

IN 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 -vs- ITO, Ward-35(3), Kolkata
Kiran Agarwal
[PAN: ADGPA 9851 N]

(Appellant)

(Respondent)

For the Appellant : Shri Subash Agarwal, Advocate

For the Revenue : Shri Saurabh Kumar, Addl. CIT Sr. DR

Date of Hearing : 24.04.2018

Date of Pronouncement : 20.07.2018

ORDER

Per J.Sudhakar Reddy, AM

This is an appeal filed by the assessee, directed against the order of the Commissioner of Income Tax (Appeals)- 10, Kolkata passed u/s.250 of the Income Tax Act, 1961(the 'Act').

2.The assessee had filed return of income on 16.07.2014 disclosing total income of Rs. 4,63,515/-. This was processed u/s. 143(1) of the Act and subsequently selected for scrutiny. The assessee had claimed exemption on income from long term capital gains of Rs. 2,18,13,073/-. This gain was earned from sale of fifty thousand shares of M/s Cressenda Solution Ltd., during the financial year 2013-

14 relevant to assessment year 2014-15. The Assessing Officer in his order passed u/s. 143(3) of the Act referred to the investigation carried out by the Investigation Wing of the Income Tax Department, Kolkata and at Para. 4, he stated as follows:

“4. Before going into the details of this particular case, it is pertinent to discuss the background of the Investigation carried out by the Investigation Wing of the Income Tax Department, Kolkata. For this relevant portions of the Investigation Reports are reproduced herein:

In the whole project total 84 BSE listed penny stocks have been identified and worked upon. After that, number of search and surveys were conducted in the office premises of more than 32 shares broking entities, which accepted that they were actively involved in the bogus LTCG/STCG Scam. Surveys were also conducted in the office premises of many accommodation entry providers and their statements recorded. All have accepted their role in the scam.

Beneficiaries of more than Rs. 38 thousand Crore have been identified and segregated DGIT(Inv.) wise. Total number of more than 60 thousand PAN numbers of the beneficiaries have been identified, which is being reported to assessment wings through the DGIT's.

This report also covers more than 5000 Shell/Paper companies which are better known as Jamakharchi Companies, which are involved in providing bogus accommodation of various kinds. Statements of most of the Directors were recorded on oath and part of the said report.

Later, he stated that M/s Cressenda Solution Ltd. is one of the 84 scrips which were identified by the 'Directorate of Investigation', as involved in the scheme of bogus LTCG/STCG and that the name and PAN no. of the assessee is part of list of beneficiaries identified by the Directorate. Thereafter, he discussed the "Modus Operandi" of these companies and held that the total sale consideration earned by the assessee is to be added as unexplained cash credit as these are sale of bogus shares.

3. The Modus Operandi listed out by the AO is summarized as follows:

- i. The initial allotment of shares to beneficiaries is generally done through preferential allotment.
- ii. The market price of shares of these companies rise to very high level within a span of one year.
- iii. The trading volume of shares during the period, in which manipulations are done to raise the market price, is extremely thin.
- iv. Most of the purported investors are returned their initial investment amount in cash. Only small amount is retained by the operator as security. Thus, an enquiry would reveal that most of the capital receipts through preferential allotment or other means would have found their way out of system as cash.
- v. Most of these companies have no business at all. Few of the companies which have some business do not have the credentials to justify the sharp rise in Market Price of their shares.
- vi. The sharp rise in market price of the shares of these entities is not supported by fundamentals of the company or any other genuine factors.
- vi. An analysis in respect of persons involved in transactions apparently carried out in order to jack up the share prices has been done in respect of 84 companies. It has been noted that many common persons/entities were involved in trading in more than 1 LTCG companies during the

period when the shares were made to rise which implies that they had contributed to such price rise.

