

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR
श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 16/JP/2018
निर्धारण वर्ष / Assessment Year :2014-15

Deputy Commissioner of Income Tax, Circle- Bharatpur	बनाम Vs.	Saurabh Mittal, Kothi, Near Old Bus Stand, Dholpur (Raj).
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ADDPM 5232 A		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

राजस्व की ओर से / Revenue by : Shri J.C. Kulhari (JCIT)
निर्धारिती की ओर से / Assessee by : Shri Mahendra Gargieya (Adv)

सुनवाई की तारीख / Date of Hearing : 09/08/2018
उदघोषणा की तारीख / Date of Pronouncement : 29/08/2018

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the revenue is directed against the order dated 09/10/2017 of Id. CIT(A), Alwar for the A.Y. 2014-15. The revenue has raised following grounds of appeal:

- "1. On the facts and circumstances of the case and in law, the Id. CIT(A) erred in deleting the addition of Rs. 2,60,17,995/- made by the A.O. on account of unexplained cash credit U/s 68 r.w.s. 115BE of the I.T. Act, 1961 without appreciating the material facts of the case.*
- 2. On the facts and circumstances of the case and in law, the Id. CIT(A) erred in deleting the addition of Rs. 10,68,720/- made by the A.O. on account of unexplained commission expenses U/s 69C of the IT Act, 1961."*

2. Ground No. 1 of the appeal is regarding the addition made by the Assessing Officer on account of unexplained cash credit U/s 68 of the Income Tax Act, 1961 (in short the Act) as against the long term capital gain on sale of shares exempt U/s 10(38) of the Act. The assessee is an individual and derives income from salary, house property, capital gains and income from other sources. The assessee filed his return of income on 31/7/2014 declaring total income of Rs. 17,97,890/- after claiming long term capital gain on sale of shares as exempt U/s 10(38) of the Act. During the course of assessment proceedings, the Assessing Officer proposed to treat the transaction of long term capital gain as accommodation in nature and not genuine. The Assessing Officer has referred to the investigation conducted by the department, therefore, Directorate of Investigation (DIT), Kolkata wherein an organized racket of generating bogus long term capital gain was unearthed. The Assessing Officer discussed the modus operandi adopted by the operators was to make beneficiary to buy some shares of a pre-determined penny stock company controlled by them. The shares are transferred to the beneficiaries at a very nominal price in off-market transactions, sometimes through preferential allotments. The Assessing Officer has also made reference to the Securities and Exchange Board to the orders passed by the Securities and Exchange Board of India (SEBI) on the issue

of manipulation of share market for providing accommodation entries to bogus long term capital gain. The shares of Kailash Auto Finance Limited, which the assessee traded, was also been put under surveillance measure by the SEBI. Thus, the Assessing Officer noted that the assessee is one of such beneficiaries who has taken the entry of Rs. 2,67,17,995/- during the assessment year 2014-15 and therefore, should not be viewed in isolation but as one of the beneficiary in the larger scheme of providing bogus long term capital gain. In response, the assessee furnished the submissions as well as relevant documentary evidence comprising of bank statement, purchase bills, merger of the company with another company and subsequently allotment of shares by merging company, order of Hon'ble High Court approving the scheme of merger, dematerialization of shares in the DEMAT account, books of account showing holding of shares as on 31/3/2013, sale bill, progress note and proof of payment of STT on the transactions of sale.. The Assessing Officer did not accept the contention and explanation of the assessee and referred to the statements of one Shri Devesh Upadhaya and Shri Pankaj Agarwal recorded by the DDIT (Inv.), Kolkata. The Assessing Officer also referred the statement of Shri Anil Kumar Khemka recorded U/s 131/133A of the Act by the DDIT(Inv.), Kolkata wherein they have admitted in providing accommodation entries in the shares of the companies controlled by them

including the shares of Kailash Auto Finance Limited. The Assessing Officer finally held that the claim of capital gain of Rs. 2,60,17,995/- is entirely unaccounted income which is rooted back to the assessee but camouflaged as long term capital gain. Hence, the Assessing Officer treated the same amount of Rs. 2,60,17,995/- as cash receipt and added the same to the income of the assessee U/s 68 read with Section 115BBE of the Act.

3. The assessee challenged the action of the Assessing Officer before the Id. CIT(A) and referred to the evidence produced by the assessee before the Assessing Officer to establish the genuineness of the transactions. The assessee specifically contended that the Assessing Officer has made addition on behalf of the statements recorded by the DDIT(Inv.), Kolkata whereas there was no allegation or any admission in those statements that the assessee was one of the beneficiaries of the alleged transaction of accommodation entries. The assessee also relied upon the various decisions. The Id. CIT(A) on consideration of the evidence produced in support of the claim as well as the various judicial precedents on the issue, hold that the share transaction resulting in capital gain is valid transaction and subject to the provisions of Section

10(38) of the Act. Accordingly, the Id. CIT(A) has deleted the addition made by the Assessing Officer.

4. Before us, the Id DR has submitted that the assessee has claimed to have purchased three lacs shares of Careful Advisory Ltd. @ Rs. 1 per share from a broker in off-market transaction and four lacs shares of Panchshul Marketing Ltd. @ Rs. 1 per share from the same broker in a similar off-market transaction, thus it is clear that the assessee has claimed to have acquired these shares as penny stocks and within the short span of time, the assessee has claimed long term capital gain of Rs. 2,60,17,995/- as against the purchase price of Rs. 7,00,000/-. Thus, the transactions itself show that there is extra ordinary and abnormal profit claimed by the assessee which is not possible in any normal transaction of purchase and sale of shares within such a short period of one year. The Id. DR has further contended that since the transaction of purchase was off-market, therefore, the assessee failed to prove the genuineness of the transaction of the purchase and the subsequent sale of the shares from the DEMAT account is nothing but was an eyewash and giving a colour of genuineness to a bogus transaction of accommodation entries. It is highly improbable to have such a huge and many fold increase in the sale price within a short period of one year. The Id DR has submitted that the

Investigation Wing of Kolkata has carried out the enquiries and investigations in cases of operators of providing accommodation entries of bogus capital gain through penny stocks. The DDIT(Inv.), Kolkata recorded statements of Shri Anil Kumar Khemka, Shri Pankaj Agarwal and Shri Devesh Upadhaya, who are the stock brokers and have admitted/indulged in giving accommodations entries through penny stocks of various companies including Kailash Auto Finance Limited. Thus, the Assessing Officer has brought on record the various facts discovered by the Investigation Wing during the proceedings carried out by the DDIT(Inv), Kolkata and unearth a racket involved in providing accommodation entries of bogus capital gain which is claimed exempt U/s 10(38) of the Act. Thus, the entire modus operandi in dealing in scripts of the companies controlled by the said group shown as sold at a nominal price and then claimed to have been sold at exceptionally high price to create an artificial capital gain exempt U/s 10(38) of the Act. The investigation Wing has given all the relevant facts and modus operandi as to how these operators are giving accommodation entries by making bogus back date entries of purchase of penny stocks and sale just after one year. The transaction is so arranged to give colour of earning the long term capital gain. Thus, the Id DR has submitted that when the shares were purchased off-market in physical form and just before sale,

the same were dematerialized which is part of the entire scheme of providing accommodation entries of bogus capital gain. The Assessing Officer has already referred to the order of the SEBI dated 29/3/2016 in respect of Kailash Auto Finance Limited suspending the trading in the said script till the investigation was pending. The Id DR has relied upon the order of the Assessing Officer.

