tax effect in the appeals falling below the threshold prescribed under Circular No. 23 dated 6 th September, 2019, the appeals are maintainable in view of the Office Memorandum dated 16th September, 2019 issued by the CBDT, which clarifies that the monetary limits prescribed in the aforementioned circular shall not apply where an assessee is claiming bogus LTCG through penny stocks, and the appeals be

heard on merits. 7. Mr. Zoheb Hossain, learned senior standing counsel for the revenue (Appellant herein), contends that the learned ITAT has completely erred in law in deleting the addition, and thus the Impugned Order suffers from perversity. He submits that there are certain germane factual errors, inasmuch as the learned ITAT has wrongly recorded that there was no independent enquiry conducted by the AO, when in fact the AO had issued notices to the companies in question under Section 133(6) of the Act. He points out that the observations recorded in para 25 of the Impugned Order are factually incorrect, and in conflict with para 4 of the order of the CIT(A) dated 24th December, 2018 which reads as follows: "4. Even the broker through whom the shares were dematerialized and sold i.e. SMC Global Securities Ltd. was also a part of the scam. This is a Delhi based broker whose regional office was also surveyed. The sub brokers were also surveyed and also statements recorded which confirmed the payment of cash commission by the beneficiaries for being part of the syndicate." 8. Mr. Hossain argues that in cases relating to LTCG in penny stocks, there may not be any direct evidence in the hands of the Revenue to establish that the investment made in such companies was an accommodation entry. Thus the Court should take the aspect of human probabilities into consideration that no prudent investor would invest in penny scrips. Considering the fact that the financials of these companies do not support the gains made by these companies in the stock exchange, as well as the fact that despite the notices issued by the AO, there was no evidence forthcoming to sustain the credibility of these companies, he argues that it can be safely concluded that the investments made by the present Respondents were not genuine. He submits that the AO made sufficient independent enquiry and analysis to test the veracity of the claims of the Respondent and after objective examination of the facts and documents, the conclusion arrived at by the AO in respect of the transaction in question, ought not to have been interfered with. In support of his submission, Mr. Hossain relies upon the judgment of this Court in *Suman Poddar v. ITO*, [2020] 423 ITR 480 (Delhi), and of the Supreme Court in *Sumati Dayal v. CIT*, (1995) Supp. (2) SCC 453.

9. Mr. Hossain further argues that the learned ITAT has erred in holding that the AO did not consider examining the brokers of the Respondent. He asserts that this holding is contrary to the findings of the AO. As a matter of fact, the demat account statement of the Respondent was called for from the broker M/s SMC Global Securities Ltd under Section 133(6) of the Act, on

perusal whereof it was found that the Respondent was not a regular investor in penny scrips. 10. We have heard Mr. Hossain at length and given our thoughtful consideration to his contentions, but are not convinced with the same for the reasons stated hereinafter. 11. On a perusal of the record, it is easily discernible that in the instant case, the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites, the AO observes that the quantum leap in the share price is not justified; the trade pattern of the aforesaid company did not move along with the sensx; and the financials of the company did not show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an agreement to convert unaccounted money by claiming fictitious LTCG, which is exempt under Section 10(38), in a preplanned manner to evade taxes. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income Tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of providing entries of bogus LTCG. However, the reliance placed on the report, without further corroboration on the basis of cogent material does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued under Sections 133(6)/131 of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh. Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the

reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from de-mat account and the consideration has been received through banking channels." The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material that could support the case put forth by the Appellant, the additions cannot be sustained. 12. Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent. With regard to the claim that observations made by the CIT(A) were in conflict with the Impugned Order, we may only note that the said observations are general in nature and later in the order, the CIT(A) itself notes that the broker did not respond to the notices. Be that as it may, the CIT(A) has only approved the order of the AO, following the same reasoning, and relying upon the report of the Investigation Wing. Lastly, reliance placed by the Revenue on Suman Poddar v. ITO (supra) and Sumati Dayal v. CIT (supra) is of no assistance. Upon examining the judgment of Suman Poddar (supra) at length, we find that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. On such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the factual matrix at hand. Similarly, the case of Sumati Dayal v. CIT

(supra) too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue. 13. The learned ITAT, being the last fact-finding authority, on the basis of the evidence brought on record, has rightly come to the conclusion that the lower tax authorities are not able to sustain the addition without any cogent material on record. We thus find no perversity in the Impugned Order. 14. In this view of the matter, no question of law, much less a substantial question of law arises for our consideration. 15. Accordingly, the present appeals are dismissed.”

10. *In the above noted judgment, the Hon'ble court has held that startling spike in the share price and other factors may be enough to show circumstances that might create suspicion but the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The Hon'ble court further distinguished the judgment in the case of Suman Podar which was in favour of Revenue. The Hon'ble court further held that case of Sumati Dayal u/s CIT was also not applicable to the assessee. The Hon'ble court further held that reliance placed by the Assessing Officer on the investigation report of Investigation Wing without further corroboration on the basis of cogent material does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries.*

11. *In view of above facts and circumstances and in view of judicial preceden s, Ground Nos. 3 and 4 are allowed in ITA No. 475/Lkw/2019 and Ground No. 1, 2, 5 & 6 were not argued, therefore, same are dismissed as not pressed. In view of above, appeal in ITA no 475/Lkw/2019 is partly allowed.*

12. *As regards, appeal in ITA No. 681/Lkw/2019, Ground Nos. 5 and 6 are allowed. Ground Nos. 1 to 4 and ground No. 7 to 8 were not argued, therefore, these grounds are dismissed as not pressed. As regards ground No. 9 and 10, the Assessing Officer had made additions u/s 69C as deemed commission on the arrangement of capital gains. Since we have allowed relief to the assessee on ground No. 5 & 6, therefore, these grounds are also allowed.*

13. *As regards grounds 11 to 13 regarding deposit in bank, the assessee has filed additional evidences which could not be filed because of mistake of counsel and illness of assessee therefore, we deem it appropriate to remit this issue back to the office of the Assessing Officer who, after affording reasonable opportunity of being heard to the assessee, will pass appropriate orders. In view of the above, ground No. 11 to 13 are allowed for statistical purposes.*

14. *In view of above, appeal in ITA No. 681 is also partly allowed and partly allowed for statistical purposes.”*

9. In view of the above facts and circumstances and in view of the judicial precedents, the denial of claim u/s 10(38) is not justified and the order of learned CIT(A) is reversed and ground No. 1,2,3,4 & 7 of the appeal are allowed.

10. Ground Nos. 5,6,8 & 9 were not argued and therefore, these are dismissed as not pressed.

11. Since appeal of the assessee has been allowed on the merits, the Stay Application filed by the assessee has become infructuous and is therefore, dismissed.

12. In the result, the appeal of the assessee stands partly allowed and Stay Application is dismissed as infructuous.

(Order pronounced in the open court on 20/07/2021)

Sd/.
(A. D. JAIN)
Vice President

Sd/.
(T. S. KAPOOR)
Accountant Member

Dated:20/07/2021

*Singh

Copy of the order forwarded to :

1. The Appellant
2. The Respondent.
3. Concerned CIT
4. The CIT(A)
5. D.R., I.T.A.T., Lucknow

By order
Assistant Registrar