- vii. Names of most of the LTCG companies are changed during the period of the scam.
- viii. Most of the companies split the face value of shares [this is probably done to avoid the eyes of market analysts].
- ix. The volume of trade jumps manifold immediately when the market prices of shares reach at optimum level so as to result in LTCG assured to the beneficiaries. This maximum is reached around the time when the initial allottees have held the shares for one year or little more and thus, their gain on sale of such shares would be eligible for exemption from Income Tax.
- x. An analysis of share buyers of some of LTCG companies was done to see if there were common persons/entities involved in buying the bogus inflated shares. It was noted that there were many common buyers [which were paper companies].
- xi. The prices of the shares fall very sharply after the shares of LTCG beneficiaries have been off loaded through the pre-arranged transactions on the Stock Exchange floor/portal to the Short Term Loss seekers or dummy paper entities.

- xii. The shares of these companies are not available for buy/sell to any person outside the syndicate. This is generally ensured by way of synchronized trading by the operators amongst themselves and/or by utilizing the mechanism of upper/lower circuit of the Exchange.

The assessee submitted various documents in support of her claim that the transactions in question are genuine. She also relied on certain case laws. The AO did not accept the evidence filed by the assessee in support of her claim and by relying on the report of the investigating wing rejected the claim of the assessee that she had earned capital gains on the genuine sale of shares. He held that the receipt is an unexplained cash credit and made an addition u/s. 68 of the Act. Aggrieved the assessee carried the matter on appeal.

4. The First Appellate Authority had given his decision from page 41 of his order. His findings are summarized as follows:

- a) The AO had placed on record the entire gamut of finding and there is no further requirement for elaboration.
- b) There is direct evidence to clearly indicate that the entire transaction undertaken by the assessee was merely an accommodation taken for the purpose of bogus longterm capital gains to claim exempt income. The authorities such as SEBI have after investigating such abnormal price increase of certain stocks, suspended certain scrips.

- c) The submissions of the assessee pointed out elaborate documentation such as:
- i) Application of shares.
 - ii) Allotment of shares.
 - iii) Share Certificates
 - iv) Payment by cheques
 - v) Filings before Registrar of Companies.
 - vi) Proof of amalgamation of companies.
 - vii) Copies of bank statement,
 - viii) Bank contract notes.
 - ix) Delivery instruction to the broker etc.
- d) The elaborate paper book is filed to strengthen the matter relevant to the bogus claim of LTCG, and this is clearly been schemed and pre-planned with malafide intention. Therefore, all these documents are not evidence.
- e) The transactions are unnatural and highly suspicious. There are grave doubts in the story propounded by the assessee before the authorities below. Banking documents are mere self-serving recitals.

5. Thereafter, he referred to a number of judgments relating to human behavior and preponderance of probabilities and upheld the addition made by the Assessing Officer by relying on what he calls rules of "Suspicious" transactions. Aggrieved the assessee is in appeal before us.

6. The Id. Counsel for the assessee reiterated the contentions raised by the assessee before the lower authorities. The sum & substance of his submissions is that the assessee has been allotted fifty thousand equity shares of "Smart Champ IT & Infra Ltd", on an application made by the assessee, and the amount in question was paid through banking channels and the name of the assessee was reflected by the company "Smart Champ IT & Infra Ltd." in its return filed before the Registrar of companies as a shareholder in the year 2011-12 and that the assessee had lodged the shares with a depository, with a demat request on 11.02.2012. Further, the Hon'ble Bombay High Court had approved the Scheme of Amalgamation of "Smart Champ IT & Infra Ltd." with a company M/s. "Cressanda Solution Ltd.". That in accordance with the scheme of amalgamation the assessee was allotted fifty thousand equity shares of M/s. Cressanda Solution Ltd. and that the documents filed reflected the transaction statement for the period 01.11.2011 to 31.12.2013. It was further submitted that these shares were sold through the broker "SKP Stock Broking Pvt. Ltd." who is a SEBI registered broker and all the evidences in this regard were filed. It was pleaded that the scripts were held for more than 500 days, which proves the bonafide nature of the shareholdings as no sale was done immediately on completion of 365 days. It was submitted that the assessee is not connected with the promoters and has nothing to do with the alleged rigging of shares, if any. Reliance was placed on number of decisions for the proposition that, evidence cannot be discarded by applying theory of human behavior and the theory of preponderance of probabilities.