5. On the other hand, the Id AR of the assessee has submitted that the assessee purchased three lacs shares of Careful Projects Advisory Ltd. (CPAL) @ Rs. 1 per share from M/s Sanskriti Vincom Pvt. Ltd. on 12/3/2012 vide share purchase bill, which is placed at page No. 5 of the paper book. He has referred to the bank statement of the assessee to show that the payment of Rs. 3.00 lacs was made from the bank account of the assessee on 14/3/2012. Similarly, the assessee purchased four lacs shares of M/s Panchshul Marketing Ltd. (PML) @ Rs. 1 per share from M/s Sanskriti Vincom Pvt. Ltd. on 12/7/2012 vide purchase bill, which is placed at page No. 8 of the paper book. The payments for purchase consideration was also made from the bank account on 05/7/2012. The Id AR has referred to the bank statement of the assessee and submitted that in both the cases, the payment was made through the bank account at the time of purchase of these shares, therefore, when the assessee has produced purchase bills alongwith the bank statement of the assessee

showing the payment of purchase consideration through bank then the transactions of purchase cannot be doubted. Subsequently in pursuant to the scheme of amalgamation sanctioned by the Hon'ble Allahabad High Court and Hon'ble Bombay High Court on 09 & 10/05/2013, these two companies were amalgamated in the company M/s Kailash Auto Finance Limited the assessee was allotted 7 lacs shares of M/s Kailash Auto Finance Ltd. in lieu of total shares held by the assessee in Careful Project Advisory Ltd. and Panchshul Marketing Ltd. The Id AR has thus submitted that the assessee has shows these investments in the balance sheet as on 31/3/2012 as well as 31/3/2013 respectively and thereafter when the assessee was allotted shares of equal numbers in the amalgamated company which is listed in the stock exchange. These shares were duly dematerialized as per DEMAT account, details placed at page Nos. 12 to 69 of the paper book. Hence, the holding of shares by the assessee cannot be doubted when the assessee has purchased all the relevant records and supporting evidences. He has submitted that a careful reading of the assessment order shows that the entire impugned addition has been made merely by referring to various statements recorded during the course of some investigation (Shri Anil Kumar Khemka, Devesh Upadhyay, Pankaj Agarwal). However, no clinching evidences have been brought on record directly supporting the suspicion raised by the AO and

falsifying the genuine claim of the LTCG made. The impugned order is full of suspicion, surmises & conjectures, presumptions and assumptions, drawing inferences and is also full of repetitions. The only purpose of writing a thesis type of order running into 30 pages, by itself goes to show the serious lack of direct evidences in favor of AO to support the impugned addition. But even then there is no substance in his allegations and the discussion made at many places shall be found irrelevant, in the sense that it was not shown to be directly related to the assessee. Not only there is a serious lack of contrary evidences and other supporting material but even the direct cogent evidences admittedly submitted and available before him, could not be have not at all been (successfully) adversely commented upon what to talk of disproving or rebutting or falsifying the same. The Id. AO also unsuccessfully tried to take support of the various case laws though based on peculiar facts available in those cases only but ignoring the one favoring the assessee. Admittedly, the assessee had furnished all possible evidences i.e. copy of De-mat account, bank statement, and share transfer form and share allotment certificate, ledger of share broker account to establish the genuineness of purchase and sale transaction of shares. There appears no valid reason for entertaining any suspicion or doubt by the AO and the adverse inference so drawn and the suspicion so raised, are completely unfounded. The

payment of Rs.3,00,000/- was sent through NEFT of ICICI Bank which is evident from Bank Statements of assessee and payment of Rs.4,00,000/- was also sent through NEFT of ICICI Bank as on dated 05.07.2012 which is evident from the Bank Statements of the assessee. These shares were sold in thirteen parts over a period of 5 Months viz 62,500 shares on 29.07.2013 for Rs.23,56,250/- through registered stock broker Raghunandan Capital Pvt. Ltd. The Broker M/s Raghunandan Capital Pvt. Ltd. is a registered broker having Broker Member ID: 6112. The brokers while selling, had also charged STT Rs.26,745.75/-. The entire sale proceeds of Rs. 2,67,45,750/- on account of both the sale transactions, were received through cheque and duly found credited in the bank account of the assessee. Both the transactions of sale and purchase were also duly evidenced by the D-Mat Account of the assessee which shows the fact of purchasing and selling of the shares, delivery of shares was taken given. It is submitted that the assessee has been in the field of the financial market and financial products with an extensive experience of more than 15 years. He was having in-depth knowledge, strong understanding of the various intricacies of the financial market. The assessee has been holding the position of director in various companies namely Raghunandan Industries P. Ltd, Raghunandan Capital P. Ltd., Raghunandan Insurance & Broker P. Ltd, R Money Wealth Advisors P.

Ltd., which are in the field of financial consultancy & services. Raghunandan Capital (RCPL) is a broking entity and currently providing its services in Cash, F&O and Currency derivative segments. Needless to say that the assessee is not a mere layman and had been investing in the share market based on the various reports and analytical studies made by the experts of the fields, credible newspaper reports, trade magazines etc. and based on that only has been making investment during the period from April 2013-2016 in several other securities also viz. Power Grid Corporation, Coal India Ltd, State Bank of India etc. The assessee is also well conversant with the stock exchange mechanism. It is in this process only, when the assessee came to know of the 2 companies namely- Careful Projects Advisory Ltd. ("CAPL" for short) and Panchshul Marketing Ltd. ("PML" for short), hence after making requisite study and application of mind, analyzing the situation, the assessee decided to purchase the share which were being offered at a nominal amount of @ Rs.1/- Per Share. Interestingly and notably, there is no whisper what to talk of establishing that the assessee really delivered cash in exchange of the LTCG received through cheques. There is absolutely no detail as to when and where this has happened except blindly relying upon the statements of few people who even, never specifically named the assessee or the subjected transaction. Otherwise, in absence of cross

examination, such evidence could not have been used. The AO did not discharge his duties but rather blindly relied upon other's information. It is an admitted fact that the AO had strongly relied upon the statements of the various persons namely Shri Anil Khemka, Devesh Upadhyay, Pankaj Agarwal and various other persons and unfortunately, despite using the same against the assessee, the assessee was never confronted and even the statements of these persons were not fully reproduced in the impugned order, what to talk of giving an opportunity of cross examination. In the aforesaid letter dated 30.11.2016, even the name of these persons were not disclosed by the AO nor the assessee was confronted the requisite details through order sheet entries. Thus, without knowing that the statements of third parties were being used against the assessee, requiring an opportunity of cross examination by the assessee giving specific name from the AO, was an impossibility. Yet however, the assessee in its reply dated 26.12.2016 (AO. Pg. 11) specifically submitted that in the absence of cross examination of the key persons no adverse inference can be drawn. But still, the AO, in its rebuttal pg. 14 Para 9, completely ignored such a request for opportunity of cross examination and aspect of providing the material (relied and used) to the assessee. It is submitted that AO has heavily relied upon the orders of the SEBI and in particular passed on dated 29.03.2016 (Pg. 8 Para 4 onward Pr. 12)

whereby some adverse finding given by the SEBI has been relied upon. Pertinently however, the SEBI vide its order dated 21.09.2017 (PB- 367-381) has revoked the suspension order. The Id AR has relied on the following case laws:

- (i) Andaman Timber Industries vs CIT (2015) 127 DTR 241(SC),
- (ii) Meghraj Singh Shekhawat vs. DCIT in ITA No. 444??/JP/17 vide order dated 7th March, 2018
- (iii) Sh. Pramod Kumar Lodha Vs ITO in ITA No. 826/JP/2014 order dated 16/07/2017
- (iv) CIT vs. Smt. Puja Agrawal in DBIT No. 385/2011 dated 11.09.2017

6. We have heard the rival submissions as well the relevant material on record. The assessee stated to have purchased three lacs shares of Careful Projects Advisory Ltd. for a consideration of Rs. 3.00 lacs vide invoice dated 12/3/2012. We find that M/s Sanskriti Vincom Pvt. Ltd. has issued the invoice dated 12/3/2012 for the purchase made by the assessee of three lacs shares of Careful Projects Advisory Ltd.. The payments of the consideration of Rs. 3.00 lacs was made by the assessee through his bank account with ICICI bank and the statement of bank account reflected said payment of Rs. 3.00 lacs on n14/3/2012. Thus, the payment of consideration through bank account for purchase of shares is not in dispute as the same has been proved by the evidence which can be

verified independently without even any scope of manipulation or control by the assessee. Similarly, the purchase transaction of four lacs shares of M/s Panchshul Marketing Ltd. vide invoice dated 12/7/2012 issued by M/s Sanskriti Vincom Pvt. Ltd. is also established to the extent that the assessee made payment of purchase consideration of Rs. 4.00 lacs through his bank account with ICICI bank and the payment is duly reflected in the bank account statement. Therefore, the payment of purchase consideration has been established beyond any doubt. The only question which can be raised for this transaction of purchase of shares of these two companies is the suppression of purchase price so as to create an artificial capital gain of maximum amount. However, the Assessing Officer has not given any finding that the purchase price was artificial suppressed by the parties with intention to maximize the capital gain through the modus operandi of bringing the assessee unaccounted income in the shape of long term capital gain exempt U/s 10(38) of the Act. The Assessing Officer has given much emphasis on the report of DDIT(inv.), Kolkata and some statements were recorded during the investigation proceedings by Kolkata wing wherein three persons who were brokers namely Shri Anil Khemka, Shri Devesh Upadhyay and Shri Pankaj Agarwal were examined by the DDIT(Inv.), Kolkata and in their statements recorded U/s 131(1) and 133A of the Act, they admitted their

indulgence in providing accommodation entries of bogus capital gain in some of the scripts including the scripts of M/s Kailash Auto Finance Ltd. However, we find that in the entire report of investigation Wing of which the relevant part is reproduced by the Assessing Officer as well as the statements of these persons, there is no mention either of the assessee or M/s Sanskriti Vincom Pvt. Ltd. through whom the assessee purchased these shares. Thus, even if three persons are considered to have indulged in the transaction of providing accommodation entries, it would not automatically lead to the conclusion that each and every transaction in purchase and sale of shares of those companies are bogus transactions, which were between the some other parties not connected with those operators. Even otherwise in the case in hand, the assessee did not purchase the shares of M/s Kailash Auto Finance Ltd. but the assessee purchased the shares of Careful Projects Advisory Ltd. and M/s Panchshul Marketing Ltd.. These two companies were subsequently amalgamated with M/s Kailash Auto Finance Ltd. in pursuant to the scheme of amalgamation approved by the Hon'ble Allahabad High Court as well as the Hon'ble Bombay High Court vide their respective decisions dated 09th & 10th May, 2013. Consequently, the assessee was allotted equal number of shares of the amalgamated entries of M/s Kailash Auto Finance Limited in lieu of the shares held by the assessee in erstwhile two companies

namely Careful Projects Advisory Ltd. and Panchshul Marketing Ltd.. The allotment of these shares are duly reflected in the record through the correspondence of the allotment and the same company M/s Kailash Auto Finance Ltd. is a listed company in the stock exchange, therefore, the allotment of shares by the said company is verifiable transaction from an independent record. The assessee has also produced DEMAT account showing the shares held in the dematerialized form and therefore, the holding of the shares by the assessee after the dematerialization cannot be questioned from any angle. During the financial year relevant to the assessment year under consideration, the assessee sold these shares through stock exchange and from his DEMAT account. The sale transaction of shares through stock exchange is not in doubt and the shares were sold from the DEMAT account of the assessee is also cannot be doubted. The sale price as on the date of transaction is also the prevailing price in the stock exchange. Hence it is not a case of the Assessing Officer that the assessee has shown an inflated sale price which is not as per the prevailing market price of the shares of M/s Kailash Auto Finance Ltd.. It is pertinent to note that the shares of M/s Kailash Auto Finance Ltd. were issued to the assessee only in lieu of the shares of erstwhile two companies M/s Careful Projects Advisory Ltd. and M/s Panchshul Marketing Ltd. and it is not a transaction of acquiring the

shares of M/s Kailash Auto Finance Ltd against the consideration. Thus, the allotment of shares by M/s Kailash Auto Finance Ltd. in pursuant to the scheme of amalgamation established the fact that the assessee was already holding the equal number of shares in the erstwhile companies namely M/s Careful Projects Advisory Ltd. and M/s Panchshul Marketing Ltd. Thus the holding of shares by the assessee and allotment of shares of M/s Kailash Auto Finance Ltd. are the material facts emerging from the records, which cannot be disputed. The allotment of shares of M/s Kailash Auto Finance Ltd. itself is a proof of holding of shares by the assessee in the erstwhile companies which got amalgamated into new entity. Hence, all these facts go to prove beyond any doubt that the assessee was holding the shares in question and the payment of consideration was duly made through banking channel, which is also not in dispute. The Assessing Officer has treated the transaction as bogus only on the basis of the statements recorded by the Investigation Wing, Kolkata, however, even if those statements are considered and taken into account, it cannot lead to the conclusion or establish the fact that the assessee was part of the said racket of providing accommodation entries of bogus capital gain. The Id. CIT(A) while considering all these facts, have decided the issue in para 5.4 and 5.5 as under:

“5.4 I have considered the above mentioned facts of the case. It is my considered view that the assessee needs to maintain and produce following documents/evidence to prove the genuineness of the share transaction. To conclude assessee need to maintain the following documents in order to prove genuineness of the investments:-

Basic documents

- Source of the investments made.
- Business activity of the investor.
- Contract note for purchase of investment made and sale of investment.
- Bank statement reflecting payment and receipt of sale of investments.
- Demat statement to prove delivery of shares.
- Ledger copy of share broker a/c.
- Copy of ledger a/c of source of investment.

Additional Documents/information which can even help during investigation

- To prepare the justification/ reason to buy shares of that company?
- Name and address of the person who has recommended the purchase of shares.
- Analysis of financial performance before purchase of share.
- Copy of share purchase agreement, if any.
- Reason for selling the shares. Business of the investor/company investing the shares?
- The frequency of analysis of performance of the investee company and kinds of analysis assessee did.
- How did assessee place the purchase orders with broker? To whom did he speak / instruct for placing the orders?
- How was the payment made/received to/from broker?
- What is the status of that demat account?
- Justification in case of delay in dematerialization of shares, since it is one of the main ingredients to prove backdated purchase of shares.

So far as the basic documents are concerned, they have been filed before the A.O and also during the appellate proceedings.

Additional informations as stated above have also been provided by the appellant. In this regard I have taken note of the fact that the appellant is himself a founder and promoter of Raghunandan group and is a management graduate having experience of more than 19 years in financial market and financial products. In this regards, the appellant has submitted as under;

1. He has an in depth knowledge and strong understanding of various intricacies of financial market. The Appellant has been investing in the share market based on various reports, analysis and studies made by experts in the field, which are published in newspapers, trade magazines etc. as also on the basis of knowledge gained through acquaintances.
2. During the period April 2013 to April 2016, the Appellant had traded in several other securities as well through the stock exchange mechanism. In or about February 2012, the Appellant came to know from Mr. Anuj Goyal that shares of Careful Projects Advisory Ltd. ("CPAL") were available with one Sanskriti Vincom Pvt. Ltd. Mr. Anuj Goyal also impressed upon the Appellant that CPAL was engaged in to the business of investment in various companies and were holding shares of various companies. The Appellant was informed that these investment made by CPAL would grow and could yield good profits to the Appellant. In view of the same the Appellant thought it fit and presumed it to be a good investment opportunity and decided to purchase shares of CPAL. Accordingly in March, 2012, the Appellant purchased 300000 shares of CPAL at the price of Rs. 1 per share for a total consideration of Rs. 3,00,000/-.
3. Further in May 2012 the Appellant came to know that CPAL and one Panchshul Marketing Ltd. ("PML") had purchased in Kailash Auto Finance Ltd. ("KAL") and once the company is acquired by the PML and CPAL they would infuse fresh capital in KAL and they would be revamping the business drastically. Accordingly in July 2012, Our Client again approached Sanskriti Vincom Private Limited and purchased 400000 shares of PML at the price of Rs. 1 per share for a total consideration of Rs. 4,00,000/-.
4. Following the amalgamation of CPAL and PML with Kailash Auto Finance Ltd. pursuant to the Scheme of Amalgamation sanctioned by the Hon 'ble Allahabad High Court and the Hon'ble Bombay High Court on 9th and 10th May 2013 respectively, and on July 22, 2013 the Appellant was allotted 7,00,000 shares of Kailash Auto Finance Ltd. for the 3,00,000 and 4,00,000 shares held by him in CPAL and PML. The Appellant had therefore, not directly invested in the shares of Kailash Auto Finance Ltd. but was allotted shares of Kailash Auto as a result of the amalgamation of CPAL and PML with Kailash Auto Finance Ltd. Between January 2013 and Jane 04. 2013 the shares of Kailash Auto Finance Ltd. were trading on the stock exchange in the price range of Rs. 11/- to Rs. 44.35/-. Seeing this as a good opportunity to earn a good return on his investment, the Appellant sold the 7,00,000 shares of Kailash Auto Finance Ltd. held by him on the stock exchange mechanism

I have also taken note of the fact that the appellant has sold the scrip of KAFL through recognized stock exchange on various dates from 29/07/2013 to 23/10/2013 and through registered stock broker. When

sale of the shares have been recognized as genuine then corresponding purchase of such shares in the demat form is also recognised. The A.O has particularly raised the issue of exorbitant price of the share at which they are sold as compared to very low purchase price. If there any manipulation is done to rig the price of the shares then the SEBI is the competent body to investigate it. SEBI in its order dated 21/09/2017 has stated that no adverse finding against the aforementioned 244 entities with respect to their role in the manipulation of the scrip of Kailash Auto. Accordingly SEBI has revoked the suspension of the said entities including KAFL. Merely sharp increase in share price cannot be the reason for treating sale/purchase of such shares as dubious in nature.

I have also considered various reasons given by the A.O to treat the share transaction as sham transaction. Merely, basing the judgment on the basis of statement given by 3rd parties without corroborating it with evidences on record is neither tenable nor reasonable inference. The A.O has not brought on record any evidence that any cash amount were transferred , from the appellant to the share brokers/intermediaries in lieu of money received through cheque by way of sale of shares at an exorbitant price.

It is also my considered view that purchase of shares through off-market is not an illegal transaction. In this regard, Hon'ble ITAT at Mumbai in case of ACIT Vs Shri Ravindrakumar Toshiwal in ITA nos. 5302/Mum/2008 has held that:-

We find that the issue is covered by the decision of the Tribunal in the case of Mukesh R. Marolia wherein it has been held that off market transaction is not a unlawful activity and there is no relevance in seeking details of share transaction from stock exchange when the sale was not on stock exchange and relying upon it for making addition.

Further, sale of such shares have neither been disputed nor any evidence are on record which shows them as sham transaction. A.O's casting

doubt on the appellant's credential as director in M/s Raghunandan Capital Pvt. Ltd, which is the broker company through which the shares were sold is not tenable in the eyes of the law as the appellant is a separate entity and is well qualified also to take decisions on his own. Further, the A.O has failed to bring on record any wrong doings on the part of the broker company in the transaction.

Therefore, on factual matrix of the case, I failed to find any discrepancy right from the purchase of shares and till its eventual sale.

I have also taken into account Hon'ble Rajasthan High Court Judgment at Jodhpur in case of CIT Vs. Smt Sumitra Devi in ITA 54/2012 has held that:-

True it is that several suspicious circumstances were indicated by the AO but then, the findings as ultimately recorded by him had been based more on presumptions rather than on cogent proof. As found concurrently by the CIT(A) and the IT AT, the AO had failed to show that the material documents placed on record by the assessee like broker's note, contract note, relevant extract of cash book, copies of share certificate, de-mat statement etc. were false, fabricated or fictitious. The appellate authorities have rightly observed that the facts as noticed by the AO. like the notice under Section 136 to the company having been returned unserved; delayed payment to the brokers; and de-materialisation of shares just before the sale would lead to suspicion and call for detailed examination and verification but then, for these facts alone, the transaction could not be rejected altogether, particularly in absence of any cogent evidence to the contrary.

In a recent judgment, Jurisdictional Rajasthan High Court has dismissed the revenue case in the case of CIT-1 Vrs Smt. Pooja Agarwal and Jitendra Kumar Agarwal in the Appeal No.385/2011. Hon'ble High Court in its order dated 11/09/2017 has upheld the decision of CIT(A) and Hon'ble ITAT, Jaipur Bench, in giving relief to the assessee. Hon'ble Court has recorded as under;

8. the assessee submitted reply to the show cause notice contending that the share transactions are genuine and the short term capital gain of Rs.98,56,872/- has been earned from purchases and sales of shares of Konark

Commercial limited and Limtux Investment Ltd. Investigation revealed that the entire share transactions were bogus and mere accommodation entries obtained from an entry provider Sh P K Agarwal from Kolkata. The said facts were revealed during search carried out by the Investigation wing, Jaipur in the case of B C Purohit Group.

12. However, counsel for the respondent has taken us to the order of CIT(A) and also to the order of Tribunal and contended that in view of the finding reached, which was done through Stock Exchange and taking into consideration the revenue transactions, the addition made was deleted by the Tribunal observing as under:-

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

Copy of depository a/c or demat account with Alankrit Assignment Ltd., a subsidiary of NSDL was also filed which shows that the transactions were made through demat a/c. When the relevant documents are available the fact of transactions entered into cannot be denied simply on the ground that in his statement the appellant denied having made any transactions in shares. The payments and receipts are made through a/c payee cheques and the transactions are routed through Kolkata Stock Exchange. There is no evidence that the cash has come back in appellant's account. Prima facie the transaction which are supported by documents appear to be genuine transactions. The AO has discussed modus operandi in some sham transactions which were detected in the search case of B.C. Purohit Group. The AO has also stated in the assessment order itself while discussing the modus operandi that accommodation entries of long term capital gain were purchased as long term capital gain either was exempted from tax or was taxable at a lower rate. As the appellant's case is of short term capital gain, it does not exactly fall under that category of accommodation transactions. Further as per the report of DCIT, Central Circle-3 Sh. P.K. Agarwal was found to be an entry provider as stated by Sh. Pawan Purohit of B.C. Purohit and Co. group. The AR made submission before the AO that the fact was not correct as in the statement of Sh. Pawan Purohit there is no mention of Sh. P. K. Agarwal. It was also submitted that there was no mention of Sh. P. K. Agarwal in the order of Settlement Commission in the case of Sh. Sushil Kumar Purohit. Copy of the order of settlement commission was submitted. The AO has failed to counter the objections raised by the appellant during the assessment proceedings. Simply mentioning that these findings are in the appraisal report and appraisal report is made by the Investing Wing after considering all the material facts available on record does not help much. The AO has failed to prove through any independent inquiry or relying on some material that the transactions made by the appellant through share broker P.K. Agarwal were non-genuine or there was any adverse mention about the transaction in statement of Sh. Pawan Purohit. Simply because in the sham transactions bank a/c were opened with HDFC bank and the appellant has also received short term capital gain in his account with HDFC bank does not establish that the transaction made by the appellant were non-genuine. Considering all these facts the share transactions made through Shri P.K. Agarwal cannot be held as non-genuine. Consequently denying the claim of short term capital gain made by the appellant before the AO is not approved. The AO is therefore, directed to accept claim of short term capital gain as shown by the appellant."

13. The same was confirmed by CIT appeal, in view of this we are of the opinion that the view taken by the Tribunal as well as CIT is correct.

In that view of the matter, the issues are answered in favour of the assessee and against the department. The appeals stand dismissed.



Therefore, in the above mentioned judgments by the jurisdictional Rajasthan High Court, the Hon'ble Court has upheld the decision taken by the ITAT/CIT(A) that if the assessee files the copy of contract note regarding purchase and sale of shares, assessee accounts with the brokers, copy of depository a/c or demat a/c, payments and receipts are made through a/c payee cheques and the transactions are routed through recognized stock exchange and no evidence that the cash has gone back to appellant's account then the share transactions cannot be denied as bogus and not genuine.

5.5 *Therefore, taking into account all factual matrix, judicial rulings including jurisdictional Rajasthan High Court judgments, it is my considered view that the appellant in this case has reasonably discharged its onus by providing all necessary details/evidences and the A.O has not been able to bring on record any credible evidences (except 3rd part statements but the assessee has not been given proper opportunity to cross examine such persons who has given statement) to disprove the appellant's contention and claims. In view of the foregone, it is my considered view that the share transaction by the appellant involving KAFL shares cannot be treated as sham and not genuine. Accordingly, the share transaction resulting in capital gains of Rs.2,60,17,995/- as valid transaction and subjected to the provisions of section 10(38) of the Act. Accordingly the addition of Rs.2,60,17,995/- u/s 68 of the Act is deleted. Appellant's ground of appeal on this issue is allowed."*

We further note that this Tribunal has also considered the similar issue in the case of Shri Pramod Jain Vs DCIT (supra) and Shri Meghraj Singh Shekhawat Vs DCIT (Supra). In the case of Shri Meghraj Singh

Shekhawat Vs DCIT (supra), the Tribunal vide order dated 07/3/2018 has held in para 5 and 6 as under:-

“5. We have considered the rival submissions as well as relevant material on record. The assessee has produced record of allotment of 3,50,000 equity shares of M/s Rutron International Ltd. under preferential issue at par of face value of Rs. 10/- each vide allotment letter dated 08.03.2012. The Assessing Officer has not disputed the genuineness of the letter of allotment issued by the company to the assessee wherein it has been communicated that the assessee has been allotted 3,50,000 equity shares vide allotment letter dated 08.03.2012 against the application of the assessee at par of face value of Rs. 10/- each without any premium. The assessee has also produced the bank statement showing the payment of consideration of the acquisition of shares on 29.02.2012. It appears that the said payment was made by the assessee at the time of applying for allotment of shares and subsequently the shares were allotted by the company on 01.03.2012. Thus, it is clear that the shares acquired by the assessee is not a trading transaction but these were allotted directly by the company under the preferential issue and hence, the role of intermediate is ruled out. Once, the shares were directly allotted by the company M/s Rutron International Ltd. against the consideration paid by the assessee through cheque. Then the role of any intermediately particular of Shri Anil Agrawal in said allotment does not appear from any of the record. Even as per the statement as reproduced by the Assessing Officer in the assessment order Shri Anil Agrawal has stated that he is having business nexus with the companies including M/s Rutron International Ltd. The department put a question about the association with as many as 13 companies and in response to that he has accepted that he is having business nexus with these companies

including M/s Rutron International Ltd. The nature of service was also explained by Shri Anil Agrawal as the consultancy services. For ready reference we quote question No. 4 and 5 and answer, thereto in the statement of Shri Anil Agarwal as reproduced as under:-

Q 4. Whether M/s Comfort Securities Pvt. Ltd. or you have any association with the following companies or have ever had any business transactions with the companies as mentioned below:

1. First Financial Services Ltd. (FFSL)
2. Splash Media and Infra Ltd. (SPMIL)
3. D B (International) stock Brokers Ltd. (DBSBL)
4. Unisys Softwares & Holdings Industries Ltd. (USHL)
5. Fact Enterprises Ltd. (FEL)
6. Parikh Herbal Ltd. (now Safal Herbs Ltd)
7. Premier Capital Service
8. Rutron Internationa Ltd.
9. Radford Global Ltd
10. JMD Telefilms Industries Ltd
11. Dhanleela Investments & Trading Co. Ltd.
12. SRK Industries Ltd.
13. Dhenu Buildcon Infra Ltd.

Ans. M/s Comfort Securities Ltd. has business nexus with the following companies

Name of the Company	Nature of Business Transaction
1. First Financial Services Ltd.	Brokerage and Consultancy Services
2. Splash Media and Infra Ltd.	Brokerage, Share Holding and Consultancy Services
3. Fact Enterprises Ltd	Broking as well as share holding
4. Rutron International Ltd.	Consultancy Services
5. D.B. (International) Stock Brokers Ltd.	Consultancy Services
6. Unisys Software & Holding Industries Ltd.	Broking Services

Apart from the above mentioned companies neither I nor M/s Comfort Securities Ltd. has any business nexus with the companies mentioned supra.

Q5. *Do you know the promoters and directors of the above said companies? Whether M/s Comfort Securities Pvt. Ltd. or you have any association with the promoters and directors of the above said companies or have ever had any business transactions with the promoters and directors of the above said companies.*

Ans. *Sir, I know some of the directors of the First Financial Services Limited, Splash Media & Infra Services Ltd, Rutron International Limited and FACT enterprise Ltd. Regarding other companies I am not aware who are the directors of these companies."*

Thus, it is clear from the relevant part of statement of Shri Anil Agrawal as reproduced by the AO that he has stated having business nexus with these companies and nature of business being consultancy services. Hence, he has not stated anything about providing bogus long term capital gain in respect of the equity shares of M/s Rutron International Ltd. A business nexus with any company will not automatically lead to the conclusion that the shares allotted by the other company is bogus transaction. As per question no. 5 and answer thereto it is clear that Shri Anil Agrawal was not the Director of M/s Rutron International Ltd. but he has stated to know some of the directors of these companies including M/s Rutron International Ltd. Hence, from this relevant part of the statement of Shri Anil Agrawal it cannot be inferred that he has provided the bogus long term capital gain from purchase and shares of equity shares of M/s Rutron International Ltd. much less the specific transaction of preferential issue allotment of shares by the company itself to the assessee. Further, though he has explained the modus operandi of providing bogus long term capital gain entries in the equity shares however, when the transaction was not routed through Shri Anil Agrawal and the shares were allotted directly by the company to the assessee at par on face value then the same cannot be considered as a penny stock transactions. The assessee has produced the D-mat account

and therefore, as on 18.06.2012 the assessee was holding 3,50,000 equity shares of M/s Rutron International Ltd. in D-mat account. This fact of holding the shares in the D-mat account as on 18.06.2012 cannot be disputed. Further, the Assessing Officer has not even disputed the existence of the D-mat account and shares credited in the D-mat account of the assessee. Therefore, once, the holding of shares in D-mat account cannot be disputed then the transaction cannot be held as bogus. The AO has not disputed the sale of shares from the D-mat account of the assessee and the sale consideration was directly credited to the bank account of the assessee, therefore, once the assessee produced all relevant evidence to substantiate the transaction of purchase, dematerialization and sale of shares then, in the absence of any contrary material brought on record the same cannot be held as bogus transaction merely on the basis of statement of one Shri Anil Agrawal recorded by the Investigation Wing, Kolkata wherein there is a general statement of providing bogus long term capital gain transaction to the clients without stating anything about the transaction of allotment of shares by the company to the assessee. Further, Shri Anil Agrawal was not a director of M/s Rutron International Ltd. as perceived by the AO and therefore, the entire finding of the AO is without any corroborative evidence or tangible material.

6. *The assessee has specifically demanded the cross examination of Shri Anil Agrawal which was denied by the AO as under :-*

“(ii) The assessee’s pleas that effective opportunity may be provided to cross examination. In this regard, it is pointed out that the Hon’ble Supreme Court in the case of C.Vasantlal & Co. v/s CIT 45 ITR 206 (SC) (3 Judge Bench) has observed that “the ITO is not bound by any technical rules of the law of evidence. It is open to him to collect material to facilitate assessment even by Private enquiry.”

Thus, in view of the decision of Hon'ble Supreme Court in case of CCE vs. Andaman Timber Industries (supra) the assessment based on statement without giving an opportunity is not sustainable in law. We further note that the assessee produced copy of affidavit of Shri Anil Agrawal who has retracted his statement before the Investigation Wing, Kolkata however, without going into controversy of the retraction of the statement we find that the statement cannot be used by the AO without giving an opportunity to cross examination of Shri Anil Agrawal. The Coordinate Bench of this Tribunal in case of Pramod Jain and Others vs. DCIT (supra) whole dealing with an identical issue as held in para 6 to 8 as under:-

"6. We have considered the rival submissions as well as relevant material on record. The assessee purchases 800 equity shares M/s Gravity Barter Ltd. for a consideration of Rs. 4 lacs the assessee has produced the purchase bill of the shares purchase from M/s Winall Vinimay Pvt. Ltd. which shows that the assessee purchase 800 equity shares having face value of Rs. 10/- each M/s Gravity Barter Pvt. Ltd. in allots of 400 each for a consideration of Rs. 2 lacs each total amount to Rs. 4 lacs @ Rs. 500 per shares. The purchase price of Rs. 500 per share itself shows that it was not a transaction of purchase of penny stock. These shares were duly reflected in the balance sheet as 31.03.2011. The payment of the purchase consideration was made by the assessee vide cheque on 17.05.2011 which is evident from the bank account of the assessee at page 40 of the paper book. In the mean time the said M/s Gravity Barter Pvt. Ltd. changed its status from private limited to a public limited and fresh certificate was issued by the Registrar of company on 05.02.2011 which is placed at page 43 of the paper book. Therefore, there is no reason to disbelief the fact of fresh certificate issued by the Registrar of companies on 05.02.2011 and hence, the date mentioned in the order of the Hon'ble Kolkata High Court as 18.04.2011 appears to be typographical mistake. Even otherwise these two dates do not have any effect on the genuineness of the transactions of purchase of equity shares by the assessee of M/s Gravity Barter Pvt. Ltd. The assessee though produced all the relevant records and evidences right from the purchase bills, certificate issued by the Registrar about the change of name, the communication between the assessee and the seller of the shares and thereafter, the amalgamation of M/s Gravity Barter Ltd. with M/s Oasis Cine Communication Ltd. which was duly approved by the Hon'ble High Court vide order dated 28.8.2011. The assessee in the mean time got the physical share certificate dematerialized

into Demat account on 16.02.2012. There is no reason to doubt the allotment of the shares to the assessee after amalgamation took place between M/s Gravity Barter Ltd. and M/s Oasis Cine Communication Ltd. and subsequent to amalgamation the assessee was allotted shares of M/s Oasis Cine Communication Ltd. on 04.02.2012. Hence, the allotment of 35,200 equity shares of M/s Oasis Cine Communication Ltd. cannot be doubted or disputed as these shares were issued post amalgamation and by a listed company. It is also not in dispute that these shares of M/s Oasis Cine Communication Ltd. were issued in exchange of the shares held by the assessee of M/s Gravity Barter Ltd. Therefore, once the shares issued by M/s Oasis Cine Communication Ltd. cannot be doubted then the holding of the shares of the M/s Gravity Barter Ltd. by the assessee correspondingly cannot be doubted because of the reasons that the shares of M/s Oasis Cine Communication Ltd. could be allotted only in exchange of shares of M/s Gravity Barter Ltd. The holding the shares of M/s Gravity Barter Ltd. and the allotment of shares M/s Oasis Cine Communication Ltd. are directly interconnected. In the absence of holding of shares M/s Gravity Barter Ltd. the shares of the M/s Oasis Cine Communication Ltd. could not be issued or allotted to the assessee. Therefore, holding of the shares by the assessee at least at time of amalgamation took place and shares of the M/s Oasis Cine Communication Ltd. on 04.02.2012 cannot be doubted. Moreover, these shares were dematerialized by the assessee in the Demat account, therefore, on the date of allotment of share of M/s Oasis Cine Communication Ltd the assessee was holding these shares and prior to that the assessee was holding the shares of M/s Gravity Barter Ltd. on exchange of the same the shares of M/s Oasis Cine Communication Ltd. were issued to the assessee. The Assessing Officer has doubted the genuineness of the transactions however, once the holding of shares of the assessee at the time of the same were issued by M/s Oasis Cine Communication Ltd. is not in dispute then the holding of shares of M/s Gravity Barter Ltd. also cannot be dispute because of the fact that without holding of the same the shares of M/s Oasis Cine Communication Ltd. could not be issued to the assessee. Once, the shares were held by the assessee then, the question of genuineness of the transaction does not arise however, the purchase consideration can be doubted by the AO if the shares were claimed to have been purchased against consideration paid in cash which is not in case of the assessee. The assessee has paid purchase consideration through cheque and therefore, even if the said consideration is found to be very less in comparison to the sale price at the time of sale of shares in the absence of any material or other facts detected or brought on record by the AO that the assessee has brought back his own unaccounted money in the shape of long term capital gain and has used the same as a device to avoid tax, the purchase

consideration paid by the assessee cannot be doubted in the absence of any corroborating evidence. The Assessing Officer has not disputed that the fair market value of the shares of M/s Gravity Barter Ltd. was more than the purchase price claimed by the assessee. It may be a case that ensuring merger/amalgamation of the said company with M/s Oasis Cine Communication Ltd. the assessee might have anticipated the exceptional appreciation in the share price due to extraordinary event of merger/ amalgamation. However, the same cannot be a reason for doubting genuineness of the transaction if the motive of purchase of the share is to earn an extraordinary gain because of some internal information available to the assessee.

7. In case of equity shares M/s Paridhi Properties Ltd. the assessee purchase 50,000 equity share on 26.03.2011 by paying share application money of Rs. 5 lacs which is duly reflected in the bank account of the assessee as paid on 28.03.2011. Therefore, the payment of share application money has been duly established by the assessee through his bank account for allotment of shares of 50,000 equity shares of M/s Paridhi Properties Ltd. The share allotted in private placement as per of Rs. 10/- cannot be termed as penny stock. The AO doubted that the entire process of application and allotment of shares as it have been completed within a short duration of 5 days, which in the opinion of the AO is not possible in ordinary course. However, when the assessee has produced the record including the share application, payment of share application money, allotment of share then merely because of a short period of time will not be a sufficient reason to hold that the transaction is bogus. The shares allotted to the assessee vide share certificate dated 31.03.2011 were dematerialized on 21.10.2011, therefore, on the date of dematerialization of the shares the holding of the shares of the assessee cannot be doubted and hence the acquisition of the shares of the assessee cannot be treated as a bogus transaction. Nobody can have the shares in his own name in demat account without acquiring or allotment through due process hence, except the purchase consideration paid by the assessee holding of shares cannot be doubted when the assessee has produced all the relevant record of issuing of allotment of shares, payment of share application money through bank, share certificate and demat account showing the shares credited in the demat account of the assessee on dematerialization. The said company M/s Paridhi Properties Ltd. was subsequently merged with M/s Luminaire Technologies Ltd. vide scheme approved by the Hon'ble Bombay High Court order dated 27.07.2012. Hence, the assessee got allotted the equity shares of M/s Luminaire Technologies Ltd. as per swap ratio approved in the scheme and consequently the assessee was allotted 5 lacs share of Rs. 1/- each on M/s

Luminaire Technologies Ltd. The evidence produced by the assessee leave no scope of any doubt about the holding of the shares by the assessee.

8. As regards the purchase consideration when the assessee has shown the share application money paid through his bank account and the AO has not brought on record any material to show that apart from the share application money paid through bank account the assessee has brought his own unaccounted money back as long term capital gain. It is also pertinent to note that the shares of M/s Oasis Cine Communication Ltd. are still held by the assessee in its demat account to the extent of 17,200 shares and therefore, the holding of the shares by any parameter or stretch of imagination cannot be doubted. The AO has passed the assessment year based on the statement of Shri Deepak Patwari recorded by the Investigation Wing of Kolkata however, the assessee has specifically demanded the cross examination of Shri Deepak Patwari vide letter dated 15.03.2016 specifically in paras 3 and 4 as reproduced by the AO at page No. 7 of the assessment order as under:-

“3. Since, the shares were allotted by the company through private placement after completing the formalities of ROC and were sold through the recognized Bombay Stock Exchange (BSE) there is no question of knowing individual persons or company official personally in the whole process, so the assessee is not in position to produce any one for cross examination before your good self. Since your good self has got the authority, we humbly request you to kindly issue the notice u/s 131 of the Income tax Act 1961 to the concerned individual persons or company officials for cross examination. Please note that the assessee is ready to bear the cost of their travelling in this regards.

4. As regard your opportunity given to us to read the recorded statement of Shri Deepak Patwari and to produce him from the cross examination before your good self, we have to submit that from the reading of the statements of Shri Deepak Patwari it is clear that he has never taken the name of the assessee, nor the assessee is aware of any Shri Deepak Patwari neither he has made any transaction with him, so in what capacity he can call him for cross examination before your good self. Since your good self has got the authority, we humbly request you to kindly issue the notice u/s 131 of the income Tax act 1961 to him also for cross examination. We also request your good self to kindly provide us the copy of statements of Shri Deepak Patwari along with the other relevant documents. Please note that the assessee is ready to bear the cost of his travelling in this regard.”

It is manifest from the assessee's reply to show cause notice that the assessee had specifically demanded the cross examination of Shri Deepak Patwari however, the Assessing Officer did not offer the opportunity to the assessee to cross examine Shri Deepak Patwari. Further, the AO asked the assessee to produce the Principal Officers of the M/s Gravity Barter Ltd. and M/s Paridhi Properties Ltd. However, in our view if the Assessing Officer wanted to examine the principal Officers of those companies he was having the authority to summon them and record their statements instead of shifting burden on the assessee. It is not expected from the assessee individual to produce the principal Officers of the companies rather the AO ought to have summoned them if the examination of the officers were considered as necessary by the AO. Hence, it was improper and unjustified on the part of the AO to asked the assessee to produce the principal Officers of those companies. As regards the non grant of opportunity to cross examine, the Hon'ble Supreme Court in case of Andaman Timber Industries vs. CCE (supra) while dealing with the issue has held in para 5 to 8 as under:

"5. 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.

6. 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.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. 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.”

Therefore, the statement of witness cannot be sole basis of the assessment without given an opportunity of cross examination and consequently it is a serious flaw which renders the order a nullity. The Mumbai Special of the Tribunal in case of GTC Industries vs. ACIT (supra) had the occasion to consider the addition made by the AO on the basis of suspicion and surmises and observed in par 46 as under:-

“46. In situations like this case, one may fall into realm of 'preponderance of probability' where there are many probable factors, some in favour of the assessee and some may go against the assessee. But the probable factors have to be weighed on material facts so collected. Here in this case the material facts strongly indicate a probability that the wholesale buyers had collected the premium money for spending it on advertisement and other expenses and it was their liability as per their mutual understanding with the assessee. Another very strong probable factor is that the entire scheme of 'twin branding' and collection of premium was so designed that assessee-company need not incur advertisement expenses and the responsibility for sales promotion and advertisement lies wholly upon wholesale buyers who

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

Therefore, when the Assessing Officer has not brought any material on record to show that the assessee has paid over and above the purchase consideration as claimed and evident from the bank account then, in the absence of any evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. The Hon'ble Jurisdiction High Court in case of CIT vs. Smt. Pooja Agrawal (supra) has upheld the finding of the Tribunal on this issue in para 12 as under:-

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

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

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

Copy of depository a/c or demat account with Alankrit Assignment Ltd., a subsidiary of NSDL was also filed which shows that the transactions were made through demat a/c. When the relevant documents are available the fact of transactions entered into cannot be denied simply on the ground that in his statement the appellant denied having made any transactions in shares. The payments and receipts are made through a/c payee cheques and the transactions are routed through Kolkata Stock Exchange. There is no evidence that the cash has gone back in appellants's account. Prima facie the transaction which are supported by documents appear to be genuine transactions. The AO has discussed modus operandi in some sham transactions which were detected in the search case of B.C. Purohit Group. The AO has also stated in the assessment order itself while discussing the modus operandi that accommodation entries of long term capital gain were purchased as long term capital gain either was exempted from tax or was taxable at a lower rate. As the appellant's case is of short term capital gain, it does not exactly fall under that category of accommodation transactions. Further as per the report of DCIT, Central Circle-3 Sh. P.K. Agarwal was found to be an entry provider as stated by Sh. Pawan Purohit of B.C. Purihit and Co. group. The AR made submission before the AO that the fact was not correct as in the statement of Sh. Pawan Purohit there is no mention of Sh. P. K. Agarwal. It was also submitted that there was no mention of Sh. P. K. Agarwal in the order of Settlement Commission in the case of Sh. Sushil Kumar Purohit. Copy of the order of settlement commission was submitted. The AO has failed to counter the objections raised by the appellant during the assessment proceedings. Simply mentioning that these findings are in the appraisal report and appraisal report is made by the Investing Wing

after considering all the material facts available on record does not help much. The AO has failed to prove through any independent inquiry or relying on some material that the transactions made by the appellant through share broker P.K. Agarwal were non-genuine or there was any adverse mention about the transaction in question in statement of Sh. Pawan Purohi. Simply because in the sham transactions bank a/c were opened with HDFC bank and the appellant has also received short term capital gain in his account with HDFC bank does not establish that the transaction made by the appellant were non genuine. Considering all these facts the share transactions made through Shri P.K. Agarwal cannot be held as non-genuine. Consequently denying the claim of short term capital gain (6 of 6) [ITA-385/2011] made by the appellant before the AO is not approved. The AO is therefore, directed to accept claim of short term capital gain as shown by the appellant."

In view of the above facts and circumstances of the case, we are of the considered opinion that the addition made by the AO is based on mere suspicion and surmises without any cogent material to show that the assessee has brought back his unaccounted income in the shape of long term capital gain. On the other hand, the assessee has brought all the relevant material to substantiate its claim that transactions of the purchase and sale of shares are genuine. Even otherwise the holding of the shares by the assessee at the time of allotment subsequent to the amalgamation/merger is not in doubt, therefore, the transaction cannot be held as bogus. Accordingly we delete the addition made by the AO on this account."

Thus, it is clear that the Tribunal in the said case has analyzed an identical issue wherein the shares allotted in the private placement @ Rs. 10 at par of face value which were dematerialized and thereafter sold by the assessee and accordingly the Tribunal after placing reliance on the decision of Hon'ble Supreme Court in case of CCE vs. Andaman Timber Industries (supra) as well as the decision of Hon'ble jurisdiction High court in case of CIT vs. Smt. Pooja Agarwal (supra) as held that when the Assessing Officer has not brought any material on record to show that the assessee has paid over and above purchase consideration as claimed and evident from the bank account then, in the absence of any evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital

gain. Similar in the case in hand the assessee has produced the relevant record to show the allotment of shares by the company on payment of consideration by cheque and therefore, it is not a case of payment of consideration by in cash. But the transaction is established from the evidence and record which cannot be manipulated as all the entries are part of the bank account of the assessee and the assessee dematerialized the shares in the D-mat account which is also an independent material and evidence cannot be manipulated. Therefore, the holding of the shares by the assessee cannot be doubted and the finding of the AO is based merely on the suspicion and surmises without any cogent material to show that the assessee has introduction his unaccounted income in the shape of long term capital gain. We find that the Id. CIT(A) has also referred to SEBI enquiry against the M/s Anand Rathi Share and Stock Brokers Ltd. However, we note that the said enquiry was regarding financial irregularities and use of fund belonging to the clients for the purpose other than, the purchase of shares on behalf of the clients. Therefore, the subject matter of the enquiry has no connection with the transaction of bogus long term capital gain. The decisions relied upon the Id. DR in case of Sanjay Bimalchand Jain vs. Pr. CIT (supra) is not applicable in the facts of the present case as the said decision is in respect penny stock purchase by the assessee from a persons who was found to be indulged in providing bogus capital gain entries whereas in the case of the assessee the shares were allotted to the assessee by the company at par of face value. Hence, in view of the facts and circumstances when we hold that the order of the Assessing Officer treating the long term capital gain as bogus and consequential addition made to the total income of the assessee is not sustainable. Hence, we delete the addition made by the AO on this account.

Therefore, on analyzing of the facts as well as the evidence produced by the assessee, we find that the Assessing Officer has not brought any material on record to controvert the fact duly established by the supporting evidence of purchase bills, payment of consideration through bank, dematerialization of shares in the DEMAT account, allotment of the shares amalgamated new entity in lieu of the earlier two companies of equal number of shares. Sale of shares from the DEMAT account through stock exchange and at the prevailing price as on the date of sale and further payment of STT on the transaction of sale has been duly established. In absence of any contrary fact, the mere reliance by the Assessing Officer on the report of Investigation Wing, Kolkata is not sufficient to establish the fact that the transaction is bogus. The finding of the Assessing Officer is based merely on the suspicion and surmises without any tangible material to show that the assessee has introduced his own unaccounted income in the share of long term capital gain even otherwise the reliance of the statements recorded by the Investigation Wing, Kolkata wherein without giving an opportunity of cross examination is a complete violation of principles of natural justice as held by the Hon'ble Supreme Court in the case of CCE Vs Andaman Timber Industries (Supra). The Coordinate Bench has also followed the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs. Pooja Agarwal

order dated 11/09/2017 wherein the Hon'ble High Court has duly considered the fact that the Assessing Officer has not brought any material on record to show that the assessee has paid over and above the purchase consideration as claimed and evident from the bank account. Therefore, in absence of any evidence, it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. Accordingly, in view of above facts and circumstances, we do not find any error or illegality in the order of the Id. CIT(A) qua this issue. Hence, this ground of revenue's appeal is dismissed.

7. Ground No. 2 of the appeal is regarding the addition made by the Assessing Officer on account of notional commission expenses U/s 69C of the Act. We have heard the Id DR as well as the Id AR of the assessee and considered the relevant material on record. This is a consequential issue to the addition made by the Assessing Officer U/s 68 of the Act treating long term capital gain as accommodation entries for bogus claim of exempt income and consequently the Assessing Officer has also made an addition on account of expenditure of Rs. 10,68,720/- being unexplained commission expenses on such transaction of accommodation entries.

8. Since this is a consequential issue and the Id. CIT(A) has decided and same in para 6.3 as under:

“6.3 I have considered the order passed by the A.O. and submissions filed by the appellant. This ground of appeal is the offshoot of the Ground of appeal No. 2, which has been adjudicated in favour of the assessee. Hence there is no basis left for the addition of Rs. 10,68,720/- as possible commission paid to brokers/intermediaries to arrange for the accommodation entry. Accordingly, the addition of Rs. 10,68,720/- is deleted. And the appellant’s ground of appeal on this issue is allowed.”

Being a consequential issue to the issue involved in ground No. 1 of the appeal, this ground has been adjudicated in favour of the assessee and against the revenue.

9. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on 29/08/2018.

Sd/-
(विक्रम सिंह यादव)
(VIKRAM SINGH YADAV)
लेखा सदस्य / Accountant Member

Sd/-
(विजय पाल राव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 29th August, 2018

*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- The DCIT, Circle- Bharatpur.
2. प्रत्यर्थी / The Respondent- Shri Saurabh Mittal, Dhoolpur (Raj).
3. आयकर आयुक्त / CIT

4. आयकर आयुक्त(अपील)/The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/ Guard File (ITA No. 16/JP/2018)
आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar