

IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH KOLKATA

BEFORE SHRI A.T.VARKEY, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.19/Kol/2019

(निर्धारणवर्ष / Assessment Year:2015-16)

| | | |
|---|------------|---------------------------------|
| Shankar Lal Daruka | Vs. | ITO, Ward-22(4), Kolkata |
| 8, Peary Mohan Mukherjee Street, Belurmath, Howrah | | |
| स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AFSPD 7195 L | | |
| (Assessee) | .. | (Revenue) |

Assesseeby : Shri Amit Agarwal, AR

Respondent by :Shri Nicholas Murmu, Addl. CIT Sr DR

सुनवाईकीतारीख/ Date of Hearing : 13/06/2019

घोषणाकीतारीख/Date of Pronouncement : 02/08/2019

आदेश / O R D E R

Per Dr. A. L. Saini:

The captioned appeal filed by the assessee, pertaining to assessment year 2015-16, is directed against an order passed by the learned Commissioner of Income Tax (Appeals)-6, Kolkata (in short the Id. 'CIT(A)'], which in turn arises out of an assessment order passed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (in short the 'Act') dated 18/12/2017.

2. However, in this appeal, the assessee has raised multiple grounds of appeal, but at the time of hearing, the main grievance of the assessee has been confined to the issue that the Id. CIT(A) was erred in rejecting the exemption claimed by the assessee u/s 10(38) of the Act and confirmed addition of Rs. 6,02,041/- u/s 68 of

the Act, in respect of long term capital gain (LTCG) arising on sale of 15,000 shares of Kailash Auto Finance Ltd.

3. Brief facts qua the issue are that the assessee filed his return of income on 28.03.2016, for assessment year 2015-16, declaring total income of Rs. 3,73,420/-. The return of income filed by the assessee was processed by the Department u/s 143(1) of the Act. Thereafter, the assessee's case was selected for scrutiny u/s 143(2) of the Act. During the assessment proceedings, the Assessing Officer noted that the assessee had purchased scrip of M/s Kailash Auto Finance Ltd. which were sold in the financial year 2014-15, having capital gain of Rs. 6,02,041/-. The assessee has taken the amount as exempt long term capital gain in his return of income for assessment year 2015-16 u/s 10(38) of the Act. The Assessing Officer asked the assessee why this long term capital gain should not be treated as bogus. In response, the assessee submitted the contract notes, bills, bank statements etc. However, the Assessing Officer rejected the contentions of the assessee and made the addition u/s 68 to the tune of Rs. 6,02,041/-.

4. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A) who has confirmed the addition made by the Assessing Officer. Aggrieved by the order of the Id. CIT(A), the assessee is in appeal before us.

5. We have heard both the parties and perused the material available on record. We note that before us the Id. Counsel for the assessee submitted the income tax returns acknowledgment (PB-1). The assessee filed computation of total income of balance sheet and profit and loss account (PB-5 to 6). The assessee filed balance sheet and profit and loss account of proprietary firm of M/s S.L. Daruka company for the previous year relevant to assessment year 2015-16 (PB-11 to 14). The assessee filed details of long term capital gain as on 31.03.2015 which is placed on paper book page 10. The assessee also filed previous year's balance sheet and profit and loss account as on 31.03.2012 and 31.03.2013 also. The assessee filed the purchase bill dated 26.03.2012 evidencing purchase of shares of

sale of Panchsul Marketing Ltd. (PB-17). The assessee submitted before us the bank statement of the assessee evidencing the payment of Rs. 40,000 from banking channels to M/s Brijdhara Mercantile Pvt. Ltd. for purchase of shares of PanchsulMarketing Ltd. (PB-18). The assessee furnished before us the letter received from Kailash Auto Finance Ltd. intimating about the issue of shares in pursuant to scheme of arrangement (PB-19). The order passed by the Hon'ble Allahabad High Court approving amalgamation of Kailash Auto Finance Ltd. with Careful Projects Advisory Ltd. and Panchsul Marketing Ltd.(paper book pages 22 to 50). The assessee submitted contract note evidencing sale of shares Kailash Auto Finance Ltd. PB- 51 to 52. Evidence of receipts of sale proceeds of shares from the broker by way of bank were also placed on paper book page 53 to 54. The assessee also submitted the broker's ledger account and demat account statement issued by the broker viz. JRK Stock Broking Pvt. Ltd. which was at PB- 55 to 61. By submitting these plethora documents and evidences, the Id. Counsel for the assessee submitted before us that the assessee has proved the genuineness of the long term capital gain. The Id. Counsel for the assessee has submitted that where the transaction is done within the four corners of the law then it should not be disallowed. The Id. Counsel submitted that the bank statement, brokers note, contract note, demat statement submitted by the assessee before the Assessing Officer were not found by the Assessing Officer as false / untrue. In other words, the Assessing Officer failed to find any defect in the main documents submitted by the assessee(i.e the bank statement, contract notes, demat account, bills / invoices of the shares) therefore, the transaction done by the assessee is genuine, hence the addition should be deleted. On the other hand, Id DR for the Revenue, reiterated the stand taken by the assessing officer which we have already noted in our earlier para and the same is not being repeated for the sake of brevity.

6. We note that the scrip of M/s Kailash Auto Finance Ltd. is squarely covered by the judgment of Co-ordinate Bench of ITAT Kolkata in the case of Sanjib Kumar Patwari(HUF) in I.T.A. No.205/Kol/2018 for A.Y 2014-15 wherein it was held as follows:

12. We have heard both the parties and perused the material available on record. We note that the assessee is a regular investor in shares and has been investing in shares since past several years. The said fact is evident from the details given below:

| Financial year | Assessment year | Balance Sheet | Details of Investment in shares | No. of shares in which investment is made | Value of Investments |
|----------------|-----------------|-----------------|---------------------------------|---|----------------------|
| 2014-15 | 2015-16 | At page no. 117 | At page no. 119 | 14 | 16,79,92,772/- |
| 2013-14 | 2014-15 | At page no. 121 | At page no. 122 | 15 | 1,56,51,000/- |
| 2012-13 | 2013-14 | At page no. 124 | At page no. 126 | 10 | 2,23,78,742/- |

Thus, from the above table, it is abundantly clear that the assessee is a regular investor in shares and is having a substantial amount of investments. During the year under consideration, the assessee has sold the impugned three scrips and earned capital gains on the same which is claimed year after year consistently. The details of long term capital gain earned by the assessee is given below:

| Sl No. | Name of the Share | No. of Shares | Purchase Value (Rs.) | Sale Value (Rs.) | Long Term Capital gains (Rs.) |
|--------------|------------------------------|---------------|----------------------|------------------|-------------------------------|
| 1. | Kailash Auto Finance Ltd. | 7,34,000 | 7,34,000/- | 2,35,57,282/- | 2,28,23,282/- |
| 2. | Lifeline Drugs & Pharma Ltd. | 1,76,000 | 10,50,000/- | 4,39,13,859/- | 4,28,63,859/- |
| 3. | EINS Edutech | 14,700 | 2,35,200/- | 58,37,526/- | 56,02,326/- |
| Total | | | | | 7,12,89,467/- |

We note that the assessee claimed exemption of LTCG of Rs.7,12,89,467/- u/s 10(38) of the Act, since the shares purchased and sold were listed shares and were purchased and sold through stock broker in Stock Exchange and STT was deducted at the time of sale. The details of purchase and sales transaction made by the assessee is given below:

Details of Purchase of Investments:

| Name of the Company | No. of Shares purchased | Date of Purchase | Amount of Purchases ₹ | Purchased From/ Name of Broker | Name of Stock Exchange | Paid Through |
|------------------------------|-------------------------|-------------------------|-----------------------|--|------------------------|-----------------|
| Kailash Auto Finance Ltd. | 7,34,000 | 09.10.2012 & 10.02.2012 | 7,34,000 | Trump Traders Pvt. Ltd. (12,20,000 shares of Careful Projects Advisory Ltd.) | Off Market | Banking Channel |
| Lifeline Drugs & Pharma Ltd. | 1,76,000 | 01.10.2012 | 10,50,000 | Purchased Through Private Placement made by the company | Off Market | |
| EINS Edutech Ltd. | 14,700 | 10.08.2013 | 2,35,200 | Neptune Financial Advisory Pvt. Ltd. (50,000 shares) | Off Market | |

Details of Sale of Investments:

| Name of the Company | No. of Shares Sold | Date of Sales | Amount of Sales ₹ | Name of Broker | Name of Stock Exchange | Paid Through |
|------------------------------|--------------------|------------------------------|-------------------|--|------------------------|-----------------|
| Kailash Auto Finance Ltd. | 7,34,000 | Various dates as per Table-C | 2,35,57,282/- | Eureka Stock & Share Broking Services Ltd. | Bombay Stock Exchange | Banking Channel |
| Lifeline Drugs & Pharma Ltd. | 1,76,000 | Various dates as per Table-C | 4,39,13,859/- | | | |
| EINS Edutech Ltd. | 14,700 | Various dates as per Table-C | 58,37,526/- | | | |

Therefore, the details of LTCG of Rs. 7,12,89,467/- earned during the financial year on account of sale of shares through a registered stock broker in a recognized Stock Exchange and claimed as exempt u/s 10(38) of the Act is as under:

Table – C:

| Particulars | No. of Shares | Date of Purchase | Amount of Purchase ₹ | Date of Sale | Amount of Sale ₹ | LTCG ₹ |
|-----------------------------|-----------------|------------------|----------------------|--------------|--------------------|--------------------|
| Kailash Auto | 25000 | 09-10-2012 | 25,000 | 07-04-2014 | 10,21,587 | 9,96,587 |
| Kailash Auto | 25000 | 09-10-2012 | 25,000 | 09-04-2014 | 10,63,757 | 10,38,757 |
| Kailash Auto | 25000 | 09-10-2012 | 25,000 | 10-04-2014 | 10,61,260 | 10,36,260 |
| Kailash Auto | 25000 | 09-10-2012 | 25,000 | 11-04-2014 | 10,58,763 | 10,33,763 |
| Kailash Auto | 25000 | 09-10-2012 | 25,000 | 15-04-2014 | 10,58,763 | 10,33,763 |
| Kailash Auto | 25000 | 09-10-2012 | 25,000 | 16-04-2014 | 10,34,072 | 10,09,072 |
| Kailash Auto | 25000 | 09-10-2012 | 25,000 | 17-04-2014 | 10,45,309 | 10,20,309 |
| Kailash Auto | 30000 | 10-02-2012 | 30,000 | 08-05-2014 | 12,66,357 | 12,36,357 |
| Kailash Auto | 30000 | 09-10-2012 | 30,000 | 26-05-2014 | 12,55,870 | 12,25,870 |
| Kailash Auto | 25000 | 09-10-2012 | 25,000 | 20-06-2014 | 7,64,940 | 7,39,940 |
| Kailash Auto | 25000 | 09-10-2012 | 25,000 | 04-07-2014 | 8,99,505 | 8,74,505 |
| Kailash Auto | 25000 | 09-10-2012 | 25,000 | 07-07-2014 | 9,10,743 | 8,85,743 |
| Kailash Auto | 25000 | 09-10-2012 | 25,000 | 18-07-2014 | 8,87,020 | 8,62,020 |
| Kailash Auto | 25000 | 09-10-2012 | 25,000 | 31-07-2014 | 8,84,521 | 8,59,521 |
| Kailash Auto | 50000 | 09-10-2012 | 50,000 | 27-08-2014 | 16,84,143 | 16,34,143 |
| Kailash Auto | 40000 | 09-10-2012 | 40,000 | 02-09-2014 | 13,03,372 | 12,63,372 |
| Kailash Auto | 28000 | 09-10-2012 | 28,000 | 15-09-2014 | 9,59,907 | 9,31,907 |
| Kailash Auto | 56000 | 09-10-2012 | 56,000 | 16-09-2014 | 19,14,219 | 18,58,219 |
| Kailash Auto | 50000 | 09-10-2012 | 50,000 | 16-10-2014 | 11,20,916 | 10,70,916 |
| Kailash Auto | 150000 | 09-10-2012 | 1,50,000 | 25-11-2014 | 23,62,258 | 22,12,258 |
| Total | 7,34,000 | - | 7,34,000 | - | 2,35,57,282 | 2,28,23,282 |
| Lifeline Drugs & Pharma Ltd | 10000 | 01-10-2012 | 60000 | 01-07-2014 | 2496529 | 2436529 |
| Lifeline Drugs & Pharma Ltd | 10000 | 01-10-2012 | 60000 | 08-07-2014 | 2501524 | 2441524 |
| Lifeline Drugs & Pharma Ltd | 15000 | 01-10-2012 | 90000 | 11-07-2014 | 3722320 | 3632320 |
| Lifeline Drugs & Pharma Ltd | 8000 | 01-10-2012 | 48000 | 15-07-2014 | 1969345 | 1921345 |
| Lifeline Drugs & Pharma Ltd | 14215 | 01-10-2012 | 85290 | 21-07-2014 | 3563015 | 3477725 |
| Lifeline Drugs & Pharma Ltd | 15000 | 01-10-2012 | 90000 | 22-07-2014 | 3737303 | 3647303 |
| Lifeline Drugs & Pharma Ltd | 14000 | 01-10-2012 | 84000 | 23-07-2014 | 3502133 | 3418133 |
| Lifeline Drugs & Pharma Ltd | 10000 | 01-10-2012 | 60000 | 24-07-2014 | 2491535 | 2431535 |
| Lifeline Drugs & Pharma Ltd | 16000 | 01-10-2012 | 96000 | 25-07-2014 | 3986456 | 3890456 |
| Lifeline Drugs & Pharma Ltd | 10000 | 01-10-2012 | 60000 | 28-07-2014 | 2511512 | 2451512 |
| Lifeline Drugs & Pharma Ltd | 12000 | 01-10-2012 | 60000 | 30-07-2014 | 3001828 | 2941828 |
| Lifeline Drugs & Pharma Ltd | 14000 | 01-10-2012 | 84000 | 31-07-2014 | 3502135 | 3418135 |
| Lifeline Drugs & Pharma Ltd | 11000 | 01-10-2012 | 66000 | 01-08-2014 | 2746182 | 2680182 |
| Lifeline Drugs | 10000 | 01-10-2012 | 66000 | 05-08-2014 | 2491535 | 2425535 |

| | | | | | | |
|-----------------------------|-----------------|------------|------------------|------------|--------------------|--------------------|
| & Pharma Ltd | | | | | | |
| Lifeline Drugs & Pharma Ltd | 6785 | 01-10-2012 | 40710 | 06-08-2014 | 1690507 | 1649797 |
| Total | 1,76,000 | - | 10,50,000 | - | 4,39,13,859 | 4,28,63,859 |
| EINS Edutech | 5000 | 10-08-2013 | 80000 | 01-12-2014 | 1948403 | 1868403 |
| EINS Edutech | 2000 | 10-08-2013 | 32000 | 11-12-2014 | 799293 | 767293 |
| EINS Edutech | 1500 | 10-08-2013 | 24000 | 12-12-2014 | 602449 | 578449 |
| EINS Edutech | 1700 | 10-08-2013 | 27200 | 15-12-2014 | 681928 | 654728 |
| EINS Edutech | 2500 | 10-08-2013 | 40000 | 16-12-2014 | 1002835 | 962835 |
| EINS Edutech | 2000 | 10-08-2013 | 32000 | 18-12-2014 | 802618 | 770618 |
| Total | 14,700 | - | 2,35,200 | - | 58,37,526 | 56,02,326 |
| Grand Total | 9,24,700 | - | 20,19,200 | - | 7,33,08,667 | 7,12,89,467 |

We note that the AO in his order has discussed about the interim order of SEBI, where SEBI has restrained some persons including assessee from accessing the securities market. However, SEBI in its final order did not give adverse comment. The same was revoked by SEBI, vide its final order, SEBI/WTM/MPB/EFD-DRA- 1/31/2017 dated 21.09.2017, (page nos. 69-84). Assessee's name is at S.N. 154 (at page no. 80) read with para 7 of Page no. 83. The AO has made some other general allegations including the statement of an alleged entry operator Sri Sunil Dokania at page no. 22 of the assessment order. However, no copy of such statement was given to the assessee nor any opportunity of cross examination of the party was allowed to the assessee. Further, the AO did not brought any corroborative evidence on record to substantiate the contents of the statement relied on. We note that not allowing the assessee to cross examine the witness by the adjudicating authority though the statements of those witness were made the basis of the impugned order is a serious flaw which makes the order nullity. We note that same view expressed by the Hon`ble Calcutta High Court in the case of Eastern Commercial Enterprises 210 ITR 103 (Cal), wherein it was held that it is a trite law that cross examination is the sine qua non of due process of taking evidence and no adverse inference can be drawn against the party unless the party is put on notice of the case made out against him. Therefore, the addition made by the assessing officer based on the statement of an alleged entry operator Sri Sunil Dokania is not sustainable in law, as the assessing officer did not provide an opportunity to the assessee to cross examine the statement of Sri Sunil Dokania.

13. Now, coming to the merits of the assessee`s case, we note that ld Counsel for the assessee submitted before us paper book which contain the documents and evidences in support of the Purchase and sale of shares on which the long term capital gain(LTCG) arose to the assessee. These all documents and evidences were available before the ld CIT(A) as well as before the ld AO. The Assessee submitted before us following documents and evidences in respect of Kailash Auto Finance Ltd.

(1) KAILASH AUTO FINANCE LTD.

i) Copy of purchase bill dated 12.02.2012, reflecting the purchase of 3,20,000 shares of Careful Projects Advisory Ltd. from Trump Traders Pvt. Ltd. (Paper Book Page No. 4)

ii) Copy of purchase bill dated 09.10.2012 reflecting the purchase of 9,00,000 shares of Careful Projects Advisory Ltd. from Trump Traders Pvt. Ltd. (Paper Book Page No. 5)

iii) Copy of Bank Statement reflecting the debit transaction of the amount of Rs. 3,20,000/- paid for the purchase of shares by cheque no. 729958 on 10.02.2012 (Paper Book Page No. 9)

iv) Copy of Bank Statement reflecting the debit transaction of the amount of Rs. 9,00,000/- paid for the purchase of shares by cheque no. 037633 on 09.10.2012 (Paper Book Page No. 8)

v) Copy of statement of DEMAT account evidencing the debit of shares of Kailash Auto Finance Ltd. on 07.04.2014, 09.04.2014, 10.04.2014, 11.04.2014, 15.04.2014, 16.04.2014 and so on; (Paper Book page no. 64- 65)

vi) Copy of order approving the Scheme of Amalgamation passed by the Hon'ble High Court in relation to merger of Kailash Auto Finance Ltd. and Careful Projects Advisory Ltd. and Panchshul Marketing Ltd. (Paper Book page No. 85-115).

vii) Copy of Contract Notes evidencing the sale of shares of Kailash Auto Finance Ltd.

viii) Copy of bank statement reflecting the transactions of sale of shares of Kailash Auto Finance Ltd. (Paper Book page No. 59-61)

ix) SEBI by its interim order dated 29.03.2016 restrained 246 entities from accessing the securities market and from dealing and buying & selling in securities, directly or indirectly in any manner whatsoever till any further directions (Page No. 69) and included Kailash Auto Finance Ltd. and assessee at Serial No. 1 and Serial No. 156 (Page Nos. 70 & 74 respectively) .

x) The same was revoked by SEBI vide its order SEBI/WTM/MPB/EFD-DRA-1/31/2017 dated 21.09.2017 (page nos. 69-84). Assessee's name is at S.N. 154 (at page no. 80) read with para 7 of Page no. 83.

(2) LIFELINE DRUG & PHARMA LTD.

i) Copy of Allotment Advice dated 05.10.2012 reflecting the purchase of 20,000 shares of Lifeline Drugs & Pharma Ltd. (Paper Book Page No. 6) (Later, 20,000 shares of Rs. 10 each were split to 2,00,000 shares of Rs. 1 each)

ii) Copy of Bank Statement reflecting the debit transaction of the amount of Rs. 12,00,000/- paid for the purchase of shares, by cheque no. 037632 on 01.10.2012 (Paper Book Page No. 8)

iii) Copy of statement of DEMAT account evidencing the debit of shares of Lifeline Drugs & Pharma Ltd. on 01.07.2014, 08.07.2014, 11.07.2014, 15.07.2014, 21.07.2014 and so on; (Paper Book Page No. 66-67)

iv) Copy of Contract Notes evidencing the sale of shares of Lifeline Drugs & Pharma Ltd.;

v) Copy of bank statement reflecting the transactions of sale of shares of Lifeline Drugs & Pharma Ltd. (Paper Book page No. 59-61)

(3) EINS EDUTCEHLTD. (Now Aplaya Creations Ltd.)

i) Copy of purchase bill dated 10.08.2013, reflecting the purchase of 50,000 shares of EINS Edutech Ltd. from Neptune Financial Advisory Pvt. Ltd. (Paper Book Page No.7);

ii) Copy of Bank Statement reflecting the debit transaction of the amount of Rs. 8,00,000/- paid for the purchase of shares by cheque no. 37644 on 01.08.2013 (Paper Book Page No. 10)

iii) Copy of statement of DEMAT account evidencing the debit of shares of EINS Edutech Ltd. on 01.12.2014, 02.12.2014, 06.12.2014, 11.12.2014 and so on; (Paper Book Page No. 63)

iv) Copy of Contract Notes evidencing the sale of shares of EINS Edutech Ltd.;

v). Copy of bank statement reflecting the transactions of sale of shares of EINS Edutech Ltd. (Paper Book page No. 59-61) .

Therefore, by submitting these plethora documents and evidences, the ld Counsel for the assessee claimed that long term capital gain (LTCG) earned in respect of the scrips, namely: Kailash Auto Finance Ltd., Lifeline Drug & Pharma Ltd, and EinsEdutceh Ltd. (Now Aplaya Creations Ltd.) are genuine. We also note that the Securities Exchange Board of India (SEBI) also declared these scrips and shares as genuine and the interim order passed by the SEBI was revoked by SEBI itself, vide its order SEBI/WTM/MPB/EFD-DRA- 1/31/2017 dated 21.09.2017 (page nos. 69-84). Assessee's name is at S.N. 154 (at page no. 80) read with para 7 of Page no. 83. Hence, we note that since these shares/scrips were traded on the platform of recognized stock exchange and the Securities Exchange Board of India (SEBI) did not give any adverse report therefore, long term capital gain arise or earned by the assessee should be genuine and it should not be bogus by any stretch of imagination. Moreover, the assessing officer did not doubt on the documents and evidences as noted by us above. The assessing officer mainly made addition based on suspicion, and probability. As we have noted that in the course of assessment proceedings, all the relevant details and documents requisitioned by the ld. Assessing Officer in notice u/s 142(1) was filed before him. The assessee has submitted the details of LTCG, copy of contract notes, bank statements, allotment advise, copy of bills, DEMAT account and other necessary details before AO and the AO failed to bring any cogent evidence on record to show that these documents and evidences were false and untrue.

14. We would like to mention some important salient features of the LTCG transaction entered into by the assessee, which is given below:

(i) The assessee is a regular investor in shares and securities as evident from past assessment records.

(ii) The shares were purchased and sold through a Registered Broker named "Eureka Stock & Share Broking Services Ltd." in the Stock Exchange.

(iii) The shares were purchased and sold based on the prevailing market condition.

(iv) *The purchase and sale of shares are supported by contract notes. The payments were received through proper banking channel.*

(v) *The purchase and sale transactions were subjected to Security Transaction Tax, Service Tax, Brokerage charges and Stamp duty.*

(vi) *The share purchase and sale transactions are reflected in the D-mat account.*

(vii) *The purchase of shares (Investments) was not disputed in earlier year, where assessment is completed u/s. 143(3) of the Income Tax Act.*

(viii) *These facts are verifiable from the regular books of accounts.*

(ix) *The transactions can also be verified from the Stock Exchange.*

(x) *The SEBI has cleared these shares and scrips from the allegation of Market Rigging.*

Hence, the genuineness of the transaction cannot be doubted.

15. Now coming to the allegations made by the Assessing Officer for making the addition. The Assessing Officer alleged in the assessment order that on the basis of information received from the investigation wing, Kolkata, the claim of LTCG u/s 10(38) by the assessee is bogus. In the assessment order, the ld. Assessing Officer has mentioned the story that the list of 84 scrips identified by the investigation wing where price rigging have been found which includes the name of the scrips in which the assessee has earned Long Term Capital Gain. The Assessing Officer alleged that the transactions were pre-arranged to book such gain in the hands of the pre-fixed beneficiaries. The above allegations are generalized and not specific to the case of the assessee. The assessee was asked to show cause, vide letter dated 14.12.2017, as to why the Long Term Capital Gain booked by way of transaction in the aforesaid scrips would not be considered bogus, and consequently, be added to his total income. The assessee duly replied to the show cause notice vide his letter dated 22.12.2017 thereby giving all the details and reasons as required by the AO to prove that the LTCG incurred by the assessee on sale of above mentioned shares are genuine and cannot be considered as bogus. However, the Ld. AO did not consider the submission of the assessee and made the addition of LTCG in the hands of the assessee treating the same to be unexplained. We note that it appears from the show cause notice that the Ld. AO has relied on the following information for arriving at such conclusion:

(a) *Information received from the office of DIT(Inv), Kol regarding entry of bogus LTCG.*

(b) *Statement given by Sri Sunil Dokania, an alleged entry operator who was involved in price rigging and providing Bogus LTCG through penny stocks.*

So far first allegation of AO is concerned, we note that the assessee has purchased the shares from the recognized stock exchange through his broker i.e. Eureka Stock & Share Broking Services Ltd. on various dates. The assessee submitted Contract Notes. This transaction is not through any preferential allotment or offline sale. All the transactions are made through proper banking channels. The shares were sold through registered share broker, M/s Eureka Stock & Share Broking Services Ltd. In

the course of assessment proceedings, the assessee has submitted all the details and documents that were necessary for allowing the claim of the assessee. In the assessment order u/s. 143(3), Ld. AO has stated that there was inflow of some information from the Investigation wing alleging that the assessee was involved in selling of so called "penny stock". In this regard it was submitted by the assessee before the assessing officer as follows:

i) The assessee is a regular investor in shares and securities as evident from past assessment records.

ii) The shares were purchased and sold through a Registered Broker named "Eureka Stock & Share Broking Services Ltd." in the Stock Exchange.

iii) The shares were purchased and sold based on the prevailing market condition.

iv) The purchase and sale of shares are supported by contract notes. The payments were received through proper banking channel.

v) The purchase and sale transactions were subjected to Security Transaction Tax, Service Tax, Brokerage charges and Stamp duty.

vi) The share purchase and sale transactions are reflected in the d-mat account.

vii) The purchase of shares (Investments) was not disputed in earlier year, where assessment is completed u/s. 143(3) of the Income Tax Act.

viii) These facts are verifiable from the regular books of accounts.

ix) The transactions can also be verified from the Stock Exchange.

x) The interim order of SEBI about which the AO has discussed in his order, has been reversed by the final order of SEBI dated 21.09.2017, where the SEBI has cleared the assessee from the allegation of Market Rigging.

Therefore, so far first allegation of the assessing officer is concerned, the assessee has proved beyond any doubt that assessee is a regular investor in shares and securities. The shares were purchased and sold through a Registered Broker named "Eureka Stock & Share Broking Services Ltd." in the Stock Exchange. The shares were purchased and sold based on the prevailing market condition. The payments were received through proper banking channel. The purchase and sale transactions were subjected to Security Transaction Tax, Service Tax, Brokerage charges and Stamp duty. The share purchase and sale transactions are reflected in the d-mat account. The purchase of shares (Investments) was not disputed in earlier year, where assessment is completed u/s. 143(3) of the Income Tax Act. These facts are verifiable from the regular books of accounts. The transactions can also be verified from the Stock Exchange. Therefore, we do not agree with the assessing officer and hence the addition made by assessing officer needs to be deleted.

So far second allegation of the assessing officer is concerned, we note that assessing officer has relied on the statement given by Sri Sunil Dokania, an alleged entry operator. We note that the AO has made general allegations about the alleged entry operator, Sri Sunil Dokania, vide page no. 22 of the assessment order. We note that no copy of such statement was given to the assessee nor any opportunity of cross examination of the party was allowed to the assessee. Further, the AO did not

brought any corroborative evidence on record to substantiate the contents of the statement relied on. We note that not allowing the assessee to cross examine the witness by the adjudicating authority though the statements of those witness were made the basis of the impugned order is a serious flaw which makes the order nullity. We note that same view expressed by the Hon`ble Calcutta High Court in the case of Eastern Commercial Enterprises 210 ITR 103 (Cal), wherein it was held that it is a trite law that cross examination is the sine qua non of due process of taking evidence and no adverse inference can be drawn against the party unless the party is put on notice of the case made out against him.

We note that the fact that neither the statement relied on by the authorities below were provided to the assessee nor any cross examination was allowed to prove the veracity of the statement. We note that the fact that in the statement of third party, the name of the assessee was not implicated. Even otherwise, according to Learned Counsel, no adverse inference could be drawn against the assessee on the basis of untested statements without allowing opportunity of cross-examination. For that we rely on the following judgements in support of the aforesaid view:-

- (i) *Andman Timber Industries vs. CCE* – [2015] 62 taxmann.com 3 (SC)
- (ii) *ITO vs. Ashok Kumar Bansal* – ITA No. 289/Agr/2009 (Agra ITAT)
- (iii) *ACIT vs. Amita Agarwal & Others* – ITA No. 247/(Kol) of 2011 (Kol ITAT)
- (iv) *ITO vs. BijayaGanguly*- ITA Nos. 624 & 625/Kol/2011 (Kol ITAT)
- (v) *GaneshmullBijay Singh Baid HUF vs. DCIT* – ITA Nos. 544/Kol/2013 (Kolkata ITAT)
- (vi) *Rita Devi & Others vs. DCIT – IT(SS))A Nos. 22-26/Kol/2p11* (Kol-ITAT)
- (vii) *MaltiGhanshyambhaiPatadia vs. ITO* - ITA No.3400/Ahd/2015Ahmedabad ITAT)
- (viii) *Pratik Suryakant Shah vs. ITO* – [2017] 77 taxmann.com 260 (Ahmedabad ITAT)

Therefore, the addition made by the assessing officer based on the statement of an alleged entry operator Sri Sunil Dokania is not sustainable in law, as the assessing officer did not provide an opportunity to the assessee to cross examine the statement of Sri Sunil Dokania. Coupled with this, the CBDT's circular dated 10.03.2003 itself made it clear that such admissions or statements without any tangible evidence found during search carry no significance.

16. We note that Securities Exchange Board of India (SEBI) is an authority which regulates the listed companies. The SEBI controls listed companies and makes rules and regulations and the listed companies are supposed to follow the rules, regulations and directions given by SEBI. We note that SEBI by its interim order dated 29.03.2016 restrained 246 entities from accessing the securities market and from dealing and buying & selling in securities, directly or indirectly in any manner whatsoever till any further directions (Page No. 69) and included Kailash Auto Finance Ltd. and assessee at Serial No. 1 and Serial No. 156 (Page Nos. 70 & 74 respectively).

However, the same was revoked by SEBI vide its order SEBI/WTM/MPB/EFD-DRA- 1/31/2017 dated 21.09.2017 (page nos. 69-84). Assessee's name is at S.N. 154 (at page no. 80) read with para 7 of Page no. 83. We note that the SEBI by its order bearing reference no. SEBI/WTM/MPB/EFD- DRA-I/31/2017, dated 21.03.2017, has held as under:

"6.Considering the fact that there are no adverse findings against the aforementioned 244 entities with respect to their role in the manipulation of the scrip of Kailash Auto, I am of the considered view that the directions issued against them vide interim order dated March 29, 2016 and confirmatory orders dated June 15, 2016, September 30, 2016, October 21, 2016, October 27, 2016 and July 13, 2017 are liable to be revoked.

In view of the foregoing, in exercise of the powers conferred upon us under Section 19 of the Securities and Exchange Board of India Act, 1992 read with Sections 11, 11(4) and 11B of the SEBI Act, hereby revoke the interim order dated March 29, 2016 and confirmatory orders dated June 15, 2016, September 30,2016, October 21,2016, October 27,2016 and July 13, 2017 qua aforesaid 244 entities (paragraph 5 above) with immediate effect.

The revocation of the directions issued vide the above mentioned orders (at paragraph 7) is only in respect of the entities mentioned at paragraph 5 of this order in the matter of Kailash Auto. As regards remaining entities in the scrip of Kailash Auto, violations under SEBI Act, PFUTP Regulations, etc., were observed and SEBI shall continue its proceedings against them. Hence, the directions issued vide confirmatory order dated June 15, 2016 against the remaining 2 entities shall continue. This revocation order is without prejudice to any other action SEBI may initiate as per law."

We note that in the above order of the SEBI, the name of the assessee is also mentioned in the serial no. 154. Therefore, the SEBI itself has freed the assessee from market rigging allegation and thus the assessee is proved to be a bona-fide investor not involved in any malicious activities. Hence, considering the above, it is abundantly clear that no doubt can be arisen about the shares being penny stock.

17. We note that the assessee had never entered into any transaction with Sri Sunil Dokania against whom investigation wing had allegedly made inquiry. We also note that in the extracts of the statement of Sri Sunil Dokania given in the Show Cause notice, it is nowhere mentioned that the alleged person has provided any entry to the assessee directly. The statement talks about the entries provided by him to preferential allottees and the modus operandi adopted by him for providing the bogus LTCG. The assessee being a genuine investor was unaware of the fact that any such activity was undertaken in the scrips purchased by him. He was nowhere, associated with the person alleged to provide the entries as alleged by the AO. We also note that SEBI has given a clean chit to the company and has freed it from the allegation of market rigging. Therefore, the allegation of the AO itself becomes infructuous. Further, the assessee had also requested for an opportunity to cross examine Sri Sunil Dokania, whose statement has been relied on by the AO for making the addition. However, the Ld. AO did not provide any opportunity for cross examine the so-called operators. It is well established law that no adverse view can be taken against an assessee on the basis of statement recorded by department of any person without providing copy of the statement to the assessee and also without providing opportunity for cross examination of the said person.

18. We note that Hon'ble Bombay High Court in the case of CIT vs. Lavanya Land Pvt. Ltd. [2017] 83taxmann.com 161 (Bom) held that there was no evidence whatsoever to allege that money changed hands between the assessee and the broker

or any other person including the alleged exit provider whatsoever to convert unaccounted money for getting benefit of LTCG as alleged. In the said case, the Hon'ble High Court at Para 21 held that in absence of any material to show that huge cash was transferred from one side to another, addition cannot be sustained.

19. We note that all the observations, conclusions and findings of the lower authorities are based on suspicion, surmises and rumor. It is trite law that the suspicion howsoever strong cannot partake the character of legal evidence. Reference was made to the judgement of Hon'ble Supreme Court in the case of Lalchand Bhagat Ambica Ram vs. CIT (1959) 37ITR 288 (SC, Umacharan Shaw 37 ITR 271 and Omar Salay Mohamed Sait 37ITR 151. We note that the entire case of the revenue is based upon the presumption that the assessee has ploughed back his own unaccounted money in the form of bogus LTCG. However, this presumption or suspicion howsoever strong it may appear to be, but needs to be corroborated by some evidence to establish a link that the assessee had brought back his unaccounted income in the form of LTCG.

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

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

21. The ld Counsel also brought to our notice that once the assessee has furnished all evidences in support of the genuineness of the transactions, the onus to disprove the same is on revenue. He referred to the judgement of Hon'ble Supreme Court in

the case of Krishnanand Agnihotri vs. The State of Madhya Pradesh [1977] 1 SCC 816 (SC). In this case the Hon'ble Apex Court held that the burden of showing that a particular transaction is benami and the appellant owner is not the real owner always rests on the person asserting it to be so and the burden has to be strictly discharged by adducing evidence of a definite character which would directly prove the fact of benami or establish circumstances unerringly and reasonably raising inference of that fact. The Hon'ble Apex Court further held that it is not enough to show circumstances which might create suspicion because the court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence. The 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 – ITA No. 32/Agr/2007 (Agra ITAT)*

22. Moreover it was submitted before us by ld Counsel 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 BSE/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)*

23. We note that the ld. D.R. for the Revenue 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 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.

24. We note that when the transactions were as per norms prescribed by SEBI and concerned stock exchange and suffered STT, brokerage, service tax, and cess. There is no iota of evidence over the transactions as it were reflected in demat account. AO did not doubt the genuineness of the documents submitted by assessee. The ld AO failed to bring on record any evidence to suggest that the sale of shares by the Assessee were not genuine. The assessee produced the contract notes, details of demat accounts and produced documents showing all payments were received by the

assessee through banks. In these circumstances, the long term capital gain (LTCG) earned by the assessee should not be treated as bogus, as held by the jurisdictional Hon'ble Calcutta High court in various cases, as mentioned below:

(i) . 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.

(ii) 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 ld AO did not accept the explanation of the assessee in respect of his transactions in alleged penny stocks. The Tribunal found that the ld 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 ld AO did not doubt the genuineness of the documents submitted by the assessee. The Tribunal held that the ld AO's conclusions are merely based on the information received by him. The appeal filed by the revenue was dismissed.

(iii) CIT V. Andaman Timbers Industries Ltd [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 ld AO failed to bring on record any evidence to suggest that the sale of shares by the Assessee were not genuine.

(iv) 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 ld 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 claim 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.

(v).The Hon'ble High Court of Calcutta in the case of ALPINE INVESTMENTS ITA 620 of 2008, dated 26th August 2008, 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.”

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

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

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

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

(vii).M/s Classic Growers Ltd. vs. CIT [ITA No. 129 of 2012] (Cal- HC)

In this case the ld AO found that the formal evidences produced by the assessee to support huge losses claimed in the transactions of purchase and sale of shares were stage managed. The Hon'ble High Court held that the opinion of the AO that the assessee generated a sizeable amount of loss out of prearranged transactions so as to reduce the quantum of income liable for tax might have been the view expressed by the ld AO but he miserably failed to substantiate that. The High Court held that the transactions were at the prevailing price and therefore the suspicion of the AO was misplaced and not substantiated.

(viii)CIT V. Lakshmanarh Estate & Trading Co. Limited [2013] 40 taxmann.com 439 (Cal) – In this case the Hon'ble Calcutta High Court held that on the basis of a suspicion 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.

We note that above mentioned judgments of Hon'ble Calcutta High Court, by and large held that where the whole transactions were supported by contract notes, bills and were carried out through recognized stockbroker of Stock Exchange and all the payments made to the stockbroker and all the payments received from stockbroker through account payee cheques, then in these facts and circumstances addition made

by assessing officer on account of bogus long term capital gain should be deleted. We note that unless and until the order of Jurisdictional Hon`ble High Court is reversed by Hon`ble Supreme Court, the same has to be given due effect. Judicial discipline demands that once an order has been passed in the assessee's own case, by the Jurisdictional High court, the Tribunal is duty bound to act in accordance with the same.

We note that in the case of **Union of India v. Raghubir Singh (1989) 178 ITR 548 (SC)**, the Supreme Court held that the doctrine of binding precedent has merit of promoting certainty and consistency in judicial decisions. As per the doctrine of precedent, all lower Courts, Tribunals and authorities exercising judicial or quasi-judicial functions are bound by the decisions of the High Court within whose territorial jurisdiction these Courts, Tribunals & authorities functions. Therefore, respectfully following the judgments of the Jurisdictional, Hon`ble High Court of Calcutta, on similar and identical facts, the addition made by assessing officer should be deleted.

25. We note that when the transactions were as per norms prescribed by SEBI and concerned stock exchange and suffered STT, brokerage, service tax, and cess. There is no iota of evidence over the transactions as it were reflected in demat account. AO did not doubt the genuineness of the documents submitted by assessee. The ld AO failed to bring on record any evidence to suggest that the sale of shares by the Assessee were not genuine. The assessee produced the contract notes, details of demat accounts and produced documents showing all payments were received by the assessee through banks. In these circumstances, the long term capital gain (LTCG) earned by the assessee should not be treated as bogus, as held by the Coordinate Benches of ITAT Kolkata, in the following cases:

(i). Mr. Sanjiv Shroff, I.T.A. No. 1197/Kol/2018, Assessment Year: 2014-15, order dated, 02.01.2019

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

- (xx) *Bajnath Agarwal vs. ACIT – [2010] 40 SOT 475 (Agra (TM))*
- (xxi) *ITO vs. Bibi Rani Bansal – [2011] 44 SOT 500 (Agra) (TM)*
- (xxii) *ITO vs. Ashok Kumar Bansal – ITA No. 289/Agra/2009 (Agra ITAT)*
- (xxiii) *ACIT vs. Amita Agarwal & Others – ITA Nos. 247/(Kol)/ of 2011 (Kol ITAT)*
- (xxiv) *Rita Devi & Others vs. DCIT – IT(SS))A Nos. 22-26/Kol/2p11 (Kol ITAT)*
- (xxv) *Surya Prakash Toshniwal vs. ITO – ITA No. 1213/Kol/2016 (Kol ITAT)*
- (xxvi) *Sunita Jain vs. ITO – ITA No. 201 & 502/Ahd/2016 (Ahmedabad ITAT)*
- (xxvii) *Ms. Farrah Marker vs. ITO – ITA No. 3801/Mum/2011 (Mumbai ITAT)*
- (xxviii) *Anil Nandkishore Goyal vs. ACIT – ITA Nos. 1256/PN/2012 (Pune ITAT)*
- (xxix) *CIT vs. Sudeep Goenka – [2013] 29 taxmann.com 402 (Allahabad HC)*
- (xxx) *CIT vs. Udit Narain Agarwal – [2013] 29 taxmann.com 76 (Allahabad HC)*
- (xxxi) *CIT vs. Jamnadevi Agarwal [2012] 20 taxmann.com 529 (Bombay HC)*

- (xxxii) *CIT vs. Himani M. Vakil* – [2014] 41 taxmann.com 425 (Gujarat HC)
- (xxxiii) *CIT vs. Maheshchandra G. Vakil* – [2013] 40 taxmann.com 326 (Gujarat HC)
- (xxxiv) *CIT vs. Sumitra Devi* [2014] 49 Taxmann.com 37 (Rajasthan HC)
- (xxxv) *GaneshmullBijay Singh Baid HUF vs. DCIT* – ITA Nos. 544/Kol/2013 (Kolkata ITAT)
- (xxxvi) *Meena Devi Gupta & Others vs. ACIT* – ITA Nos. 4512 & 4513/Ahd/2007 (Ahmedabad ITAT)
- (xxxvii) *Manish Kumar Baid* ITA 1236/Kol/2017 (Kolkata ITAT)
- (xxxviii) *Mahendra Kumar Baid* ITA 1237/Kol/2017 (Kolkata ITAT)

29. 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 *Krishnanand Agnihotri vs. The State of Madhya Pradesh* [1977] 1 SCC 816 (SC). In this case the Hon'ble Apex Court held that the burden of showing that a particular transaction is benami and the appellant owner is not the real owner always rests on the person asserting it to be so and the burden has to be strictly discharged by adducing evidence of a definite character which would directly prove the fact of benami or establish circumstances unerringly and reasonably raising inference of that fact. The Hon'ble Apex Court further held that it is not enough to show circumstances which might create suspicion because the court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence. The 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.

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

30. 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 :-

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

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

32. It is clear from the above that the facts of the case of the assessee are identical with the facts in the cases wherein the co-ordinate bench of the Tribunal has deleted the addition and allowed the claim of LTCG on sale of shares of M/s KAFL. We, therefore, respectfully

following the same, and set aside the order of Ld. CIT(A) and direct the AO not to treat the long term capital as bogus and delete the consequential addition.”

(ii) Jagmohan Agarwal Vs. ACIT, ITA No.604/Kol/2018, order dated 05.09.2018.

“35.In the light of the documents stated in para 30 at Page14(supra) we find that there is absolutely no adverse material to implicate the assessee to the entire gamut of unfounded/unwarranted allegations leveled by the AO against the assessee, which in our considered opinion has no legs to stand and therefore has to fall. We take note that the ld. DR could not controvert the facts which are supported with material evidences furnished by the assessee which are on record and could only rely on the orders of the AO/CIT(A). We note that the allegations that the assessee/brokers got involved in price rigging/manipulation of shares must therefore consequently fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the transactions relevant to the purchase and sale of shares resulting in long term capital gain. Neither these evidences were found by the AO nor by the ld. CIT(A) to be false or fictitious or bogus nor the AO had issued any notice to the brokers for confirmation. The facts of the case and the evidence in support of the evidence clearly support the claim of the assessee that the transactions of the assessee were genuine and the authorities below was not justified in rejecting the claim of the assessee exempted u/s 10(38) of the Act on the basis of suspicion, surmises and conjectures. It is to be kept in mind that suspicion how so ever strong, cannot partake the character of legal evidence. In the aforesaid facts and circumstance, for allowing the appeal 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.”

36. We note that the ld. 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 ld. AR (supra) and have been duly considered to arrive at our conclusion. The ld. DR could not bring to our notice any case laws to support the impugned decision of the ld. CIT(A)/AO. In the aforesaid facts and circumstances of the case, we hold that the ld. 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.”

(iii).Navneet Agarwal, ITA No.2281/Kol/ 2017, order dated 05.09.2018

“The assessee in this case had stated that the assessee was allotted of 50000 equity shares of SCITIL. The payment for the allotment of shares was made through an account payee cheque (copy of the bank statement evidencing the source of money). Annual return no. 20B was filed with Registrar of companies by SCITIL showing the assessee's name as shareholder. The assessee lodged the said shares with the Depository ESSBSL with a Demat request. The said shares were dematerialized and copy of demat request slip along with the

transaction statement is placed on record. Later on, the High Court approved the scheme of amalgamation of SCITIL with CSL. In accordance with the said scheme of amalgamation, the assessee was allotted 50000 equity shares of CSL. The demat shares are reflected in the transaction statement of the period from 1-11-2011 to 31-12-2013. The assessee sold 50000 shares through her broker SKP which was a SEBI registered broker and earned a Long Term Capital Gain. 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 on record. 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. The Assessing Officer as well as the Commissioner (Appeals) 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 of Investigation wing were general in nature and were applied across the board to all the 60,000 or more assesseees who fall in this category. Specific evidences produced by the assessee were not controverted by the revenue authorities. No evidence collected from third parties was confronted to the assesseees. No opportunity of cross-examination of persons, on whose statements the revenue relied to make the addition, was provided to the assessee. The addition is made based on a report from the investigation wing.

The issue for consideration is whether, in such cases, the legal evidence produced by the assessee has to guide decision in the matter or the general observations based on statements, probabilities, human behaviour 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 imply 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 Assessing Officer relies on any statements or third party as evidence to make an addition. If any material or evidence was sought to be relied upon by the Assessing Officer, 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 behaviour by the department.

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 Assessing Officer relied only on a report as the basis for the addition. The evidence based on which the DDIT report was prepared is not brought on record by the Assessing Officer 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

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 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 Assessing officer as well as the Commissioner (Appeals) has been guided by the report of the investigation wing prepared with respect to bogus capital gains transactions. However, the Assessing Officer as well as the Commissioner (Appeals), 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. 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, 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. However, 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.

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 under these circumstances nothing can be implicated against the assessee

One is bound to consider and rely on the evidence produced by the assessee in support of its claim and base decision on such evidence and not on suspicion or preponderance of probabilities no material was brought on record by the Assessing Officer to controvert the evidence furnished by the assessee. Under these circumstances, the evidence filed by the assessee is accepted and the claim that the income in question is a bona fide Long Term Capital Gain arising from the sale of shares is allowed and hence exempt from income tax. [Para 20]"

26. To conclude, we note that SEBI has given a clean chit to the company and has freed it from the allegation of market rigging. Therefore, the allegation of the AO itself becomes infructuous. Further, the assessee had also requested for an opportunity to cross examine Sri Sunil Dokania, whose statement has been relied on by the AO for making the addition. However, the Ld. AO did not provide any opportunity for cross examine, the so-called operators. It is well established law that no adverse view can be taken against an assessee, on the basis of statement recorded by department of any person without providing copy of the statement to the assessee and also without providing opportunity for cross examination of the said person. We note that the assessee had never entered into any transaction with Sri

Sunil Dokania, against whom investigation wing had allegedly made inquiry. We also note that in the extracts of the statement of Sri Sunil Dokania given in the Show Cause notice, it is nowhere mentioned that the alleged person has provided any entry to the assessee directly.

We note that the Id Counsel has proved that assessee is a regular investor in shares and securities. The shares were purchased and sold through a Registered Broker named "Eureka Stock & Share Broking Services Ltd." in the Stock Exchange. The shares were purchased and sold based on the prevailing market condition. The payments were received through proper banking channel. The purchase and sale transactions were subjected to Security Transaction Tax (STT), Service Tax, Brokerage charges and Stamp duty. The share purchase and sale transactions are reflected in the DMAT account. The purchase of shares (Investments) was not disputed in earlier year, where assessment is completed u/s. 143(3) of the Income Tax Act. These facts are verifiable from the regular books of accounts. The transactions can also be verified from the Stock Exchange. It is clear from the above that the facts of the case of the assessee are identical with the facts in the cases wherein the co-ordinate benches of this Tribunal has deleted the addition and allowed the claim of LTCG. The assessee's case is also covered by the various judgments of Jurisdictional High Court of Calcutta, as noted (Supra). We, therefore, respectfully following the same, set aside the order of Ld. CIT(A) and direct the AO not to treat the long term capital as bogus and hence we delete the addition of Rs.7,12,89,467/-.

27. The next issue in ITA No.205/Kol/2018, for A.Y. 2014-15 is in relation to confirming the addition of Rs.57,02,785/- as unexplained expenditure towards commission charges of sale of such shares by the operator. We have already held that the transactions relating to LTCG were genuine and not the accommodation entries as alleged by the AO. Consequently, the addition of Rs.57,02,785/- is hereby directed to be deleted. We accordingly hold that the issue is allowed in favour of the assessee.

28. Same above detailed reasoning to be followed in all remaining appeals, being, ITA No. 2268 & 2269/Kol/2018, case of former assessee and in case of latter assessee's in ITA No.205/Kol/2018, for A.Y. 2014-15, as it transpires that there are common and identical issues are involved in these two assessees relating to the same group. We further note that the relevant scrips in issue were Kailash Auto Finance Ltd, Lifeline Drugs & Pharma Ltd, and ENIS Edutech, in ITA 2270/Kol/2018, same as is the "lead" case. We note that in Sanjib Kumar Patwari (HUF), in ITA 205/Kol/2018, the relevant scrips were, Kailash Auto Finance Ltd, Lifeline Drugs & Pharma Ltd, which are exactly identical & Common and scrips of M/s NCL Research & Financial Services and Essar India Limited were also covered by the identical facts and issues by our this order and other orders of the Coordinate Benches. We adopt the preceding detailed reasoning mutatis mutandis to delete all the corresponding Long term capital gain(LTCG) addition hereinabove.

7. We note that scrip of M/s Kailash Auto Finance Ltd. is squarely covered by the judgment of Co-ordinate Bench of ITAT Kolkata in the case of Sanjib Kumar Patwari(HUF) in I.T.A. No.205/Kol/2018 for A.Y 2014-15(supra). The Ld DR for the Revenue failed to controvert the findings of the Coordinate Bench (supra)

therefore, respectfully following the judgment of the Co-ordinate Bench of ITAT, Kolkata (supra), we deleted the addition of Rs.6,02,041/-.

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

Order pronounced in the Court on 02.08.2019

Sd/-
(A.T.VARKEY)
न्यायिकसदस्य / JUDICIAL MEMBER

Sd/-
(A.L.SAINI)
लेखासदस्य / ACCOUNTANT MEMBER

दिनांक/ Date: 02/08/2019
(SB, Sr.PS)

Copy of the order forwarded to:

1. Shankar Lal Daruka
2. ITO, Ward-22(4), Kolkata
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.
6. Guard File.

True copy

By Order

Assistant Registrar
ITAT, Kolkata Benches