7. On the findings of the Assessing Officer as well as Ld. CIT(A), he submitted as follows:

- a. As regards the allegation in respect of artificial rigging up of the price of shares, it is submitted that the Id. A.O. did not provide any documentary evidence of a live link and direct relation to such alleged rigging of prices with the assessee. Hence, no adverse inference could be drawn against the assessee in this regard.
- b. That the sale transactions in question had taken place in the stock exchange electronically, through a registered broker SKP Stock Broking Pvt. Ltd. (now Relybulls Stock Broking Pvt. Ltd.). All such activity of purchase and sale on the platform of the stock exchange are logged in, on real time basis. It is not possible to sell / purchase the shares of any company on the stock exchange in variance to the prevailing market price at any point of time. Hence, the assessee cannot be, nor is supposed to be aware of and know the identity of the persons, who have sold the shares at the time of purchase of the shares by the assessee and purchaser of the shares at the time of sale of the said shares by the assessee at the Stock Exchange.
- c. It is further submitted that the share price is always determined by the market mechanism at any given point of time because there is a robust system of the stock exchange which is transparent, open and equitable, and the assessee has also sold the shares on such a platform at a price which was a reflection of the market price derived through the interplay of the forces of market demand and supply.
- d. In the instant case, the assessee is not connected with “Cressanda Solutions Ltd.” or the amalgamated company or their promoters, directors or any

other person who exercises any control over Cresssanda Solutions Ltd or the amalgamated company or any so-called entry operator. As a matter of fact, the assessee has never indulged in any such questionable activity nor has been part of any modus operandi as stated by the A.O.

- e. The assessee has transacted in the shares of Cressand Solutions Ltd. / amalgamated company in the normal course of investment like millions of investors do in the stock market. Therefore, the question of alleged conversion of unaccounted money in the form of alleged bogus long term capital gain with the help of many alleged connected parties through price rigging and price manipulations does not arise.
- f. The A.O. has drawn an adverse inference in regard to purchases through private placement of shares. It is common knowledge that the management of various companies comes out with private placement of equity shares, of which information is disseminated through market grapevine. Applications are made on that basis and allotment is obtained. There are also market rumours that the shares in question will see a phenomenal rise in the near future. The assessee merely acted on the basis of such market information and happened to get phenomenal gain. It could have been otherwise as well. The rags to riches story in the stock market are a galore. But the scope of downside in this particular scrip was virtually nil as the assessee was getting the shares at the rock bottom price. So, she took a prudent but calculated risk.

- g. It has been submitted that the alleged circumstances, circumstantial evidence and material has led the A.O. to believe that the real is not the apparent. In the absence of any link between the assessee and the alleged admissions of the directors and brokers, human probability is being used as a vague and convenient medium for the department's conjectures. Blaming the assessee by vague observations and drawing an adverse inference without any admissible evidence on record, is bad in law, illegal, invalid and void-ab-initio.
- h. It is further submitted that investment in a company with weak fundamentals can be for several reasons such as professional advice, reasonable price per share, a foreseeable turnaround, past pricing and volume patterns and just market rumour about phenomenal movement in share price of a particular scrip. Moreover, the mere fact that the shares were sold at a high price cannot be termed as conclusive proof or a ground for an allegation that the assessee has converted some unaccounted money through accommodation entries as alleged by the A.O. in the assessment order.
- i. The Ld. A.O. in the assessment order relied upon the purported statements of various alleged operators on the basis of which the Ld. A.O. had drawn adverse inference in the instant case. It is worthy to note that nowhere any of them has ever named the assessee in the alleged manipulation. Further, the Ld. A.O. did not provide any opportunity to cross examine the said persons. It is a well-settled principle of law that no credence can be given

to the statement/report of any person given behind the back of the assessee unless any opportunity to cross examine him is afforded to the assessee.

- j. That the assessee conducted all the transactions through a recognized share broker and received and made the payments through account payee cheques. It is submitted that the genuine transactions cannot be and should not be treated as ingenuine merely on an arbitrary view of suspicion.
- k. The A.O.'s contention that the company in question had insignificant business operation, which fact does not support the unprecedented rise in its price is also of no consequence. It is a well-known fact in the stock market that share price movement has very often, no correlation with the fundamentals of the company. The price of any commodity including shares is determined by the market forces of demand and supply of the market players and not by their intrinsic worth.
- l. The assessee categorically submits that the assesseebonafidely purchased the shares in private placement in anticipation of substantial gain and sold the shares in the online system, when substantial gains materialised. It is submitted that just because the assessee is able to draw benefit out of the rigging of prices done by others in the transactions bonafidely done in the fully legalised system with not a shred of evidence on record to prove the complicity of the assessee in the alleged crime, it is not possible to draw any adverse inference against the assessee.

m. The A.O. has also, nowhere in the assessment order referred to any material which can prove the complicity of assessee in the alleged accommodation entry operation. If the assessee has taken advantage of the price rise in an open manner through the transaction conducted in the official online system, no adverse inference can be drawn against the assessee.

8. He submitted that the overwhelming documentary and circumstantial evidence has to be considered and not mere suspicion and preponderance of probabilities. He relied on a number of case laws, which we would refer to, as and when necessary.

9. The Id. DR on the other hand, relied on the order of the assessing officer and reiterated the findings made therein and submitted that the same be upheld. He vehemently argued that merely because the assessee has produced all the evidences required to prove his claim, the same cannot be accepted as these are organized and managed transactions. He took this bench through the modus operandi mentioned by the AO and submitted that in all cases where the shares of these companies are purchased and sold, additions have to be made, irrespective of the evidence produced as there are cases where manipulation has taken place. He reiterated each and every observation and finding of the Id. AO as well as the Ld. CIT(A) and prayed that the same be upheld.

10. After careful consideration of the rival submissions, perusal of the papers on record and order of the lower 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 his 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 evidencesproduced by the assesseeare not controverted by the revenue authorities. No evidence collected from third parties is confronted to the

assesses. 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 law 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 inference to that effect. The Hon'ble Supreme Court in the case of Umacharan Shah & Bros. Vs. CIT 37 ITR 271 held that suspicion however strong, cannot take the place of evidence. In this connection we refer to the general view on

the topic of conveyance of immovable properties. The rates/sale price are at variance with the circle rates fixed by the Registration authorities of the Government in most cases and the general impression is that cash would have changed hands. The courts have laid down that judicial notice of such notorious facts cannot be taken based on 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 arhatdar 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

the 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.*

“23. A Constitution Bench of this Court in State of M.P. v. Chintaman Sadashiva Vaishampayan AIR 1961 SC 1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice. (See also: Union of India v. T.R. Varma, AIR 1957 SC 882; Meenglas Tea Estate v. Workmen, AIR 1963 SC 1719; M/s. Kesoram Cotton Mills Ltd. v. Gangadhar and Ors., AIR 1964 SC 708; New India Assurance Co. Ltd. v. Nusli Neville Wadia and Anr. AIR 2008 SC 876; Rachpal Singh and Ors. v. Gurmit Singh and Ors. AIR 2009 SC 2448; Bienco Lawrie and Anr. v. State of

West Bengal and Anr. AIR 2010 SC 142; and State of Uttar Pradesh v. Saroj Kumar Sinha AIR 2010 SC 3131).

24. *In Lakshman Exports Ltd. v. Collector of Central Excise (2005) 10 SCC 634, this Court, while dealing with a case under the Central Excise Act, 1944, considered a similar issue i.e. permission with respect to the cross-examination of a witness. In the said case, the Assessee had specifically asked to be allowed to cross-examine the representatives of the firm's concern, to establish that the goods in question had been accounted for in their books of accounts, and that excise duty had been paid. The Court held that such a request could not be turned down, as the denial of the right to cross-examine, would amount to a denial of the right to be heard i.e. audi alteram partem.*

28. *The meaning of providing a reasonable opportunity to show cause against an action proposed to be taken by the government, is that the government servant is afforded a reasonable opportunity to defend himself against the charges, on the basis of which an inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so only when he is told what the charges against him are. He can therefore, do so by cross-examining the witnesses produced against him. The object of supplying statements is that, the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against him. Unless the said statements are provided to the government servant, he will not be able to conduct an effective and useful cross-examination.*

29. *In Rajiv Arora v. Union of India and Ors. AIR 2009 SC 1100, this Court held: Effective cross-examination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Indian Evidence Act as also the principles of natural justice demand that the maker of the report should be examined, save and except in cases where the facts are admitted or the witnesses are not available for cross-examination or similar situation. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the Appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review.*

30. *The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice."*

b) *Andaman Timber Industries vs. Commissioner of C. Ex., Kolkata-II* wherein it was held that:

“4. We have heard Mr. Kavin Gulati, learned senior counsel appearing for the Assessee, and Mr. K.Radhakrishnan, learned senior counsel who appeared for the Revenue.

5. According to us, not allowing the Assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the Assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the Assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the Assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the Assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the Appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the Appellant wanted to cross-examine those dealers and what extraction the Appellant wanted from them.

6. As mentioned above, the Appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17-3-2005 [2005 (187) E.L.T. A33 (S.C.)] was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

7. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the show cause notice.”

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 BLBCABLES & CONDUCTORS [ITA No. 78 of 2017] dated 19.06.2018. The High Court held vide Para 4.1:

“.....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. Here in the case the transactions of the commodity exchanged have not only been explained but also substantiated from the confirmation of the party. Both the parties are confirming the transactions which have been duly supported with the books of accounts and bank transactions. The AR has also submitted the board resolution for the trading of commodity transaction. The broker was expelled from the commodity exchange cannot be the criteria to hold the transaction as bogus. In view of above, we reverse the order of the lower authorities and allow the common grounds of assessee's appeal.” [quoted verbatim]

This is essentially a finding of the Tribunal on fact. No material has been shown to us who would negate the Tribunal's finding that off market transactions are not prohibited. As regards veracity of the transactions, the Tribunal has come to its conclusion on analysis of relevant materials. That being the position, Tribunal having analyzed the set of facts in coming to its finding, we do not think there is any scope of interference with the order of the Tribunal in exercise of our jurisdiction under Section 260A of the Income Tax Act, 1961. No substantial question of law is involved in this appeal. The appeal and the stay petition, accordingly, shall stand dismissed.”

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:

“We hold that the addition made by the AO is merely based on suspicion and surmises without any cogent material to controvert the evidence filed by the assessee in support of the claim. Further, the AO has also failed to establish that the assessee has brought back his unaccounted income in the shape of long term capital gain. Hence we delete the addition made by the AO on this account.”

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:

“..... 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.”

d) The BENCH “D” OF KOLKATA ITAT in the case of GAUTAMPINCHA [ITA No.569/Kol/2017] order dated 15.11.2017 held as under vide Page 12 Para 8.1:

“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 ld. 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 ld. CIT (A) to be false or fictitious or bogus. The facts of the case and the evidence in support of the claim clearly support the claim of the assessee that the transactions of the assessee were genuine and the authorities below were not justified in rejecting the claim of the assessee that income from LTCG is exempted u/s 10(38) of the Act.”

Further in Page 15 Para 8.5 of the judgment, it held:

“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 by us 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.”

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:

“..... 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. 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.

It further held as follows:

“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.”

f) The BENCH “A” OF KOLKATA ITAT in the case of SHALEENKHEMANI [ITA No.1945/Kol/2014] order dated 18.10.2017 held as under vide Page 24 Para 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 ld AO against the assessee, which in our considered opinion, has no legs to stand in the eyes of law. We find that the ld DR could not controvert the arguments of the ld AR with contrary material evidences on record and merely relied on the orders of the ld 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 ld 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 ld AO was not justified in rejecting the assessee’s claim of exemption under section 10(38) of the Act.”

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:

“.....We found that as far as initiation of investigation of broker is concerned, the assessee is no way concerned with the activity of the broker. Detailed finding has been recorded by CIT (A) to the effect that assessee has made investment in shares which was purchased on the floor of stock exchange and not from M/s Basant Periwal and Co. Against purchases payment has been made by account payee cheque, delivery of shares were taken, contract of sale was also complete as per the Contract Act, therefore, the assessee is not concerned with any way of the broker. Nowhere the AO has alleged that the transaction by the assessee with these particular broker or share was bogus, merely because the investigation was done by SEBI against broker or his activity, assessee cannot be said to have entered into ingenuine transaction, insofar as assessee is not concerned with the activity of the broker and have no control over the same. We found that M/s Basant Periwal and Co. never stated any of the authority that transactions in M/s Ramkrishna Fincap Pvt. Ltd. On the floor of the stock exchange are ingenuine or mere accommodation entries. The CIT (A) after relying on the various decision of the coordinate bench, wherein on similar facts and circumstances, issue was decided in favour of the assessee, came to the conclusion that transaction entered by the assessee was genuine. Detailed finding recorded by CIT (A) at para 3 to 5 has not been controverted by the department by bringing any positive material on record. Accordingly, we do not find any reason to interfere in the findings of CIT (A).”

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:

“On the basis of the documents produced by the assessee in appeal, the Commissioner of Income Tax (Appeal) recorded a finding of fact that there was a genuine transaction of purchase of shares by the assessee on 16.3.2001 and sale thereof on 21.3.2002. The transactions of sale and purchase were as per the valuation prevalent in the Stocks Exchange. Such finding of fact has been recorded on the basis of evidence produced on record. The Tribunal has affirmed such finding. Such finding of fact is sought to be disputed in the present appeal. We do not find that the finding of fact recorded by the Commissioner of Income Tax in appeal, gives give rise to any question(s) of law as sought to be raised in the present appeal. Hence, the present appeal is dismissed.”

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:

“The tribunal found that the chain of transaction entered into by the assessee have been proved, accounted for, documented and supported by evidence. The assessee produced before the Commissioner of Income Tax(Appeal) the contract notes, details of his Demat account and, also, produced documents showing that all payments were received by the assessee through bank.”

j) The Hon’ble Supreme Court in the case of PCIT vs. TejuRohitkumar Kapadia order dated 04.05.2018 upheld the following proposition of law laid down by the Hon’ble Gujrat High Court as under:

“ It can thus be seen that the appellate authority as well as the Tribunal came to concurrent conclusion that the purchases already made by the assessee from Raj Impex were duly supported by bills and payments were made by Account Payee cheque. Raj Impacts also confirmed the transactions. There was no evidence to show that the amount was recycled back to the assessee. Particularly, when it was found that the assessee the trader had also shown sales out of purchases made from Raj Impex which were also accepted by the Revenue, no question of law arises.”

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.

Order pronounced in the Court on 20.07.2018

Sd/-
[S.S.Viswanethra Ravi]
Judicial Member

Sd/-
[J.Sudhakar Reddy]
Accountant Member

Dated : 20.07.2018
SB, Sr. PS

Copy of the order forwarded to:

1. Navneet Agarwal, Legal Heir of Late Kiran Agarwal, C/o, Subash Agarwal & Associates Siddha Gibson, 1, Gibson Lane, 2nd Floor, Suite-213, Kolkata-700069.
2. ITO, Ward-35(3), Aayakar Bhawan (Poorva), 110, Shantipally, Kolkata-700107.
3. C.I.T.(A)- , Kolkata
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches