

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'SMC', NEW DELHI**

BEFORE SH. H.S. SIDHU, JUDICIAL MEMBER

ITA No. 457/Del/2018
Assessment Year: 2014-15

ARUN KUMAR, C/O KAPIL GOEL, ADV. F-26/124, SECTOR-7, ROHINI, DELHI – 110 085 (PAN: AEZPG8292D)	Vs.	ACIT, CIRCLE-1, NOIDA
(Appellant)		(Respondent)

ITA No. 2825/Del/2018
Assessment Year: 2014-15

MANOJ KUMAR, C/OKAPIL GOEL, ADV. F-26/124, SECTOR-7, ROHINI, DELHI – 110 085 (PAN: AEZPG8292D)	Vs.	ITO, WARD 2(4), GURGAON
(Appellant)		(Respondent)

ITA No. 2826/Del/2018
Assessment Year: 2014-15

NITASHA GUPTA, C/O KAPIL GOEL, ADV. F-26/124, SECTOR-7, ROHINI, DELHI – 110 085 (PAN: AQKPG1453B)	Vs.	ITO, WARD 3(1), GURGAON
(Appellant)		(Respondent)

Assessee by	Sh. Kapil Goel, Advocate
Department by	Sh. B.S. Anant, Sr. DR.

ORDER

The aforesaid assessees have filed the appeals against respective orders passed by Ld. CIT(A) confirming the orders of Assessing Officer wherein following additions were made against sale of shares of M/s Kappac Pharma Limited treated as unexplained cash credit u/s 68 of the Act read with section 115BBE of the Act. This was claimed as exempt by assessees u/s 10(38) of the Income Tax Act, 1961.

Name of the case	ITA No.	Addition (Rs)
Nitasha Gupta	2826/Del/2018	Rs 28,66,148
Manoj Kumar Gupta	2825/Del/2018	Rs. 21,41,792
Arun Kumar	457/Del/2018	Rs 21,23,850

2. Since facts involved in these appeals are same and identical, hence, the appeals were heard together and for the sake of convenience, all these appeals are being consolidated and disposed of by this common order. For sake of reference and facility, facts in case of Nitasha Gupta vs. ITO, Ward 3(1) Gurgaon in ITA 2826/Del/2018 (AY 2014-15) are taken up to adjudicate the principal issue of allowability of exemption u/s 10(38) of the Act vis. a vis. unexplained cash credit u/s 68 of the Act and only Grounds of appeal raised by assessee i.e in the case of Nitasha Gupta case in ITA 2826/Delhi/2018 (AY 2014-2015) (Supra) are reproduced hereunder:-

1. That order passed by Ld AO dated 26/12/2016 and further order passed by Id CIT A dated 23/03/2018 are bad in law in as much as notice u/s 143(2) on basis of CASS is not in accordance with jurisdictional conditions stipulated under the Act.

1.1 That order passed by Ld AO dated 26/12/2016 and further order passed by Id CIT A dated 23/03/2018 are bad in law in as much as assessment is framed on basis of invalid notice u/s 143(2) dated 30.09.2015 which is apparently not served on

same day by speed post before time barring date as stipulated under the Act.

1.2 That order passed by Ld AO dated 26/12/2016 and further order passed by Id CIT A dated 23/03/2018 are bad in law in as much as assessment is framed on basis of invalid notice u/s 143(2) dated 30.09.2015 where there is no formal transfer u/s 127 order from ITO Ward 37(1) New Delhi to ITO Ward 3(1) Gurgaon.

2. That order passed by Ld AO dated 26/12/2016 and further order passed by Id CIT A dated 23/03/2018 are bad in law in as much as addition of Rs 28,66,148 is made violating principles of natural justice and on basis of vague show cause notice which was challenged and repudiated before Ld AO for not offering cross examination of revenue's witness at place of assessment where back material referred is used against the assessee.

2.1 That order passed by Ld AO dated 26/12/2016 and further order passed by Id CIT A dated 23/03/2018 are bad in law in as much as addition of Rs 28,66,148 is made on basis of statements of Nikhil Jain and Anil Kumar Khemka (assessment order pages 7 to 9, para 5.2, page 13 para 5.7) where as assessee was only confronted with statement of Nikhil Jain only which is proven from show cause notice reproduced in impugned asst order at page 10&11 para 5.3 & para 5.6 pages 12&13 which makes the entire order a nullity;

2.2 That order passed by Ld AO dated 26/12/2016 and further order passed by Id CIT A dated 23/03/2018 are bad in law in as much as addition of Rs 28,66,148 is made on basis of statements of Nikhil Jain and Anil Kumar Khemka (assessment order pages 7 to 9, para 5.2, page 13 para 5.7) which have no evidentiary value as :

i) firstly they are recorded primarily during survey operation and u/s 133A/131 which statements are not at par with search statements

recorded u/s 132(4) and cannot straightway justify adverse inference even against the statement giving person ;

ii) secondly these statements are not equivalent to "material" much less "incriminating material" in eyes of law and they are not corroborated by any iota of independent material;

iii) thirdly, these statements cannot bind assessee who was not subject matter of any parallel survey operation etc;

iv) fourthly these statements are pre-existing as were recorded by investigation wing and no where independently re-examined by Ld AO;

v) fifthly, these statements are not put to acid test of cross-examination ;

vi) sixthly, statements recorded on 02/06/2015 and 30.03.2015 are after expiry of extant financial year 2013-2014 which cannot be extra-polated ;

vii) seventhly how these statements are procured and recd by Ld AO in present case is not discernible ;

viii) eighthly assessee never made the transaction through persons whose statements are recorded and relied (also denied categorically before Ld AO in reply dated 28/11/2016);

ix) lastly it is no body's case that these general statements talk about assessee's particular transaction ;

3. That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the action of Id AO in making addition of Rs 28,66,148 without appreciating that burden to prove that transaction is bogus/sham has remained un-discharged from side of revenue.

4. That on the facts and in the circumstances of the case and in law, both Id CIT-A and Id AO erred in making subject additions without appreciating that the modus operandi relied extensively in impugned orders is never co-related even remotely to the facts of the present

case as there is no iota of evidence brought on record which can display that assessee herein has inducted certain cash at the time of sale to certain unidentified broker/middleman/syndicate member who has in turn introduced certain identified artificial paper company for alleged parking of said cash to buy the shares sold by the assessee which theoretical trail has remained inchoate completely nullifying the entire basis of the addition.

- 5. That on the facts and in the circumstances of the case and in law, Id AO erred in making subject additions without appreciating that law gives discretion to the assessing officer in applying deeming fictions u/s 68 etc which discretion has not been judiciously exercised in facts are present case as assessee has no economic capacity and source to generate given amount of unaccounted income. Further law requires that additions under said deeming fiction cannot be made sans incriminating material brought on record which is completely lacking in present case.*
- 6. That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the action of Id AO in making addition of Rs 28,66,148 /- without appreciating that basis of findings of the lower authorities is "suspicion" and "human probabilities" only which is never converted to reliable and trustworthy material and entire assessment order is passed on sole basis of "borrowed satisfaction" and without any independent application of mind (like a rubber stamp order).*
- 7. That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the action of Id AO in making addition of Rs 28,66,148 /- without appreciating that no opportunity is given to the assessee to be confronted with back material relied extensively in impugned orders like investigation wing report etc and no opportunity to cross examine the revenue's witness was given despite specific written request in this regard made to Ld AO/CIT-A.*

8. *That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the action of Id AO in making addition of Rs 28,66,148 /- without appreciating that section 68 and section 115BBE are not applicable to sale of shares as mentioned in impugned assessment order.*
 9. *That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the action of Id AO in making addition of Rs 28,66,148 without appreciating that in identical facts in various orders relief has been granted to assessee accepting LTCG (long term capital gains) as genuine.*
 10. *That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the action of Id AO in making addition of Rs 28,66,148 without appreciating spirit of law contained in section 10(38) and section 43(5)(d) where statutory status is provided to evidences generated from stock exchange system treating the same to be impeccable and only from finance act 2017 with prospective effective from AY 2018-2019, amendment is made in section 10(38), prior to which such gains would remain exempt.*
 11. *That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the action of Id AO in applying section 115BBE which is out rightly bad in law.*
 12. *That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the action of Id AO in not deciding the ground of addition of Rs 34,406 on a/c of 26AS mismatch and Rs 95,000 on a/c of HRA deduction u/s 10(13A)."*
3. Similar grounds are taken in other two appeals, except the difference in figure. Before me , the Ld AR Shri Kapil Goel, Advocate has only pressed for arguments ground no 3 to 6 and 12 and accordingly the same are only taken up for adjudication in this order. Paper book and common written submissions and Paper Book containing pages 1 t 104 are filed/placed before me on records.

4. Brief facts of the case are that the AO in assessment order passed u/s 143(3) of the Income Tax Act, 1961 (in short "Act") dated 26.12.2016 has discussed in detail the general concept of penny stock etc and certain prior investigation conducted by investigation wing which has formed main basis to reject the exemption u/s 10(38) of the Act as claimed by assessee and invoke section 68 against long term capital gains earned by assessee on sale of shares of company M/s Kappac Pharma Limited. The AO in said order from para 4 to 6.2 has discussed specific facts of instant case as to long term capital gains earned by assessee, statements recorded by investigation wing Kolkata from various persons, show cause notice issued to assessee and its reply by assessee and final views of AO on the same are summed up at para 6.1 and para 6.2 of assessment order wherein AO has invoked section 68 of the Act to tax the full amount recd. on sale of shares as alleged unexplained cash credit as alleged income earned from undisclosed sources where AO has concluded the same at para 13 of his order, which view of AO is further confirmed and sustained by Ld. First Appellate Authority (Ld CIT-A) in impugned order dated 23/03/2018. Ld CIT-A in impugned order from para 4.7 to 5 of his order has dealt with the subject issue, where findings of AO are summed up by Ld CIT-A in his order at para 4.11 of his order and primary conclusion of Ld CIT-A is given at para 4.12 to 4.16 of his order. This is now assailed by assessee in present set of appeals filed. If views of both AO and Ld CIT-A are summarized then crux of the same is astronomical long term capital gains earned by assessee defies common sense and is against the principle of human probability and surrounding circumstances which according to AO and Ld CIT-A in background of investigation conducted by investigation wing Kolkata casts heavy and serious doubts on genuineness of long term capital gains earned by assessee. According to AO and Ld CIT-A the long term capital gains earned by assessee is in nature of an accommodation entry and pre-arranged affair and so both the lower authorities have concurrently held against the assessee to hold that transaction in question are not genuine.

5. At the time of hearing Mr. Kapil Goel, Advocate/Ld. Counsel for the Assessee stated that the issue involved in these appeals have already been decided in favour of the assessee by the plethora of decisions and produced the copies thereof passed by the Hon'ble Supreme Court & Hon'ble High Courts and ITAT wherein, similar views of lower authorities on basis of probabilities and stated investigation wing information, have been consistently overruled and exemption claimed u/s 10(38) of the Act has been restored once basic documents relating to transaction are put in place and same remained thoroughly undoubted by any direct enquiry on part of AO/Ld CIT-A. Ld. counsel for the assessee also filed the Written submissions and pleaded that similar view may be applied here also on basis of principle of uniformity and consistency and additions made u/s 68 may please be deleted.

6. On the other hand, Ld DR has strongly relied on the orders of lower authorities and vehemently prayed for confirming the additions made, but could not produce any contrary order passed by the Hon'ble High Courts as well as Tribunal on the issue in dispute.

7. I have heard both the parties and perused the records, especially the written submissions filed by the Assessee's counsel alongwith the various orders of the Hon'ble High Court and the Tribunal. For the sake of convenience, the relevant paragraphs of the findings of the Hon'ble High Courts as well as Tribunal on the issue in dispute are reproduced as under:-

- 1.** The Hon'ble Punjab and Haryana High Court in the case of PREM PAL GANDHI [ITA- 95-2017 (O&M)] dated 18.01.2018 (401 ITR 253) at vide Page 3 Para 4 held as under:

"..... The Assessing Officer in both the cases added the appreciation to the assessee's income on the suspicion that these were fictitious transactions and that the appreciation actually represented the assessee's income from undisclosed sources. In ITA-18-2017 also

the CIT (Appeals) and the Tribunal held that the Assessing Officer had not produced any evidence whatsoever in support of the suspicion. On the other hand, although the appreciation is very high, the shares were traded on the National Stock Exchange and the payments and receipts were routed through the bank. There was no evidence to indicate for instance that this was a closely held company and that the trading on the National Stock Exchange was manipulated in any manner.” The Court also held the following vide Page 3 Para 5 the following: “Question (iv) has been dealt with in detail by the CIT (Appeals) and the Tribunal. Firstly, the documents on which the Assessing Officer relied upon in the appeal were not put to the assessee during the assessment proceedings. The CIT (Appeals) nevertheless considered them in detail and found that there was no co-relation between the amounts sought to be added and the entries in those documents. This was on an appreciation of facts. There is nothing to indicate that the same was perverse or irrational. Accordingly, no question of law arises.”

- 2.** In similar case, the Hon’ble Calcutta High Court in the case of Principal CIT vs Rungta Properties in ITA No.105 of 2016 dated 08 May, 2017 wherein it was held that *“on the last point, the tribunal held that the AO had not brought relevant material to show that the transactions in shares of the company involved were false or fictitious. It is the finding of the AO that the scripts of this company was executed by a broker and the broker was suspended for some time. It is the assessee’s contention that even though there are allegations against the broker, and for that reason the assessee cannot be held liable on this point, the tribunal held that –*
“As a matter of fact the AO doubted the integrity of the broker and the broker firm and also AO observed that the assessee had not furnished any explanation in respect of any discussion of trading of

shares. The AO relied the loss of Rs.25,30,396/- only on the basis of information submitted by stock as fictitious. The AO has also not doubted the genuineness of the documents placed by the assessee on record. The AO's observation and conclusion are merely based on information. Therefore on such basis, no disallowance can be made and accordingly we find no infirmity in the order of the Id. CIT(A), who has rightly allowed the claim of the assessee. This ground no.1 of the revenue is dismissed." We agree with the reasoning of the tribunal on this point also. We do not find any reason to interfere with the impugned order. The suggested question, in our opinion do not raise any substantial question of law."

- 3.** The Hon'ble Calcutta High Court in the case of M/s. Alipine Investments in ITA No.620 of 2008 dated 26th August, 2008 wherein the High Court held as follows :

"It appears that there was loss and the whole transactions were supported by the contract notes, bills and were carried out through recognized stock broker of the Calcutta Stock Exchange and all the bills were received from the share broker through account payee which are also filed in accordance with the assessment.

It appears from the facts and materials placed before the Tribunal and after examining the same, the tribunal allowed the appeal by the assessee.

In doing so the tribunal held that the transactions cannot be brushed aside on suspicion and surmises. However it was held that the transactions of the shares are genuine. Therefore we do not find that there is any reason to hold that there is no substantial question of law held in this matter. Hence the appeal being ITA No.620 of 2008 is dismissed."

4. Hon'ble Rajasthan high court in case of Pooja Aggarwal DBIT Appeal No. 385/2011 dated 11.09.2017 (which is mentioned below:

"12. However, counsel for the respondent has taken us to the order of CIT(A) and also to the order of Tribunal and contended

that in view of the finding reached, which was done through Stock Exchange and taking into consideration the revenue transactions, the addition made was deleted by the Tribunal observing as under:-

"Contention of the AR is considered. One of the main reasons for not accepting the genuineness of the transactions declared by the appellant that at the time of survey the appellant in his statement denied having made any transactions in shares. However, subsequently the facts came on record that the appellant had transacted not only in the shares which are disputed but shares of various other companies like Satyam Computers, HCL, IPCL, BPCL and Tata Tea etc. Regarding the transactions in question various details like copy of contract note regarding purchase and sale of shares of Limtex and Konark Commerce & Ind. Ltd., assessee's account with P.K. Agarwal & co. share broker, company's master details from registrar of companies, Kolkata were filed.

Copy of depository a/c or demat account with Alankrit Assignment Ltd., a subsidiary of NSDL was also filed which shows that the transactions were made through demat a/c. When the relevant documents are available the fact of transactions entered into cannot be denied simply on the ground that in his statement the appellant denied having made any transactions in shares. The payments and receipts are made through a/c payee cheques and the transactions are routed through Kolkata Stock Exchange.

There is no evidence that the cash has gone back in appellants's account. Prima facie the transaction which are supported by documents appear to be genuine transactions. The AO has discussed modus operandi in some sham transactions which were detected in the search case of B.C. Purohit Group. The AO has also stated in the assessment order itself while discussing the modus operandi that accommodation entries of long term capital gain were purchased as long term capital gain either was exempted from tax or was taxable at a lower rate. As the appellant's case is of short term capital gain, it does not exactly fall under that category of accommodation transactions. Further as per the report of DCIT, Central Circle-3 Sh. P.K. Agarwal was found to be an entry provider as stated by Sh. Pawan Purohit of B.C. Purihit and Co. group. The AR made submission before the AO that the fact was not correct as in the statement of Sh. Pawan Purohit there is no mention of Sh. P. K. Agarwal. It was also submitted that there was no mention of Sh. P. K. Agarwal in the order of Settlement Commission in the case of Sh. Sushil Kumar Purohit. Copy of the order of settlement commission was submitted. The AO has failed to counter the objections raised by the appellant during the assessment proceedings. Simply mentioning that these findings are in the appraisal report and appraisal report is made by the Investing Wing after considering all the material facts available on record does not help much. The AO has failed to prove through any independent inquiry or relying on some material that the transactions made by the appellant through share broker P.K. Agarwal were non-genuine or there was any adverse mention about the transaction in question in statement of Sh. Pawan Purohi. Simply because in the sham transactions bank a/c were opened with HDFC bank and the appellant has also

received short term capital gain in his account with HDFC bank does not establish that the transaction made by the appellant were non genuine. Considering all these facts the share transactions made through Shri P.K. Agarwal cannot be held as non-genuine. Consequently denying the claim of short term capital gain (6 of 6) [ITA-385/2011] made by the appellant before the AO is not approved. The AO is therefore, directed to accept claim of short term capital gain as shown by the appellant."

5. THE INCOME TAX APPELLATE TRIBUNAL "E", BENCH MUMBAI (SPECIAL BENCH)

ITA No.5996/Mum/1993 (Assessment Year: 1984-85)

M/s.GTC Industries 164 ITD Page 1

46. In situations like this case, one may fall into realm of "preponderance of probability" where there are many probable factors, some in favour of the assessee and some may go against the assessee. But the probable factors have to be weighed on material facts so collected. Here in this case the material facts strongly indicate a probability that the wholesale buyers had collected the premium money for spending it on advertisement and other expenses and it was their liability as per their mutual understanding with the assessee. Another very strong probable factor is that the entire scheme of "twin branding" and collection of premium was so designed that assessee company need not incur advertisement expenses and the responsibility for sales promotion and advertisement lies wholly upon wholesale buyers who will borne out these expenses from alleged collection of premium. The probable factors could have gone against the assessee only if there would have been some evidence found from several searches either conducted by DRI or by the department that Assessee Company was beneficiary of any such accounts. At least something would have

been unearthed from such global level investigation by two Central Government authorities. In case of certain donations given to a Church, originating through these benami bank accounts on the behest of one of the employees of the assessee company, does not implicate that GTC as a corporate entity was having the control of these bank accounts completely. Without going into the authenticity and veracity of the statements of the witnesses Smt. Nirmala Sundaram, we are of the opinion that this one incident of donation through bank accounts at the direction of one of the employee of the Company does not implicate that the entire premium collected all throughout the country and deposited in Benami bank accounts actually belongs to the assessee company or the assessee company had direct control on these bank accounts. Ultimately, the entire case of the revenue hinges upon the presumption that assessee is bound to have some large share in so called secret money in the form of premium and its circulation. However, this presumption or suspicion how strong it may appear to be true, but needs to be corroborated by some evidence to establish a link that GTC actually had some kind of a share in such secret money. It is quite a trite law that suspicion how so ever strong may be but cannot be the basis of addition except for some material evidence on record. The theory of „preponderance of probability“ is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee.”

7. THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH : KOLKATA
[Before Hon'ble Shri J.Sudhakar Reddy, AM & Hon'ble Shri S.S.
Viswanethra Ravi, JM]

I.T.A No. 2281/Kol/2017 Assessment Year : 2014-15

Navneet Agarwal, Legal Heir of Late Kiran Agarwal [PAN: ADGPA
9851 N] (Appellant)

Date of Pronouncement : 20.07.2018

"10. After careful consideration of the rival submissions, perusal of the papers on record and order of the lowers authorities below, as well as case law cited, we hold as follows.

11. The assessee in this case has stated the following facts and produced the following documents as evidences:

1. The assessee had made an application for allotment of 50000 equity shares of "Smart champs IT and Infra Ltd." and she was allotted the share on 3rd December 2011 (copy of Application form, intimation of allotment and share certificate Paper Book at page 8 to 10).

2. The payment for the allotment of shares was made through an account payee cheque (copy of the bank statement evidencing the source of money and payment made to "Smart Champs IT & Infra Ltd." for such shares allotted is placed in the Paper Book at page no. 11).

3. Annual return no. 20B was filed with Registrar of companies by "Smart Champs IT & Infra Ltd" showing the assessee's name as shareholder (copy of annual return no. 20B filed with Registrar of companies by "Smart Champs IT & Infra Ltd. "is placed in the Paper Book at page no. 12 to 18.)

4. The assessee lodged the said shares with the Depository M/s. Eureka Stock & Share Broking Services Ltd. with a Demat request on 11th February, 2012. The said shares were dematerialized on 31st March, 2012 (copy of demat request slip along with the transaction statement is placed in the paper book at page no. 19 to 21).

5. On 24.01.2013, the Hon'ble Bombay High Court approved the scheme of amalgamation of "Smart Champs IT and Infra Ltd." with "Cressanda Solutions Ltd." In accordance with the said scheme of amalgamation, the

assessee was allotted 50000 equity shares of "M/s. Cressanda Solutions Ltd." The demat shares are reflected in the transaction statement of the period from 1st November 2011 to 31st December, 2013 (A copy of the scheme of amalgamation alongwith copy of order of the Hon'ble Bombay High Court and a copy of the letter to this effect submitted by "Cressanda Solutions Ltd". to Bombay Stock Exchange is placed in the Paper Book at page no 22 to 43.)

6. The assessee sold 50000 shares costing Rs. 500000/- through her broker "SKP Stock Broking Pvt. Ltd" which was a SEBI registered broker and earned a Long Term Capital Gain of Rs. 2,18,13,072/-. (Copy of the bank statement, brokers contract note together with the delivery instructions given to the DP and broker's confirmation is also placed in the paper book at page no 44 to 65).

7. Copy of Form No. 10DB issued by the broker, in support of charging of S.T.T. in respect of the transactions appearing in the ledger is placed in the paper book at page no. 66.

8. The holding period of the said scrip is more than one year (above 500 days) through in order to get the benefit of claim of Long Term Capital Gain the holding period is required to be 365 days.

12. The assessing officer as well as the Ld. CIT(A) have rejected these evidences filed by the assessee by referring to "Modus Operandi" of persons for earning long term capital gains which is exempt from income tax. All these observations are general in nature and are applied across the board to all the 60,000 or more assesseees who fall in this category. Specific evidences produced by the assessee are not controverted by the revenue authorities. No evidence collected from third parties is confronted to the assessee. No opportunity of cross-examination of persons, on whose statements the revenue relies to make the addition, is provided to the assessee. The addition is made based on a report from the investigation wing. 13. The issue for consideration before us is whether, in such cases, the legal evidence produced by the assessee has to guide our decision in the matter or the general observations based on statements,

probabilities, human behavior and discovery of the modus operandi adopted in earning alleged bogus LTCG and STCG, that have surfaced during investigations, should guide the authorities in arriving at a conclusion as to whether the claim is genuine or not. An alleged scam might have taken place on LTCG etc. But it has to be established in each case, by the party alleging so, that this assessee in question was part of this scam. The chain of events and the live link of the assessee's action giving her involvement in the scam should be established. The allegation implies that cash was paid by the assessee and in return the assessee received LTCG, which is income exempt from income tax, by way of cheque through Banking channels. This allegation that cash had changed hands, has to be proved with evidence, by the revenue. Evidence gathered by the Director Investigation's office by way of statements recorded etc. has to also be brought on record in each case, when such a statement, evidence etc. is relied upon by the revenue to make any additions. Opportunity of cross examination has to be provided to the assessee, if the AO relies on any statements or third party as evidence to make an addition. If any material or evidence is sought to be relied upon by the AO, he has to confront the assessee with such material. The claim of the assessee cannot be rejected based on mere conjectures unverified by evidence under the pretentious garb of preponderance of human probabilities and theory of human behavior by the department. 14. It is well settled that evidence collected from third parties cannot be used against an assessee unless this evidence is put before him and he is given an opportunity to controvert the evidence. In this case, the AO relies only on a report as the basis for the addition. The evidence based on which the DDIT report is prepared is not brought on record by the AO nor is it put before the assessee. The submission of the assessee that she is just an investor and as she received some tips and she chose to invest based on these market tips and had taken a calculated risk and had gained in the process and that she is not party to the scam etc., has to be controverted by the revenue with evidence. When a person claims that she has done

these transactions in a bona fide and genuine manner and was benefitted, one cannot reject this submission based on surmises and conjectures. As the report of investigation wing suggests, there are more than 60,000 beneficiaries of LTCG. Each case has to be assessed based on legal principles of legal import laid down by the Courts of law. 15. In our view, just the modus operandi, generalisation, preponderance of human probabilities cannot be the only basis for rejecting the claim of the assessee. Unless specific evidence is brought on record to controvert the validity and correctness of the documentary evidences produced, the same cannot be rejected by the assessee. The Hon'ble Supreme Court in the case of Omar Salav Mohamed Sait reported in (1959) 37 ITR 151 (S C) had held that no addition can be made on the basis of surmises, suspicion and conjectures. In the case of CIT(Central), Kolkata vs. Daulat Ram Rawatmull reported in 87 ITR 349, the Hon'ble Supreme Court held that, the onus to prove that the apparent is not the real is on the party who claims it to be so. The burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidences, which would directly prove the fact of bogusness or establish circumstance unerringly and reasonably raising an interference to that effect. The Hon'ble Supreme Court in the case of Umacharan Shah & Bros. Vs. CIT 37 ITR 271 held that suspicion however strong, cannot take the place of evidence. 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 generalisations. Courts of law are bound to go by evidence.

16. We find that the assessing officer as well as the Ld. CIT(A) has been guided by the report of the investigation wing prepared with respect to bogus capital gains transactions. However, we do not find that the assessing officer as well as the Ld. CIT(A), have brought out any part of

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

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

"Adverting to the various probabilities which weighed with the Income-tax Officer we may observe that the notoriety for smuggling food grains and other commodities to Bengal by country boats acquired by Sahibgunj and the notoriety achieved by Dhulian as a great receiving centre for such commodities were merely a background of suspicion and the appellant could not be tarred with the same brush as every arhardar and grain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf. The cancellation of the food grain licence at Nawgachia and the prosecution of the appellant under the Defence of India Rules was also of no consequence inasmuch as the appellant was acquitted of the offence with which it had been charged and its licence also was restored. The mere possibility of the appellant earning considerable amounts in the year under consideration was a pure conjecture on the part of the Income-tax Officer and the fact that the appellant indulged in speculation (in Kalai account) could not legitimately lead to the inference that the profit in a single transaction or in a chain of transactions could exceed the amounts, involved in the high denomination notes,---this also was a pure conjecture or surmise on the part of the Income-tax Officer. As regards the disclosed volume of business in the year under consideration in the head office and in branches the Income-tax Officer indulged in speculation when he talked of the possibility of the appellant earning a considerable sum as against which it showed a net loss of about Rs. 45,000. The Income-tax Officer indicated the probable source or sources from which the appellant could have earned a large amount in the sum of Rs. 2,91,000 but the conclusion which he arrived at in regard to the appellant having earned this large amount during the year and which according to him represented the secreted profits of the appellant in its business was e result of pure conjectures and surmises on his part and had no foundation in fact and was not proved against the appellant on the record of the proceedings. If the conclusion of the Income-tax Officer was thus either perverse or vitiated by suspicions, conjectures or surmises, the finding of the Tribunal was equally perverse

or vitiated if the Tribunal took count of all these probabilities and without any rhyme or reason and merely by a rule of thumb, as it were, came to the conclusion that the possession of 150 high denomination notes of Rs. 1,000 each was satisfactorily explained by the appellant but not that of the balance of 141 high denomination notes of Rs. 1,000 each".

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

18. We now consider the various propositions of law laid down by the Courts of law. That cross-examination is one part of the principles of natural justice has been laid down in the following judgments:

- a) *Ayaaubkhan Noorkhan Pathan vs. The State of Maharashtra and Ors.*
- b) *Andaman Timber Industries vs. Commissioner of C. Ex., Kolkata-II* wherein it was held that:

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

- a) The CALCUTTA HIGH COURT in the case of *BLB CABLES & CONDUCTORS* [ITA No. 78 of 2017] dated 19.06.2018. The High Court held vide Para 4.1:
- b) The JAIPUR ITAT in the case of *VIVEK AGARWAL* [ITA No. 292/JP/2017] order dated 06.04.2018 held as under vide Page 9 Para 3:
- c) The Hon'ble Punjab and Haryana High Court in the case of *PREMPAL GANDHI* [ITA-95-2017(O&M)] dated 18.01.2018 at vide Page 3 Para 4 held as under:
- d) The BENCH "D" OF KOLKATA ITAT in the case of *GAUTAM PINCHA* [ITA

No.569/Kol/2017]order dated 15.11.2017 held as under vide Page 12 Para 8.1:

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

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

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

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

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

j) The Hon'ble Supreme Court in the case of PCIT vs. Teju Rohit Kumar Kapadia order dated 04.05.2018 upheld the following proposition of law laid down by the Hon'ble Gujarat High Court as under:

20. Applying the proposition of law as laid down in the above-mentioned judgments to the facts of this case we are bound to consider and rely on the evidence produced by the assessee in support of its claim and base our decision on such evidence and not on suspicion or preponderance of probabilities. No material was brought on record by the AO to controvert the evidence furnished by the assessee. Under these circumstances, we accept the evidence filed by the assessee and allow the claim that the

income in question is a bona fide Long Term Capital Gain arising from the sale of shares and hence exempt from income tax.

21. Under the circumstances and in view of the above discussion, we uphold the contentions of the assessee and delete the addition in question.

22. In the result, the appeal of the assessee is allowed."

**8. IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH:
KOLKATA I.T.A. No. 604/Kol/2018 Assessment Year: 2014-15**

Jagmohan Agarwal

[Before Shri A. T. Varkey, JM & Shri M. Balaganesh, AM]

Date of Pronouncement 05.09.2018

"29. We have heard the rival submissions and perused the records. We note that in the present case, the assessee had purchased 25000 shares of M/s. Essar India Private Limited on 22.03.2012 from a recognized stock broker M/s. R. L. Agarwala Capital Market Ltd. through the BSE. These shares were held in the de-mat account of the assessee placed at pages 13 and 14 of paper book and ultimately these shares were sold through M/s. R. L. Agarwala Capital Market Ltd. through the BSE and on such sale, Security Transaction Tax was duly paid. Payments were duly received in the bank account of the assessee. The transactions were all through a registered broker and through BSE since the scrips of M/s. Essar India Pvt. Ltd. was a listed company in BSE backed by a contract note (page 2 and 8&9 of the paper book) and shares were credited in the de-mat accounts (page 13 and 14 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 and sale of shares per-se cannot be held to be bad.

31. We note that the assessee has produced before the Id. CIT(A) (i) paper relating to the application for shares, (ii) allotment of the shares, (iii) share certificates, (iv) payment by cheque, (v) necessary papers filed before the Registrar of Companies, (vi) the name of the assessee has been reflected as a shareholder, (vii) the proof of amalgamation of the companies wherein the shareholding has changed, (viii) bank statement, (ix) bank contract notes and delivery instruction to the broker to prove the genuineness of the transactions which has been disbelieved on the species plea that production of these documents strengthens the suspicious transaction of bogus transaction cannot be accepted at all. The Id CIT(A) ought not to have brushed aside these documents without pointing out any defects and therefore the impugned action of Id CIT(A) cannot be countenanced. Moreover the AO has referred in his assessment order the name of M/s. Kailash Auto and M/s. Unno Industries and also statements

of Shri L.K. Agarwal and Shri Goutam Bose and Shri S. Dokania. However these persons statements have neither been reproduced in the assessment order nor the assessee given a copy of the statements to rebut. So the action of both AO and Id CIT(A) referring to statements which were purportedly recorded under oath by the Investigation Wing cannot be made the basis for drawing adverse inference against the assessee. Thus the action of AO to refer to certain purported statements of the three individuals without establishing any nexus with the assessee can at best mislead or create suspicion and reference to irrelevant material itself makes the order bad. Not only that the AO has not even bothered to give a copy of the same to the assessee and did not give an opportunity to the assessee to cross examine those persons itself vitiates the action of the AO and the order passed by him is therefore fragile for violation of natural justice and null in the eyes of law as held by the Hon'ble Supreme Court in Andaman Timber Industries Vs. Commissioner of Central Excise in Civil Appeal No. 4228 of 2006 dated 16.11.2015. These purported statement though the contents of which neither we are aware nor the appellant assessee, cannot be the basis for drawing adverse inference against the assessee in the light of documents produced before AO/CIT(A) and this Tribunal.

33. We find force in the contentions of the Id. AR that the AO and CIT(A) was not justified in rejecting the claim of the assessee on the basis of theory of suspicious transactions surrounding circumstance, human conduct and preponderance of probability without bringing on record any relevant material or 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 Id. 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. We further note that the company under scanner as recorded by the AO at page 4 of his order was having shareholder fund as on 31.03.2014 of Rs.21.82 crores and was having assets worth Rs.41.50 crores and a turn-over of Rs.15.72 crores and profit of Rs.10 lacs. Thus the allegation that these companies did not have financial credentials at the time of purchase

of shares or sale of shares is not correct and so is perverse and therefore we do not subscribe to the said finding.

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

37. Coming to the next addition of Rs.43,934/-, i.e., 5% of Rs.11,49,425/-, as undisclosed expenditure u/s 69C of the Act in respect of purported payments made to Share Brokers/Entry Operators. On this issue since we have found the purchase and sale of shares are genuine no addition can be made in this regard, so it is ordered to be deleted.

38. In the result, the appeal of assessee is allowed."

9. IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "SMC" NEW DELHI I.T.As. No.2128/Del/2018

Assessment Years: 2015-16 M/s. Amit Rastogi HUF

Date of pronouncement: 24.10.2018

"..9. Another important fact which is to be noted here is that purchase made in the earlier year has not been disturbed and once the entire transaction is through DEMAT account with the reputed broker without having any link with any such entities pointed out by the learned Assessing Officer then no adverse inference at all can be drawn against the assessee. If the sales are evidenced through proper contract notes by HDFC Security Ltd., sold on BSE after paying STT and duly credited in the DEMAT account, then source of the credit has to be accepted that it is from transaction of sale of shares held for a Long Term Capital Gain. If purchase of shares is not doubted and these shares are not in possession with the assessee, then there cannot be any adverse inference that it is unexplained credit to be added u/s.68 of the Act. Thus, on the facts and in the circumstances of the case, we hold that there was a genuine transaction of purchase and sale of shares on which assessee has earned Long Term Capital Gain, and therefore, such Long Term Capital Gain cannot be taxed u/s.68. Since Long Term Capital Gain is exempted u/s.10 (38), therefore, no addition is called for.

Accordingly, appeal of the assessee is allowed."

**10. IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC", NEW DELHI
ITA No.2021/Del/2018**

Assessment Year : 2014-15

Shoubit Goel (HUF),

Date of pronouncement : 25-09-2018

18. I find merit in the above argument of the Id. counsel for the assessee. It is an admitted fact that the shares were sold through national stock exchange and HDFC Securities was the broker, the amounts were received after payment of STT and brokerage and the shares were sold through banking channels. No case specific or transaction specific information was given by the persons whose statements were recorded and are the basis of addition in the instant case.

19. I find the Hon'ble Punjab & Haryana High Court, which is the Jurisdictional High Court in the case of the assessee, in the case of Prem Pal Gandhi (supra) has observed as under :-

"2. The following questions of law have been raised:-

(i) Whether on the facts and in the circumstances of the case, the Hon'ble Income Tax Appellate Tribunal has erred in law in upholding the order of the CIT(A) deleting the addition of Rs. 4,11,77,474/- made by the AO on account of sham share transactions ignoring an important aspect that the transaction of shares showing their purchase price at Rs. 11,00,000/- and sale consideration at Rs. 4,23,45,295/- within a period of less than two years/purchases of shares made in cash not cheque that too before shares got dematerialized/worth of the company at the time of purchase/sale of shares not proved-All suggest non-genuineness of the said transaction?

(ii) Whether on the facts and in the circumstances of the case, the Hon'ble Income Tax Appellate Tribunal has erred in law in upholding the order of the CIT(A) deleting the addition of Rs. 4,11,77,474/- made by the AO on account of sham share transactions, whereas the CIT(A) himself had held that the assessee had not been able to substantiate the source of investment of Rs. 11,00,000/- in the said shares purchased during the financial year 2005-06 and the AO was directed to reopen the case of the assessee for the assessment year 2006-07 on this issue?

(iii) Whether the Hon'ble ITAT has erred in ignoring an important aspect that in such cases of sham transactions of shares showing abnormal hike in their value, where the facts themselves speak loud and clear, the AO is justified to even draw an inference from the attendant circumstances?

(iv) Whether on the facts and in the circumstances of the case, the Hon'ble Income Tax Appellate Tribunal has erred in law in upholding the order of the CIT(A) deleting the addition of Rs. 12,59,000/- made by the AO on the basis of seized document on the grounds that the Assessing Officer has not pointed out as to how the figure of Rs. 12.59 lacs has been worked out ignoring the fact that the assessee himself in his reply to the

AO had tried to explain the source of the receipts of Rs. 12,59,000/- instead of challenging the working out of the said figure by the AO?

3. The first three questions of law raised in this appeal are covered against the appellant by an order and judgement of a Division Bench of this Court dated 16.02.2017 in ITA-18-2017 titled as The Pr. Commissioner of Income Tax (Central), Ludhiana Vs Sh. Hitesh Gandhi, Bhatti Colony, Chandigarh Road, Nawanshahar.

4. The issue in short is this: The assessee purchased shares of a company during the assessment year 2006-2007 at Rs. 11/- and sold the same in the assessment year 2008-2009 at Rs. 400/- per share. In the above case, namely, ITA-18-2017 also the assessee had purchased and sold the shares in the same assessment years. The Assessing Officer in both the cases added the appreciation to the assessee's income on the suspicion that these were fictitious transactions and that the appreciation actually represented the assessee's income from undisclosed sources. In ITA-18-2017 also the CIT (Appeals) and the Tribunal held that the Assessing Officer had not produced any evidence whatsoever in support of the suspicion. On the other hand, although the appreciation is very high, the shares were traded on the National Stock Exchange and the payments and receipts were routed through the bank. There was no evidence to indicate for instance that this was a closely held company and that the trading on the National Stock Exchange was manipulated in any manner.

5. In these circumstances, following the judgement in ITA-18-2017, it must be held that there is no substantial question of law in the present appeal.

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

7. In the circumstances, the appeal is dismissed."

20. I find the Co-ordinate Bench of the Tribunal in the case of Smt. Shikha Dhawan (supra) has deleted similar addition by observing as under :-

"8. I have heard the rival submissions and perused the material available on record. The assessee placed sufficient documentary evidences before the AO which are copy of the shares certificates with transfer form, copy of debit note issued by Shreeji Broking (P) Ltd., copy of cash receipt of Shreeji Broking (P) Ltd., copy of the account statement of the assessee in the books of the broker, copy of ledger account of Indus Portfolio (P) Ltd., copy of evidence for payment of securities transaction tax and copy of the bank statement of the assessee to show that the assessee had entered into genuine transaction of purchase of share which were later on sold through the broker on recognized stock exchange after payment of STT.

The claim of the assessee for sale of shares has been supported by the documentary evidences which have not been rebutted by the authorities below. Whatever inquiry was conducted in the cases of other parties and statement recorded of several persons namely Sh. Anil Khemka, Sh. Sanjay Vohra and Sh. Bidyoot Sarkar as referred in the assessment order and the report of the Investigation Wing were not confronted to the assessee and above statements were also not subject to cross-examination on behalf of the assessee.

Therefore, such evidences cannot be read in evidence against the assessee. The order of the SEBI was also not confronted to the assessee. AO did not mention any such fact in assessment order. More so in those reports and statements, the name of the assessee has not been referred to. Ld. Counsel for the assessee, therefore, rightly contended that the twin conditions of section 10(38) of the Act have been satisfied in the Page 24 ITA No.3035/Del/2018 case of the assessee. The assessee has been able to prove that she has entered into the genuine transaction of purchase and sale of shares and the sale consideration is received from broker through banking channel.

The brokers have not denied the transaction with the assessee. The assessee routed the transaction of sale of shares through recognized stock exchange after making payment of STT. In similar circumstances, ITAT SMC Bench, Delhi in the case of Meenu Goel vs ITO (supra) following the decision of Jurisdictional Hon'ble P&H High Court in the case of Pr.CIT vs Prem Pal Gandhi(supra) deleted the similar addition. Therefore, the issue is covered in favour of the assessee by the order of ITAT, Delhi Bench in the case of Meenu Goel vs ITO (supra) followed by judgement of Jurisdictional P&H High Court which is binding. There is no other material available on record to rebut the claim of the assessee of exemption claimed u/s 10(38) of the Act.

9. Keeping in view of the above discussion and the material on record, in the light of the order of the Tribunal in the case of Meenu Goel vs ITO (supra), I set aside the orders of the authorities below and delete the addition of Rs.19,51,357/-. The appeal of the assessee is, accordingly, allowed.

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

21. I find the Kolkata Bench of the Tribunal in the case of Prakash Chand Bhutoria (supra) has dealt with identical issue where the long term capital gain on account of sale of shares of M/s Unno Industries Ltd. was denied by the Assessing Officer on the basis of Investigation Wing of Kolkata and the Id. CIT(A) upheld the action of the Assessing Officer. On further appeal by the assessee, the Tribunal deleted the addition made by the Assessing Officer u/s 68 by observing as under :-

"8. A perusal of the order of the AO demonstrates that this addition was made merely on "suspicion" and in a routine and mechanical manner. This is clear from the fact that the AO refers to some 'Sharp Trading Compnay' as one of the main ,manipulated company and whereas the assessee sold

scrips in Unno Industries Ltd. The AO refers to various enquiries made by "The Directors of Income Tax" , Kolkata on project basis and that this resulted into unearthing of a huge syndicate of entry operators and share brokers and money lenders involved in providing of bogus accommodation entries. The report as the so-called project and the evidence collected by the DIT (Inv.), Kolkata etc have not been brought on record. It is well settled that any document relied upon by the AO for making an addition has to be supplied to the assessee and an opportunity should be provided to the assessee to rebut the same. In this case, general statements have been made by the AO and the addition is made based on such generalizations. The assessee has not been confronted with any of the evidence collected in the investigation done by the DIT(Inv.), Kolkata. Evidence collected from third parties cannot be used against the assessee without giving a copy of the same to the assessee and thereafter giving him an opportunity to rebut the same.

9. The AO further relies on the shop increase of 31000% of the value of shares over the period of 2 years. Though this is highly suspicious, it cannot take the place of evidence. The Hon'ble Supreme Court has stated that suspicion however strong cannot be the basis for making an addition. The evidence produced by the assessee listed above proves his case and the AO could not controvert the same by bringing on record any evidence. The evidence said to have been collected by the DIT (INV.), Kolkata and the report is not produced before this Bench.

10. I now discuss the case law on the subject. The Hon'ble Calcutta High Court in the case of CIT, Kolkata-III vs. Smt. Shreyashi Ganguli reported in [2012] (9) TMI 1113 held as follows:

"1. Whether on the facts and circumstances of the case, the order of the Ld. Tribunal is perverse in law as well as on facts in deleting the addition made by the Assessing Officer as unexplained cash credit under section 68 of the Income Tax Act, 1961, by ignoring the facts on record.

The Id. Tribunal after considering the material and hearing came to a fact finding which is as follows:

The Assessing Officer has doubted the transaction since the selling broker was subjected to SEBI's action. However, the demat account given the statement of transactions from 01.04.2004 to 31.03.2005 i.e. relevant for the assessment year under appeal (2005-06) are before us. There cannot be any doubt about the transaction as has been observed by the assessing officer. The transactions were as per norms under controlled by the Securities Transaction Tax, brokerage service tax and cess, which were already paid. They were complied with. All the transactions were through bank. There is no iota of evidence over the above transactions as it were through demat format. Hence, we agree with the given findings of the Id. Commissioner of Income Tax (Appeals) in accepting the transactions as genuine too. In view of the fact findings we cannot reappreciate, recording is such, cannot be said to be perverse as it is not fact finding of the Id. Tribunal alone. The commissioner of Income Tax came to the same fact finding. Concurrent fact finding itself makes the story of perversity, unbelievable."

The "D" Bench of the Kolkata Tribunal in the case of Gautam Kumar Pincha vs. ITO, in I.T.A. No. 569/Kol/2017 dated 15.11.2017 at para 19 onwards held as follows:

(i) *M/s Classic Growers Ltd. vs. CIT* [ITA No. 129 of 2012] (Cal HC) - In this case the Id 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 Id 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.

(ii) *CIT V. Lakshmangarh 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 howsoever 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.

(iii) *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.

(iv) *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.

(v) *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.

(vi) *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.

8.4. In the light of the documents stated i.e. (I to xiv) in Para 6(supra) we find that there is absolutely no adverse material to implicate the assessee to have entered gamut of unfounded/unwarranted allegations leveled by the AO against the assessee, which in our considered opinion has no legs to stand and therefore has to fall. We take note that the Id. DR could not controvert the facts supported with material evidences which are on record and could only rely on the orders of the AO/CIT(A).

We note that in the absence of material/evidence the allegations that the assessee/brokers got involved in price rigging/manipulation of shares must therefore also fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the transactions relevant to the purchase and sale of shares resulting in long term capital gain. These evidences were neither found by the AO nor by the Id. 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 that income from LTCG is exempted u/s 10(38) of the Act. For coming to such a conclusion we rely on the decision of the Hon'ble Calcutta High Court in the case of M/s. Alipine Investments in ITA No.620 of 2008 dated 26th August, 2008 wherein the High Court held as follows :

"It appears that there was loss and the whole transactions were supported by the contract notes, bills and were carried out through recognized stock broker of the Calcutta Stock Exchange and all the bills were received from the share broker through account payee which are also filed in accordance with the assessment.

It appears from the facts and materials placed before the Tribunal and after examining the same, the tribunal allowed the appeal by the assessee.

In doing so the tribunal held that the transactions cannot be brushed aside on suspicion and surmises. However it was held that the transactions of the shares are genuine. Therefore we do not find that there is any reason to hold that there is no substantial question of law held in this matter. Hence the appeal being ITA No.620 of 2008 is dismissed."

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

9. In the result the appeal of the assessee is allowed."

The "A" bench of the Kolkata Tribunal in the case of ITO vs. Shaleen Khemani in I.T.A. No. 1945/Kol/2014 dated 18.10.2017 at para 9.1. to 9.4 held as follows:

9.1 We further find that the transaction of sale of shares by the assessee was duly backed by all evidences including Contract Notes, Demat Statement, Bank Account reflecting the transactions, the Stock Brokers have confirmed the transactions, the Stock Exchange has confirmed the transactions, the Shares have been sold on the online platform of the Stock Exchange and each trade of sale of shares were having unique trade no. and trade time. It is not the case that the shares which were sold on the date mentioned in the contract note were not traded price on that particular date.

The Id AO doubted the transactions due to the high rise in the stock price but for that, the assessee could not be blamed and there was no evidence to prove that the assessee or any one on his behalf was manipulating the stock prices. The stock exchange and SEBI are the authorities appointed by the Government of India to ensure that there is no stock rigging or manipulation. The Id AO has not brought any evidence on record to show that these agencies have alleged any stock manipulation against the assessee and or the brokers and or the Company. In absence of any evidences it cannot be said that merely because the stock price moved sharply, the assessee was to be blamed for bogus transactions. It is also to be seen that in this case, the shares were held by the Donors from 2003 and sold in 2010 thus there was a holding period of 7 years as per Section 49 of the Act and it cannot be said that the assessee and the Donors were making such plans for the last 7 years to rig the stock price to generate bogus capital gains that too without any evidences whatsoever.

9.2 It is also pertinent to note that the assessee and / or the stock broker M/s P Didwania & Co and Toshith Securities P Ltd., both registered share and stock brokers with Calcutta Stock Exchange had confirmed the transaction and have issued legally valid contract notes under the Law and such contract notes are available in pages 41-52 of the Paper Book. We find that the Hon'ble Calcutta High Court in the case of Pr CIT Vs Rungta Properties Private Limited ITAT No 105 of 2016 dated 8th May 2017 in a

similar issue dismissed the appeal of the Department by making the following observations:

(11) On the last point, the Tribunal held that the Assessing Officer had not brought on records any material to show that the transactions in shares of the company involved were false or fictitious. It is finding of the assessing officer that the scrips of this company was executed by a broker through cross deals and the broker was suspended for some time. It is assessee's contention on the other that even though there are allegations against the broker, but for that reason alone the assessee cannot be held liable. On this point the Tribunal held -

"As a matter of fact the AO doubted the integrity of the broker or the manner in which the broker operation as per the statement of one of the directors of the broker firm and also AO observed that assessee had not furnished any explanation in respect of the intention of showing trading of shares only in three penny stocks. AO relied the loss of Rs.25,30,396/- only on the basis of information submitted by the Stock fictitious. AO has also not doubted the genuineness of the documents placed on record by the assessee. AO's observation and conclusion are merely based on the information representative.

Therefore on such basis no disallowance can be made and accordingly we find no infirmity in the order of Id. CIT(A), who has rightly allowed the claim of assessee. Thus ground No. 1 of the revenue is dismissed."

We agree with the reasoning of the Tribunal on this point also. We do not find any reason to interfere with the impugned order. The suggested questions, in our opinion do not raise any substantial question of law.

9.3. We therefore hold that there is absolutely no adverse material to implicate the assessee to the entire gamut of unwarranted allegations leveled by the Id AO against the assessee, which in our considered opinion, has no legs to stand in the eyes of law.

We find that the Id DR could not controvert the arguments of the Id AR with contrary material evidences on record and merely relied on the orders of the Id AO. We find that the allegation that the assessee and / or Brokers getting involved in price rigging of SOICL shares fails. It is also a matter of record that the assessee furnished all evidences in the form of bills, contract notes, demat statements and the bank accounts to prove the genuineness of the transactions relating to purchase and sale of shares resulting in LTCG. These evidences were neither found by the Id AO to be false or fabricated. The facts of the case and the evidences in support of the assessee's case clearly support the claim of the assessee that the transactions of the assessee were bonafide and genuine and therefore the Id AO was not justified in rejecting the assessee's claim of exemption under section 10(38) of the Act. We also find that the Id CITA rightly relied on the decision of the Hon'ble High Court at Calcutta in the case of ALPINE INVESTMENTS in ITA No. 620 of 2008 dated 26th August 2008 wherein the Hon'ble Court held as follows:

"It appears that the share loss and the whole transactions were supported by contract notes, bills and were carried out through recognized stockbroker of the Calcutta Stock Exchange and all the payments made to the stockbroker and all the payments received from stockbroker through account payee instruments, which were also filed in accordance with the assessment.

It appears from the facts and materials placed before the Tribunal and after examining the same the Tribunal came to the conclusion and allowed the appeal filed by the assessee. In doing so, the Tribunal held that the transaction fully supported by the documentary evidences could not be brushed aside on suspicion and surmises. However, it was held that the transactions of share are genuine. Therefore, we do not find that there is any reason to hold that there is any substantial question of law involved in this matter. Hence, the appeal being ITA No.620 of 2008 is dismissed."

9.4. We also find that the various other case laws of Hon'ble Jurisdictional High Court and other case laws also relied upon by the Id AR and findings given thereon would apply to the facts of the instant case. The Id DR was not able to furnish any contrary cases to this effect. Hence we hold that the Id AO was not justified in assessing the sale proceeds of shares of SOICL as undisclosed income of the assessee u/s 68 of the Act and therefore we uphold the order of the Id CITA and dismiss the appeal of the revenue. Accordingly the grounds raised by the revenue are dismissed."

Applying the proposition of law laid down in all the above referred cases, the facts of this case, I find force in the submission of the assessee and there are backed by evidence. I also find that the revenue has not based its finding on in any evidence. In view of the above discussion the addition made u/s 68 of the Act is hereby deleted."

22. Since the facts of the instant case are identical to the facts of the cases decided by the Hon'ble Punjab & Haryana High Court and the Delhi and Kolkata Benches of the Tribunal, therefore, respectfully following the above decisions, I set-aside the order of the Id. CIT(A) and direct the Assessing Officer to delete the addition made u/s 68 of the I.T. Act. So far as the decisions relied on by Id. DR are concerned, they are distinguishable and not applicable to the facts of the present case. The grounds raised by the assessee in the impugned appeal are accordingly allowed.

23. The grounds raised by the assessee in other appeals i.e. in ITA No.2022 to 2028/Del/2018 are identical to the facts of the present case. I have already decided the issue in favour of the assessee. Following similar reasoning, the grounds raised by the assessee in the above appeals are also allowed."

11. The Hon'ble Delhi Bench of the Tribunal in the case of ITO vs Jatin Investment Pvt. Ltd. In ITA No.4325 & 4326/Del/2009 order dated 27.05.2015 held as follows :-

"11. In his rival submissions, the Ld. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that the assessee was having investment in shares etc. which were duly shown on the asset side of the balance sheet, out of those investments some were sold and few new were purchased and if there was any gain on the sale the same was offered for taxation. It was further submitted that in earlier year 13 4325 & 4326/ Del/2009 under similar circumstances, the case was reopened u/s 147 of the Act and the addition made by the AO was deleted by the I.T.A.T. It was further submitted that the assessee sold the shares which were earlier purchased in different years and duly shown in the balance sheet of the respective years and that the assessee had shown the sale proceeds in the books of accounts, the investments were reduced after making the sales. It was contended that there was no obligation under the law that the assessee was required to prove the source of payee. It was further contended that the AO had not rejected the books of accounts and the purchases were duly accepted so there was no reason to doubt the sales. It was submitted that the case of the assessee is squarely covered by the decision of this bench of the Tribunal in the case of ITO vs. M/s Vishal Holding and Capital Pvt. Ltd. in ITA no. 1788/Del/2009 order dated 17.07.2009 which has been upheld by the Hon'ble Jurisdictional High Court as reported in (2011) 200 Taxman 186 (Delhi). It was further, submitted that the issue is also covered by the order of the ITAT, Delhi Bench in the case of ITO vs. Goodwill Cressec Pvt. Ltd. in ITA No. 4151/Del./2010 order dated 25.01.2012. Reliance was also placed on the following cases laws :- 14 4325 & 4326/ Del/2009 "1. CIT vs. Sh. Udit Narain Aggarwal, ITA No. 560 of 2009, dt. 12.12.2012 2. CIT vs. Sudeep Goenka, ITA No. 468 of 2009, dt. 3.01.2013. 3. CIT vs. Anirudh Narain Aggarwal, ITA No. 195 of 2010, dt. 16.01.2013." It was pointed out that the same issue has been decided by the I.T.A.T. in

assessee's own case in I.T.A.T. No. 1584/Del./2009 for the A.Y. 2002-03 vide order dated 13.11.2009, in assessee's favour (copy of the order was furnished which is placed on record) 12. We have considered the submissions of both the parties and gone through the material available on the record. In the present case, it is noticed that the assessee purchased the shares in earlier years which were shown as investment in the books of accounts and reflected in the "Asset Side" of the "Balance Sheet", out of those investments (copy which is placed at page no. 23 and 24 of the assessee's paper book), the assessee sold certain investments and accounted for the profit / loss and offered the same for taxation. **In the present case, the amount in question was neither a loan or the deposit , it was also not on account of share application money, the said amount was on account of sale of investment therefore the provisions of Section 68 of the Act were not applicable and the AO was not justified in making the addition. In our opinion, the Ld. CIT(A) rightly deleted the addition made by the AO.** 13. On a similar issue the Hon'ble Jurisdictional High Court in the case of CIT vs. Vishal Holding and Capital Pvt. Ltd. vide order dated 9th August, 2010 upheld the order dated 30.7.2009 of the ITAT in ITA no. 1788/Del/2007 for the assessment year 2000-2001 wherein the order of the Ld. CIT(A) making the similar deletion was upheld by observing in para 6 as under :- "We are of the view that the assessee had produced copies of accounts, bills and contract notes issued by M/s. MKM Finsec Pvt. Ltd., and had been maintaining books of account as per Companies Act. The assessee had also demonstrated the purchase and sale of shares over a period of time as seen from the balance sheet's. In our opinion, the Assessing Officer has simply acted on the information received from the Investigation Wing without verifying the details furnished by the assessee. The assessee has also produced best possible evidence to support its claim. Consequently the addition made by the Assessing Officer cannot be sustained." 14. We, therefore, considering the totality of the facts do not see any valid ground to interfere with the findings of the Ld. CIT(A). Accordingly, we do not see

any merit in this appeal of the department. In ITA no. 4326/Del./2009 of the assessment year 2004- 05 identical issue having similar facts is involved, the only difference is in the amount of addition which was deleted by the Ld. CIT(A). Therefore, our findings given in former part of this order, in respect of 16 4325 & 4326/ Del/2009 assessment year 2003-04, shall apply mutatis mutandis for assessment year 2004-05. 14. We, therefore, considering the totality of the facts do not see any valid ground to interfere with the findings of the Ld. CIT(A). Accordingly, we do not see any merit in this appeal of the department. In ITA no. 4326/Del./2009 of the assessment year 2004- 05 identical issue having similar facts is involved, the only difference is in the amount of addition which was deleted by the Ld. CIT(A). Therefore, our findings given in former part of this order, in respect of 16 4325 & 4326/ Del/2009 assessment year 2003-04, shall apply mutatis mutandis for assessment year 2004-05."

12. The Hon'ble Delhi High Court in the case of Principal C.I.T. vs Jatin Investment Pvt. Ltd. [2017] TMI 342 (Delhi) held as follows

:- "4. The ITAT agreed with the conclusions of the CIT (A) upon its independent examination of the record. It also discounted the Revenue's submissions that the investment shown in the book of accounts and reflected as assets in the side of the balance sheet, should have been properly treated and that in the absence of such treatment .Section 68 applies. The ITAT rejected this contention and held - based upon the principles enunciated in CIT v. Vishaf Holding & Capital Pvt. Ltd. (order of this Court dated 9.8.2010) that the invocation of Section'68 in the circumstances is unwarranted. 5. Learned counsel for the Revenue reiterated the grounds cited in some of the contentions made before the ITAT. Learned counsel especially emphasized on the submission that the incorrect reflection of the receipts in the balance sheet belied the true nature of the receipts as a justification for the application of Section 68 . 6. The ITAT in our opinion quite correctly appreciated the law and its application by the first appellate authority, i.e., CIT (A). Having regard to

the facts and the nature of the analysis based upon the decisions of this Court, as well as the reliance on various decisions with respect to the true nature of Section 68, we are of the opinion that no question of law arises; the appeals are accordingly dismissed"

13. Hon'ble Jurisdictional High Court in the case cited as CIT Vs Vishal Holding and Capital Pvt. Ltd. vide order dated 9th August, 2010 upheld the order dated 30.07.2009 of the ITAT in I.T.A. No. 1788/Del/2007 for the Assessment Year 2000-2001 wherein the order of the Ld. CIT(A) making the deletion was upheld by observing in para 6 as under:- "We are of the view that the assessee had produced copies) of accounts, bills and contract notes issued by M/s. MKM Finsec Pvt. Ltd., and had been maintaining books of account as per Companies Act. The assessee had also demonstrated the purchase and sale of shares over a period of time as seen from the balance sheet. In our opinion, the Assessing Officer has simply acted on the information received from the Investigation Wing without verifying the details furnished by the assessee. The assessee has also produced best possible evidence to support its claim. Consequently the addition made by the Assessing Officer cannot be sustained."

8. In view of aforesaid judgments/orders passed by the Hon'ble High Courts as well as the Tribunal, I have no hesitation to hold that neither AO nor CIT-A has been able to controvert assessee's copious evidences filed in present case which clearly supports the case of assessee qua LTCG claimed as exempt u/s 10(38) of the Act on sale of shares of M/s Kappac Pharma Limited and so issue framed by me above needs to be answered in favor of appellant /assessee. So addition made on a/c of LTCG /s 68 read with section 115BEE is deleted. So grounds relating to addition u/s 68 are allowed.

9. As regards the ground no. 12 in ITA 2826/Del/2018 in Nitasha Gupta case relating to addition of Rs 34,406 and Rs 95,000 on a/c of 26AS mismatch and HRA deduction, as requested by the Ld. Counsel for the Assessee are set aside to file of Ld AO for denovo adjudication.

10. Since in all the other appeals, i.e., in the case of Manoj Kumar Gupta and Arun Kumar in ITA 2825/Del/2018 (AY 2014-15) and ITA 457/Del/2018 (AY 2014-15) respectively, similar facts are permeating and same finding has been given, therefore, my finding given above will apply mutatis mutandis in these two appeals also, because the nature of transactions, evidences and documents are exactly the same.

11. In the result, the Appeal No. 2826/Del/2018 (AY 2014-15)- Nitasha Gupta vs. ITO, Ward 3(1), Gurgaon stand partly allowed for statistical purposes and ITA No. 2825/Del/2018 (AY 2014-15) – Manoj Kumar Gupta vs. ITO Ward 2(4), Gurgaon and ITA No. 457/Del/2018 (AY 2014-15) –Arun Kumar vs. ACIT, Circle-1, Noida stand allowed.

The decision is pronounced on 05th November, 2018.

Sd/-

(H.S. SIDHU)
JUDICIAL MEMBER

Dated: 05th November, 2018.

"SRBHATNAGAR"

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi