

INCOME TAX APPELLATE TRIBUNAL

[G BENCH]

New Delhi

BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

AND

SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No 8703/Del/2019

A Y 2011-12

Appellant
Shri Suresh Kumar Agarwal
154, Deepali Enclave
Pitampura
New Delhi
PAN :- ABVPK1318H

Vs.

Respondent
The Assistant Commissioner of
Income Tax
Central Circle -25
New Delhi

(Appellant)

(Respondent)

Date of Hearing	17-06-2020
Date of Order	29.06.2020
Present for Assessee	Shri Gautam Jain , Advocate
Present for Income Tax Department :-	Shri Saras Kumar Senior Departmental representative

ORDER

PER PRASHANT MAHARISHI, A.M.:

01. ITA number 8703/Del/2019 is filed by Shri Sureskhumar Agarwal [Assessee/ Appellant] for assessment year 2011 – 12 against the order of the learned Commissioner Of Income Tax (Appeals) – 29, New Delhi [the ld CIT (A)] dated 4/9/2019 wherein the appeal filed by the assessee against the order of the learned Assistant Commissioner Of Income Tax, Central Circle – 25, New Delhi [The ld AO] passed on 13/12/2016 determining the total income of the assessee at Rs. 1,30,65,090/- against the total income as per return of income of ₹ 74,22,010/- was dismissed.

02. The grounds of appeal raised by the assessee are against the validity of reopening of assessment as well as on the merits of the case. As per ground number [1] of the appeal, assessee has challenged reopening of the assessment. As per ground number [2] assessee has challenged the addition of ₹ 56,43,084/- made by the learned assessing officer on account of the sale consideration on sale of equity shares under section 68 of The Income Tax Act. Therefore, though assessee has raised several grounds but they are merely challenging the reopening of the assessment and challenging the addition on the merits.
03. The brief facts of the case show that assessee is an individual. He filed his return of income originally on 29/7/2011 declaring total income of ₹ 74,22,010. Above return was processed under section 143 (1) of the act on 4/3/2013.
04. Subsequently the information was received from investigation wing by the Department that the scheme was hatched by the various players to obtain and provide accommodation entries of the bogus long-term capital gain through manipulation of the stock market. From the perusal of the information and data received from the investigation wing, the learned AO noted that assessee is one of the beneficiaries who booked bogus long-term capital gain by selling 50,000 shares of Nouvea Global Ventures Ltd for ₹ 56,43,084/- in financial year 2010 – 11 to different parties. The AO further noted that most of the purchases are on abnormal rates and were done by identified paper companies controlled by entry operators and most of those entry operators on oath admitted to have been engaged in providing entries. Therefore, LD AO was of the view that the assessee has introduced his unaccounted income in the form of long-term capital gain by manipulating the stocks to the tune of ₹ 56,43,084/-. Accordingly, case of the assessee was reopened and notice u/s 148 of the Act was issued on 31/3/2016.

05. For reopening of the assessment the learned assessing officer recorded the reasons as under:-

“ The investigation directorate of Kolkata has informed that large penny stock companies, whose share prices were artificially raised on the stock exchange in order to book bogus claims of long-term capital gains or short-term capital loss by various beneficiaries. Extensive investigation including search and seizure, survey action on entry providers, riggers, beneficiaries etc. was conducted by the investigation directorate in such cases. The statement of various entry operators were also recorded who on oath admitted that they were engaged in providing accommodation entries as well as artificially raising the stock prices in order to book bogus claims of long-term capital gains or short-term capital loss by various beneficiaries. Based upon outcome of such investigation and analysis of the data, the system directorate has uploaded details of such information in respect of individual assessee who have made transactions in such penny stocks.

2. The investigation carried out by the Department has proved that assessee was hatched by various players to obtain/provide accommodation entry of bogus LTCG through manipulation of stock market. The basic aim of the scheme is to the unaccounted money of long-term capital gain beneficiaries into their account books in the garb of long-term capital gain stop this entry of LTCG is taken by selling the shares on the stock exchange and registering the proceeds arising out of the sale of shares into the books as LTCG. For implementing the scheme, shares of some penny stock company are used. The

same modus he is adopted for providing accommodation entry of bogus loss. Penny stocks are those stocks which trade at very low price and whose market capitalisation is very low. The low price of the penny stock makes manipulation of the share price very easy.

3. From the perusal of the information data, it is observed that Shri SureshKumar Agarwal [PAN: ABVPK1318H] is one of the beneficiaries, who booked bogus long-term capital gain. The detail of such transaction is annexed and is part of the satisfaction note.

4. From the transaction given in the seat attached, it is observed that Sri Sureshkumar Agarwal has sold 50,000 scripts of 'Nouvea Multi' for ₹ 5643084 in financial year 2010 - 11 to different parties. In the script, NOUVEAU GLOBAL VENTURES LIMITED total trade of ₹ 2038723071/- have been done in the annexed transaction details. From the perusal, it is evident that most of the purchases are on abnormal rates and were done by the identified paper/ Jamakharchi companies controlled by entry operators, most of them on oath admitted to have engaged in providing entries.

5. I have examine the details provided by the investigation directorate of Kolkata, details are available in the ITD system is an information provided by the assessee in the ITR and I am satisfied that the assessee has introduced her unaccounted income in the form of long-term capital gain by manipulating the penny stock.

6. Further the assessee has not offered this income of ₹ 5 643084/- in the return of income for assessment year

2011 – 12 to taxation and accordingly, claimed exempt under section 10 (38) of the income tax act. Since the income chargeable to tax amounting to ₹ 5 643084/- has escaped assessment by way of reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for assessment year 2011 – 12 as discussed above. I have reason to believe that income chargeable to tax has escaped assessment as detailed reason given above for the assessment year 2011 – 12 within the meaning of section 147 of the income tax act, 1961.

Dated 28 – 03 – 2016”

06. The assessee submitted that the original return filed may be treated as a return of income filed in response to the above notice. The assessee requested for the reasons recorded for reopening of the assessment and same were provided to the assessee. The assessee also raised an objection. Assessee requested the assessing officer to provide tangible material, which was in the possession of the assessing officer on the date of reasons recorded on which became the foundation of reopening of the assessment. Ld AO disposed of objections on 17/10/2016. Thereafter LD AO issued notice u/s 143 (2) of the act.
07. Once again challenging reopening of assessment, assessee on 21/11/2016 requested the assessing officer to provide tangible material, which was in the possession of the assessing officer on the date of reasons recorded on which became the foundation of reopening of the assessment. The assessee was provided the relevant tangible material on 25/11/2016.

08. The AO asked assessee to prove that why the purchase of shares was made on abnormal higher side and purchases were done through identified companies controlled by entry operators.
09. On the merits of the case, assessee submitted that assessee has purchased 50,000 shares of Nouvea Mutimedia Limited on 15 December 2007 at a purchase cost of ₹ 1756121/- which was sold on 17/8/2010 at ₹ 5 622799/- resulting into a capital gain of ₹ 3 866678/- which is shown as a long-term capital gain on which securities transaction tax has been paid and therefore it is exempt under section 10 (38) of the act. Assessee submitted that all the purchases and sale of shares was through stock exchange with recognized stockbrokers and the transactions were made through banking channels as per the securities exchange Board of India and Bombay stock exchange norms. He submitted shares sold by the assessee were purchased by different persons through stockbrokers through online trading platform of Bombay stock exchange at different point of time. The assessee received the sale consideration through his broker through proper banking channel as per the Bombay stock exchange and securities and board of India norms. It was further stated that the assessee had purchased the shares on 12/12/2007 at ₹ 35 per share and sold the same at an average selling price of ₹ 113/- per share in August 2010. Therefore, the price of the shares moved approximately 3.23 times after holding the investment for a period of three years. He submitted that assessee had those shares in his demat account for three years. Thus, the claim of exemption u/s 10 (38) is genuine.
10. The learned assessing officer considered the reply filed by the assessee and held that assessee has purchased the shares at ₹ 35 per share on 12/12/2007 and assessee has not explained that this purchase price of shares was not on higher side. Assessee has not submitted any documentary evidence that can establish that the

purchase price of shares is at average market rate. He further held that the reply of the assessee is silent on paper companies being the entry operators who have admitted on oath to engage in providing accommodation entries. In view of this, he held that the explanation of the assessee is not satisfactory and rejected. The AO noted that the assessee has shown total sale of shares of ₹ 56,22,799/- and claimed exempt income of ₹ 38,66,678/- under section 10 (38) of the act and the same has not been offered for taxation for the year under consideration. Accordingly, he concluded that assessee has not disclosed long-term capital gain made through penny stock amounting to ₹ 5643085/- for F Y 2010 – 11 corresponding to AY 2011 – 12. Thus, the above sum was added to the income of the assessee. The returned income of the assessee of ₹ 7 422010/- was assessed at ₹ 1 3065094/-.

11. Aggrieved by the order of the learned assessing officer, assessee preferred an appeal before the learned Commissioner of Income Tax (Appeals) – 29 who upheld the reopening of the proceedings as well as the addition on the merits. Thus, the order passed by the learned assessing officer was confirmed. Aggrieved with the order of the learned Commissioner of income tax appeals, the assessee is in appeal before us.
12. Ld AR, as per ground number [1] assessee challenges reopening of assessment stating it to be without jurisdiction. He submitted that:-
 - i. There was no specific relevant reliable and tangible material on record to form a reason to believe that income of the assessee has escaped assessment.
 - ii. Though reasons recorded have been made available to the appellant for assumption of jurisdiction under section 147 of the income tax act however material relied by the learned assessing officer in the reasons recorded are not provided to the appellant.

- iii. Such material is investigation conducted by the directorate of investigation of Kolkata as well as the statement of various entry operators recorded by investigation wing. Assessee sought these details from assessing officer several times. AO did not supply it . Therefore, the appellant was not supplied with the foundation material in forming the basis for assumption of jurisdiction under section 147 of the act.
- iv. There is no allegation that appellant had not disclosed fully and truly, all-material facts necessary for assessment is the allegation of the assessing officer.
- v. Edifice of the assumption of jurisdiction was the information supplied by the investigation wing, which was never supplied to the appellant.
- vi. Proceedings have been initiated based on no material much less any tangible and relevant material and as such, reasons recorded do not constitute valid reasons to believe for initiation of proceedings under section 147 of the act.
- vii. Reasons of reopening are only based on the borrowed satisfaction and there is no satisfaction of the assessing officer.
- viii. Initiation of reassessment proceedings is also based on non-application of mind much less independent application of the mind.
- ix. Proceedings initiated are based on surmises conjectures on suspicion and therefore the same are without jurisdiction.
- x. Reopening of the assessment is invoked for fishing and roving enquiries, which is not permissible.
- xi. The reasons recorded are not on perusal of the record because the assessee has shown the long-term capital gain exempt under section 10 (38) of ₹ 3 866678 and the sale price is shown at ₹ 5 622799/- whereas the learned assessing officer has

stated that the assessee has earned long-term capital gain through penny stock amounting to ₹ 5 643084/-.

- xii. That the original return has been accepted under section 143 (1) of the act and after the acceptance of return of income framing of the assessment and before issuance of notice under section 148 of the act there is no fresh tangible material available with the assessing officer to initiate proceedings under section 147 of the income tax act.
- xiii. Approval obtained by the learned assessing officer from the higher authority is merely a mechanical approval.
- xiv. He dealt with several judicial precedents of various honourable High Court and the coordinate benches to support his case that reopening of the assessment is invalid.

In view of this, he submitted that the reopening of the assessment is invalid.

13. On the merits of the case he submitted that the

- i. Assessee has purchased those shares through online trading platform after payment of securities transaction tax. That the purchase of the shares has been accounted for in earlier years and this fact has been duly accepted as investment by the learned assessing officer in earlier years. He submitted that the shares were purchased through online portal of the Bombay stock exchange and payment was made to a broker Alankit Assignments Ltd [Broker] through proper banking channel as per cheque number 319720 draw on-IDBI Bank.
- ii. He otherwise stated that at least the cost of purchase of the shares in the earlier should have been reduced by the learned AO while making the addition.
- iii. The appellant has sold the shares through online trading platform after payment of security transactions tax. He

submitted that the shares have been sold in two tranches by assessee through its registered share broker Alankit Assignments Limited on 12 August 2010 wherein 17335 shares were sold at ₹ 117.27 and the security transaction tax of Rs 2546/- was paid thereon. Further, in the second tranche on 16 August 2010 32665 shares were sold at an average rate of Rs. 110.18 per share amounting to Rs. 3599009/- wherein the securities transaction tax of Rs. 4508 was paid. Thus he submitted that on sale of 50,000 shares of ₹ 56,31,798/- , assessee has deposited securities transaction tax of ₹ 7054/- resulting into the net payment received by the assessee of ₹ 56,22,799/-. He submitted that the sale of the shares have been reflected in the Demat account, the copy of Ledger account for sale of shares in the books of the broker, the receipt of consideration in the bank statement for FY 2010 – 11. He therefore submitted that the sale of the shares are also on online stock exchange platform of the Bombay stock exchange where the time and date stamp are accorded, it cannot be considered as a non-genuine.

- iv. The assessee is also a habitual investor in the various scripts. He submitted the detailed list of shares held by the assessee and capital gain earned in earlier years. He submitted that the assessee has earned in 2007 – 08 the long-term capital gain on Swastik Marble private limited and LIC future plans. In 2013 – 14 the assessee has earned the long-term capital gain exempt under section 10 (38) in Gemstones Ltd . In 2014 – 15, the assessee has earned long-term capital gain in Unno industries and V and K software. In 2015 – 16, he submitted that assessee also earned long-term capital gain in Unno industries Ltd. Therefore, he submitted that assessee is a regular investor in the shares.

- v. There is only a range bound movement in the share price of the alleged company and there was no sharp increase or decline in the price of its shares. He submitted a detailed chart where the sale price of the impugned company was tabulated from December 2007 to March 2011. He submitted that the high price recorded by the assessee in December 2007 where the shares of the assessee were purchased was at a price approximately Rs 37.85 per share. He submitted that assessee has purchased the shares approximately at that price. Therefore, it cannot be said that assessee has purchased the shares at the lowest price. With respect to the sale of the shares, he submitted that in the August 2010, the highest price was ₹ 122.40 per share and in January 2011, the shares of this company reached at ₹ 205/- per share whereas the assessee has sold the sales at ₹ 110.18 per share. Therefore, it cannot be said that the assessee has purchased at the bottom price and sold at the top high price. He also submitted that looking at the price movement of the above company, there is no sharp increase or decline in the prices of the share.
- vi. Shares of the impugned company are neither suspended nor delisted by the securities exchange Board of India and therefore the company in which the assessee has purchased the shares and sold is not tainted. He also submitted the extract from the website of the Ministry of corporate affairs about the viability of Nouvea global ventures Ltd. He further referred to the financial statement of the impugned company downloaded from the website of the Bombay stock exchanges stating that same is active as on 31/3/2016 and the company is reflecting a fixed assets together with the high amount involved in inventories, investments and receivables having

valuation in crores. The impugned company has huge cash and cash equivalents together with the revenue from operation running in several crores. He also tabulated the financial strength of the above company from FY 2008 – 09 to financial year 2016 – 17.

- vii. Neither the copy of the statement of the alleged entry operators are supplied to the assessee nor cross-examination of these parties was also given. For this proposition he relied on the decision of the honourable Supreme Court in 125 ITR 713 Kishanchand Chelaam versus CIT and Andaman Timber Industries versus Commissioner of Central Excise 2015 (324) E.L.T. 641 (SC), 2017 (50) S.T.R. 93 (SC), 2016 (15) SCC 785. He also referred to the several decisions of the honourable Delhi High Court and coordinate benches.
- viii. Assessee has purchased the shares before three years, maintained those shares in his Demat account for three years, sold those shares on stock exchange; there is no allegation of any entry provider with respect to the transactions made by the assessee through its broker. He submitted that the assessee has maintained the shares in the Demat account of the appellant maintained with Vivek Financial Focus Limited [Depository Agent] for all these years. He also submitted the copy of Ledger account of the appellant in the books of the broker, copy of the demat account showing holding of 50,000 shares, copy of contract note for purchase of shares, copy of Ledger account of purchase of shares, copy of bank statement and bank book of the assessee for financial year 2007 – 08 of the appellant to show the purchases through account payee cheques and copy of acknowledgement of return of income along with computation of income and balance sheet for assessment year 2008 – 09. He further submitted that during

the course of assessment proceedings in assessment year 2008 – 09 to assessment year 2010 – 11 the order was passed under section 153A of the act and the assessee has shown the above purchases of shares as investment which has been accepted by the assessing officer. He therefore submitted that there is no doubt about the genuineness of the transaction.

- ix. He also submitted a comparative chart stating that the facts in the case of the appellant are distinct from the facts in the case of Udit kalra in ITA 10774/2019 dated 8-3- 2019 by the honourable Delhi High Court and the facts of Suman Poddar are versus ITO in ITA number 841/2019 dated 17-09- 2019 of which SLP has been dismissed in SLP number 26864/2019. Thus, his argument was that both these decisions do not apply to the facts of the case before us.
- x. He relied upon several decisions of the coordinate benches and honourable High Court to support his case.

In view of this, he submitted that transactions are not proved bogus by the assessing officer. He further submitted that in the assessment order there is no material that assessing officer has brought in to hold that alleged long-term capital gain shown by the assessee is bogus. Therefore he submitted that the addition made by the learned assessing officer and the learned CIT – A, without any evidences.

- 14. The learned departmental representative vehemently supported the orders of the lower authority and submitted that assessee has entered into obtaining an accommodation entry through the sale of shares of a penny stock. The learned departmental representative heavily relied upon the orders of the lower authorities.
- 15. We have carefully considered the rival contentions and perused the orders of the lower authorities. We have also considered all the

judicial precedents cited before us on reopening of assessment as well as on merits of addition.

16. In the present case the assessee has filed his original return of income on 29/7/2011 declaring total income of ₹ 74,22,010/-. In the return of income the assessee has shown sales of 50,000 shares of Nova Multimedia ventures Ltd on 17/8/2010 for Rs 56,22,799 which were purchased by the assessee on 12/12/2007 for a total consideration of ₹ 17,56,121/- resulting into the long-term capital gain claimed to be exempt under section 10 (38) of the income tax act of ₹ 38,66,678/-. Subsequently the information from the investigation wing was received that the above impugned company in which the assessee has sold the shares and earned the long-term capital gain is a penny stock company and it is being operated by the various entry operators who provide accommodation entry by a distinct modus operandi where the shares are shown to have been purchased at low price of non descript companies, their prices are rigged on stock exchange and then at that price , exit providers are identified where in the sources of money is generated through trails who buy the shares at given date and time and in fraction of seconds the transaction take place at stock exchange platform at predetermined prices resulting in to gain in the hands of the beneficiaries. In the demat account the shares are parked to give it a colour of genuineness, where in fact they do not have any value, the shares are untranslatable other than through entry providers, low volumes are the identification of penny stock companies. Sources from which the entries of shares are put through in demat account are also either through promoters or through entry operators as loan. Income Tax Department through its investigation wing carried certain investigation and found several companies, entry operators, accommodation entry operators, price riggers, share brokers. Statements of several persons were

recorded to confirm the modus operandi of the bogus long term capital gain and all the brokers confirmed it. Through the list of accommodation entry providers several companies were identified where all the characteristic of penny stock was found and accommodation entry providers confirmed the price rigging of shares of those companies. The inquiry report of the investigation wing of the Income tax Department is in public domain. This report also contains a huge data provided in Compact Disc as well as Uploaded in ITD with respect to beneficiaries. In case of the assessee, who has also earned Capital gain on sales of Shares of Nouvea Global Limited , which is also one of the penny stock company identified in that report, therefore, on perusal of the above data it was observed by Id OA that Assessee Shri Sureshkumar Agarwal [PAN ABVPK1318H] is one of the beneficiaries who booked long term capital gain. Details of Transactions entered in to by the assessee were also available on ITD. Thus, the Id AO obtained the details of transactions entered in to by assessee. These details were verified with the Income tax Return filed by the assessee, he has 'reason to believe' that assessee has introduced his unaccounted income in the form of LTCG by manipulating the penny stock. Further Id AO found that assessee has not offered this sum in his return of his income for the relevant year but has claimed it as exempt u/s 10 (38) of the act. Therefore, he held that there is a failure on the part of the assessee discloses fully and truly all material facts. Therefore, the reasons were recorded, approval was obtained and notice was issued to the assessee in time. This action of the assessee is under challenge as per ground no [1] of the appeal. Hon Supreme court in ACIT V Rajesh Jhaveri Stock Brokers P Ltd 291 ITR 500 (SC) has held that :-

“16. Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in *Central Provinces Manganese Ore Co. Ltd. v. ITO* [1991] [191 ITR 662](#), for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, **what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction** (see *ITO v. Selected Dalurband Coal Co. P. Ltd.* [1996] [217 ITR 597](#) (SC) ; *Raymond Woollen Mills Ltd. v. ITO* [1999] [236 ITR 34](#) (SC).”

17. On the basis of several judicial precedents cited before us by the learned authorised representative challenging the reopening of the assessment as well as the decision of the honourable Supreme Court in case of Rajesh Jhavery Stock Brokers P Ltd (291 ITR 500) (SC) the crux of the issue that is crystallized shows that the reopening of a concluded assessment by the learned assessing officer
- i. there has to be some material or materials, which is not mere fancy, imagination speculation or suspicion
 - ii. there has to be between such material and believe of the assessing officer that income of the assessee has escaped assessment
 - iii. there has to be an application of mind by the AO on such material
 - iv. inference based on reason drawn tentatively by AO that income has escaped assessment
18. On touchstone of the above principles, the action of the learned assessing officer of the reopening of the assessment in the case of the assessee is required to be tested.
19. With respect to the material or sum materials, which are available with the assessing officer, the fact, shows that there was a report of the investigation wing prepared by the directorate of investigation wherein several companies, several brokers, several entry operators, several exit providing entities were mentioned. In the same report, the detailed modus operandi of providing bogus accommodation entries in the form of long-term capital gain is narrated. The same report also identifies certain beneficiaries who have obtained the allegedly bogus long-term capital gain by using the chain of all these parties. In such report, the investigation wing also prepared the detailed list of beneficiaries showing their name, the permanent account number, the details of the transaction, the name of the company in which they have traded, the amount of transaction, the date of exit by the beneficiaries by selling of those shares, the stock exchange where the transactions took place on online platform of

the stock exchange. In such report, the name of assessee appears along with his permanent account number, the amount of transaction carried on by the assessee, the company in which the assessee traded and the date of trading. Now the issue is whether such report is material available to the assessing officer based on which process of reopening can be commenced or not. Our answer to this question is yes. If such an exhaustive detail is available in a material before the assessing officer, it cannot be said that there is nothing in that material against the assessee. The reliance placed by the learned authorised representative heavily on the decision of the Supreme Court in case of ITO versus Lakmani Mewal das 103 ITR 437 (SC) is misplaced. We have already held that the material is available to the assessing officer which is not a pure fancy, not merely a suspicion, not a gossip at all, not a rumor and not at all a conjecture or surmises.

20. Now the question arises whether there is any nexus between the such material and the belief of escapement of income. Looking to the material available the basic allegation as per the investigation report was that these are the companies in which large-scale rigging in the price of the stock exchange has been done by the entry operators providing long-term capital gain to the beneficiaries. In such report of investigation wing there was a direct name of the assessee was found to be a beneficiary dealing in the company which has been mentioned in the information as a penny stock company and assessee has obtained huge capital gain which is falling u/s 10 (38) of the act on which no tax is required to be paid. If the long-term capital gains so obtained by the assessee is true to be bogus then the reason escapement of income. Therefore on the basis of the material available there was a direct nexus available with the assessing officer for forming the necessary belief that their reason escapement of income. This belief was further supported by the

return of income of the assessee wherein in the return of income the assessing officer found that assessee has shown long-term capital gain of the same company and claimed exemption thereon. Thus, there is a clear-cut nexus between the material available with the assessing officer as well as forming of the belief of escapement of income. The another way of looking at the issue is that from the material available to the assessing officer if an honest belief can be formed by any reasonable person upon reasonable grounds, no fault can be found with the action of the learned assessing officer to use that material in forming a necessary belief. Even otherwise, the assessing officer can always act on direct or circumstantial evidences for reopening of the assessment based on the material. All that is required at the stage of issuing of notice under section 148 of the Income-tax Act, 1961, is that the belief of the Income-tax Officer must be that of an honest and reasonable person based upon reasonable grounds and not on mere suspicion, gossip or rumours.

21. The third step in the process of the whole action shows that the assessing officer should have applied his mind on such material after forming necessary belief. Now looking at the reasons recorded by the learned assessing officer he found the name of the assessee along with the permanent account number mentioned in the list of beneficiaries. Such statement also shown that assessee has dealt in 50,000 shares of the penny stock company in the particular financial year 2010 – 11. Therefore, on the basis of the name and permanent account number available he found the details in the ITD system and information contained in the income tax return of the assessee. On the looking at the return of the assessee he found that assessee has shown the long-term capital gain on sale of the shares but has not offered same for taxation but has claimed exemption u/s 10 (38) of the act. Therefore there is a clear-cut application of mind on the information (material) received by the assessing officer

having direct nexus with the belief of the escapement of income. Now the assessee has challenged that the learned assessing officer has not independently applied his mind. It is merely a statement was no evidence placed by the assessee before us to show that the learned assessing officer has not placed any villains on record. The burden of saying so is always on the assessee to prove that that the assessing officer did not independently apply his mind on the material available for reopening of the assessment. Such is the verdict of the honourable allowable High Court 246 ITR 560 in Gupta and Co (SK) versus ITO. Therefore, in absence of any evidence placed by the assessee that there is non-application of mind by the assessing officer, this argument merely an argument argument without any legs to stand thereon. The process of reasoning given by the learned assessing officer in the present case clearly goes from the material received from the investigation wing, formation of the necessary belief, then applying his own mind to the information and then making tentative inference about the escapement of income. The process of reasoning is very important to show that the AO has its own reason and not guided by somebody else. It is not the case of assessee that merely on the basis of the investigation wing report the learned assessing officer has initiated the reassessment proceedings. In the reasons recorded para number 3 to para 6 clearly demonstrate that it is only the opinion of the assessing officer which is weighed in the mind of the AO to reopen the assessment.

22. Based on this the AO formed in inferences that income of the assessee has escaped assessment. He noted in paragraph number six of the reasons recorded at the assessee has not offered this income in the return of income for assessment year 2011 – 12 to taxation and accordingly the exemption claimed u/s 10 (38) of the income tax act. He further noted that since the income chargeable to

tax amounting to ₹ 5 643085 escaped assessment by way of reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for assessment year 2011 – 12. On this basis he had reason to believe that income has escaped assessment.

23. In the reasons recorded by the assessing officer, despite making lengthy submissions, the learned authorised representative could not point out any contradiction or infirmities. Even otherwise, the provisions of subsection 147 requires that the assessing officer should have reason to believe that any income chargeable to tax has escaped. The word ‘reason to believe’ would only mean a cause or justification to think or suppose that income has escaped assessment, he can be said to have reason to believe that such income has escaped assessment it does not mean that assessing officer should have finally ascertain the facts by legal evidence that there is a definite escapement of an income. It may happen that if it discovers or finds satisfies himself that there is no escapement of the taxable income later on hearing the side of the assessee, he may not reach at the conclusion that their reason escapement of income. Therefore, reason to believe has to be a tentative belief not a certain answer to the escapement of income. Otherwise, the law would not have made a provision of recording reason and then issuing the notice to assessee, it could have straightway provided that the assessment would be made on the basis of the material available but that is not the case. Thus, it does not mean a subjective satisfaction on the part of the assessing officer. It is merely a prima facie belief.
24. Thus even assessing officer acts as a reasonable and prudent man on the basis of information gathered there is a good case for reopening of the assessment being held valid.
25. The next contention of the learned authorised representative is that the learned assessing officer has mentioned in the reasons recorded

that the investigation conducted by the directorate of investigation Calcutta and statement of various entry operators recorded by the investigation wing. However, despite asking the learned assessing officer has not exceeded to the request of the assessee to give him copies of the same. On careful analysis of the argument of the learned authorised representative, we failed to understand why assessee wants the copy of the investigation report. Before that, we state that such investigation report is available in public domain. Despite this, we try to address this argument of the assessee. The investigation report is a total report prepared by the income tax department on the modus operandi of the large-scale tax evasion by obtaining the bogus long-term capital gain by trading in shares. To substantiate the funding of the income tax department they have recorded the statement of the several persons and they have confirmed about this fact. In fact, for reopening of the assessment the learned assessing officer has used that material, in that material the information about the assessee was only with respect to the name of the company, the number of shares traded, the amount of transactions entered into by the assessee to show that assessee is one of the beneficiaries of the above modus operandi. Neither in the assessment order nor in the reasons recorded by the AO he has mentioned name of the any person except the name of the company in which the shares were traded by the assessee. Therefore, no material has been used contained in the report except the information concerning the beneficiary. That information the assessing officer has provided to the assessee many times in the assessment proceedings as well as at the time of meeting the objections of the assessee against the reopening of the assessment. The material which is not been used by the assessee or which does not concern the assessee individually but a larger conspiracy, we do not find it necessary that such report should have been given by the

AO. The assessee himself says that the AO did not mention any specific information with respect to the such searches carried out by the investigation wing, the statements of the various persons et cetera therefore we do not find any infirmity in reopening of the assessment by not providing the report of the investigation wing. Otherwise, every investigation report, which concerns the large number of the assessee, would be obtained by the every assessee. No doubt, the AO is duty-bound to provide the information related to the assessee. In this case it has been done.

26. As per para number 4.31 of his the argument of the learned authorised representative it is submitted that in the instant case the approval obtained by the assessing officer is a mechanical approval and hence initiation of proceedings of the 6147 of the act on this ground itself is valid trust of he has also referred to the truth of judicial precedents on this issue. However, the learned authorised representative could not show us that varies the copy of the approval based on which he is alleging that such approval is mechanical. In view of this argument of the learned authorised representative deserves to be rejected.
27. In view of our above finding on the reopening of the assessment, we do not find any infirmity in the order of the learned assessing officer as far as the reopening of the assessment is concerned and confirmation thereof by the learned Commissioner of income tax appeals. Accordingly, we hold that there is no infirmity in the reopening of the assessment by the lower authorities. Thus, Ground number one and all its up ground are rejected.
28. Now we come to ground number [2] , which challenges the addition of ₹ 5 643084 on account of the sale proceeds received by the assessee on sale of equity shares through stock exchange held to be chargeable to tax by the learned assessing officer u/s 68 of the income tax act. At the cost of repetition, once again the fact shows

that assessee has purchased 50,000 shares of Nouveau global ventures Ltd on 12 December 2007 for ₹ 1756121/- through his broker Alankit Assignments Ltd by online trading platform of the Bombay stock exchange. On the purchase value of those shares the assessee paid the securities transaction tax of rupees to 188/-, brokerage of ₹ 3500 and service tax of Rs 433/-. The above payment has been made by the assessee by account payee cheque number 319720 of IDBI Bank on 13 December 2007. The shares were transferred in the Demat account of the assessee. Such Demat account and its holding statement were furnished by the assessee before the assessing officer by letter dated 28th of June 2016. The copy of the contract note of purchase orders executive by the assessee was also submitted before the assessing officer on 11/7/2016. Such shares were sold by the assessee on 12 August 2010 and 16 August 2010 by the same broker on the same online platform. The security transaction tax, service tax, stamp charges and transaction charges were also paid by the assessee. Consequently two tax of ₹ 2 029541/- and 3580061/- was received by the assessee on 16 August 2010 on 18 August 2010 respectively. On these facts after reopening of the assessment the learned assessing officer dealt with the very issue as under:-

“10. The reply of the assessee has been examined and found that the reply is silent on question “why purchases of shares were made on abnormal higher side”. Further the reply of the assessee is also not satisfactory on second question i.e.” Shares of identified paper/Jama Kharchai companies have been purchased which are controlled by entry operators, most of them on oath admitted to have been engaged in providing entries’. The assessee could not provide satisfactory reply and has just stated that “to whom these shares

were sold are not known to the assessee.”. Later the assessee submitted his reply dated 13.12.2016, relevant portion of the reply is as under:-

“so far as sale of shares at abnormally high prices are concerned, we waste to submit that in the instant case the assessee had purchased the shares on 12.12.2007 at ₹ 35 per share and sold the same at an average selling price of ₹ 1 13 for share (average of all selling prices) in August 2010. Meaning thereby the price of the shares moved approximately 3.23 times of cost after holding the investment for a period of three years approximately.

Further, so far as issue of transactions done with identified paper/jamakharchi companies controlled by entry operator is concerned, we waste to submit that all the transactions of sales had been done through screen-based trading on the recognized stock exchange. The assessee does not have any details about the identity of the persons to whom he sold shares. In this regard, we would like to appraise your good self that it is undisputed in case of screen-based trading, all trades execute in OPEC screen, wherein the persons do not get to choose counterpart to the trade. The automated system itself matches orders on price/time priority basis and hence is not possible for anybody to have access over the identity of counter party dealing in any transaction. Since the counter party identity not disclose, one can never have

any choice with whom it wants to deal or not to deal.”

10.1 The reply of the assessee has been per used and found that the assessee has stated that he purchased shares at the rate of ₹ 35 per share on 12.12.2007. The assessee has neither explained that this purchase price of shares was not on higher side note the assessee has submitted any documentary evidence that can establish that the purchase price of the share is at average market rate. Hence, the reply of the assessee is not acceptable and rejected.

10.2 Further the assessee has submitted that all the transactions of sale is have been done through screen-based trading on recognized stock exchange and the assessee does not have any details about the identity of the persons to whom he sold shares. The reply of the assessee is silent on ‘paper/jamakharchi companies’ and ‘entry operators, who have admitted on oath to have engaged in providing entries’. In view of this, the reply of the assessee is not satisfactory and is rejected. The assessee has not discharged his owners of proving that he has not purchased the shares through agents OR entry providers. Further on perusal of the computation of income, it is observed that the assessee has shown total sales of shares of ‘Nouvea Limited’ for s. 56,22,799/- and claimed exempt income of ₹ 3,866,678 u/s 10 (38) of the act, and the same has not been offered for taxation for the year under consideration.

11. In view of the above discussion, it can be concluded that the assessee has not disclosed long-term capital gain (LTCG) made through stock penny amounting to ₹ 5,643,000 zero 84/- for financial year 2010 - 11 corresponding to assessment year 2011 - 12. Accordingly, unaccounted long-

term capital gain (LTC) of ₹ 56,43,000 zero 84 is added to the income of the assessee.

{Addition of Rs 56,43,084}"

29. When the appeal was referred before the learned CIT – A, he also confirmed the addition as under:-

“6. Ground number two relates to the contention of the appellant against the disallowance of his claim made u/s 10 (38) of the IT act. The fact of the case is that the AO found that information was gathered by the Department that the scheme was hatched by various players to obtain/provide accommodation entries of bogus long-term capital gain through manipulation of stock market. Many companies are engaged in the illegal business of (also known as syndicate member). The share broker said the entry operators are involved in this scheme. The basic aim of the scheme was to root the unaccounted income of long-term capital gain beneficiaries into their account/books in the garb of long-term capital gain. This entry of long-term capital gain is taken by selling the shares on the stock exchange and registering the proceeds arising out of the sale of shares in the books as long-term capital gain. For implementing the scheme, sales of some penny stock companies were used. The same modus operandi adopted for providing accommodation entry of bogus loss. Penny stocks are those stocks which trade at very low price and whose market capitalization is very low. The low price of the penny stock makes manipulation of the sale price very easy.

6.1 On perusal of the information data, it was observed by the AO that the appellant was one of the beneficiaries, who

booked bogus long-term capital gain. From the given transaction, it was observed that the appellant at sold 50,000 scripts of 'Nouvea Multimedia' four ₹ 5,643,000 zero 84/- in financial year 2000 - 11 to different parties. In the script, Nova global ventures Limited total trade of ₹ 2,038,723,071/- has been done and it was shown in the transaction details. From the perusal of data, it was evident that most of the purchases were on abnormal higher rates and were done by the identified paper companies controlled by entry operators, most of them on oath admitted to have been engaged in providing entries.

6.2 In view of the above discussion, it was establish that the appellant has introduced his unaccounted income in the form of long-term capital gain by manipulating the penny stock to the tune of ₹ 5,643,000 zero 84/- and this amount had not been offered for taxation in the return of income.

7. I have considered the facts and circumstances of the case, submission of the appellant and perused the assessment order. The case was rural upon by the appellant were also gone through. In this regard, the case law in the following cases which are in favour of the revenue relied upon:-

[XXXXXXXXXXXXXXXXXXXXXXXXXXXX]

7.1 The facts clearly show that the appellant has not tendered cogent evidence to explain how the share price in an unknown company had jumped in no time. The fantastic sale price was not at all possible as there was no economic or financial basis to justify the price rise. The appellant had indulged in a dubious a transaction meant to account for the undisclosed income in the garb of long-term capital gain. The gain is accordingly to be assessed as undisclosed credit u/s 68. In view of the facts as discussed above, I am of the

considered view that the AO was justified to disallow the claim of the appellant u/s 10 (38) of the IT act.”

30. In the above circumstances, it is to be seen whether the assessee has discharged its onus or not because the assessing officer as well as the learned CIT – A has held that the amount added under sections 68 of the income tax act. To discharge the onus, the assessee has submitted

- i. details of the purchase of the shares showing the purchase bill from the broker of buying the shares at the market rate on the online trading platform of Bombay stock exchange and
- ii. making the payment of the shares by an account by cheque immediately after purchase.
- iii. The assessee also showed before the assessing officer that above shares have been received by him in his Demat account and subsequently the shares remained in the Demat account as claimed by the assessee for three years and
- iv. sold from the same Demat account through the same broker online trading platform of Bombay stock exchange at the prevailing market price of that particular share.
- v. Sales contract notes
- vi. Consequent payment were also received by account payee cheque.
- vii. The assessee also submitted the copies of the account of the assessee from the books of the broker.

Therefore, the assessee has discharged the prime of onus cast up on him. In the circumstances we are reminded of the decision of the honourable Delhi High Court which dealt with the taxability of accommodation entry and consequent pendulum of action required from the side of the assessee as well as AO in case of Commissioner of Income-tax v. Nova Promoters & Finlease (P) Ltd.* [2012] 18 taxmann.com 217 (Delhi)/[2012] 206 Taxman 207 (Delhi)/[2012] 342

ITR 169 (Delhi)/[2012] 252 CTR 187 (Delhi) wherein it has been held as under:-

“38. The ratio of a decision is to be understood and appreciated in the background of the facts of that case. So understood, it will be seen that where the complete particulars of the share applicants such as their names and addresses, income tax file numbers, their creditworthiness, share application forms and share holders' register, share transfer register etc. are furnished to the Assessing Officer and the Assessing Officer has not conducted any enquiry into the same or has no material in his possession to show that those particulars are false and cannot be acted upon, then no addition can be made in the hands of the company under sec. 68 and the remedy open to the revenue is to go after the share applicants in accordance with law. We are afraid that we cannot apply the ratio to a case, such as the present one, where the Assessing Officer is in possession of material that discredits and impeaches the particulars furnished by the assessee and also establishes the link between self-confessed "accommodation entry providers", whose business it is to help assessee bring into their books of account their unaccounted monies through the medium of share subscription, and the assessee. The ratio is inapplicable to a case, again such as the present one, where the involvement of the assessee in such modus operandi is clearly indicated by valid material made available to the Assessing Officer as a result of investigations carried

out by the revenue authorities into the activities of such "entry providers". The existence with the Assessing Officer of material showing that the share subscriptions were collected as part of a pre-meditated plan - a smokescreen - conceived and executed with the connivance or involvement of the assessee excludes the applicability of the ratio. In our understanding, the ratio is attracted to a case where it is a simple question of whether the assessee has discharged the burden placed upon him under sec. 68 to prove and establish the identity and creditworthiness of the share applicant and the genuineness of the transaction. In such a case, the Assessing Officer cannot sit back with folded hands till the assessee exhausts all the evidence or material in his possession and then come forward to merely reject the same, without carrying out any verification or enquiry into the material placed before him. The case before us does not fall under this category and it would be a travesty of truth and justice to express a view to the contrary.”

31. In the present case, the assessee has furnished all the information available with him. The learned assessing officer had the investigation wing report available with him. Undoubtedly in the report of the Principal Director Of Investigation, Kolkata dated 27 April 2015 contains the name of 84 companies, out of which one company at serial number 71 is Nouvea global venture limited (NOUVEAU) wherein total alleged transactions of ₹ 2,038,723,071/- took place. It is alleged to be bogus transaction. The assessee has shown that he has earned the long-term capital gain exempt u/s 10 (38) of the income tax act of this company. In the same report at

Chapter number 3, the list of all these 84 companies are given with reference to action taken on them by Securities and Exchange Board of India [SEBI]. At serial number 71 is the name of this company against which no such action has been mentioned. Further, at para number 10 of the report it has shown that there are 18 exit providers and 5 accommodation entry providers in the whole scheme. Thus, if it is true that assessee has obtained a bogus long-term capital gain, assessee should have obtained the accommodation entry of the purchase of those shares from any of the accommodation entry providers and when the shares are sold the sales should have been taken as a purchase by any of the exit providers. In such circumstances to prove that the assessee has obtained the bogus long-term capital gain, The learned assessing officer should have examined

- i. The assessee by issue of summons u/s 131 of the act to know about the basic facts about these investments such as the business of the company, how assessee came to know about investment credentials of these company, history of the investments made by the assessee in earlier years and subsequent years,
- ii. Examination of the brokers of the assessee with the screen shot of the time and date stamp of transactions, liquidity of the stock, when the order from purchases and sales were entered by the broker and when it was executed on online platform
- iii. Obtaining the details of the transaction from stock exchange and details of counter parties purchasing these shares and selling those shares . It would have given ld AO lead to the accommodation entry providers and exit providing companies

- iv. Where from in the Demat account of the assessee the shares of the above-alleged company has entered into. This information would have been available to the assessing officer had he examined the depository in which the shares are held in the Demat account.
- v. When the assessee has sold shares there has to be date and time stamped transaction at the respective stock exchange. Time and date stamped transaction would have shown that the broker of the assessee has entered into a synchronized trade with the broker of the buyer. If the synchronized trade showed that the shares have been purchased by any of the 18 exit providers mentioned in the list of the investigation wing, it would have been conclusively proved that assessee has obtained bogus long-term capital gain.
- vi. When the assessee has purchased the shares, the AO could have examined identically by verifying the date and time stamp transactions to know from where the assessee has purchased those shares. Hence the assessee purchased the shares from any of the entry operators mentioned in the investigation wing report it would have thrown a light that whether the assessee has purchased a bogus long-term capital gain or not.
- vii. The AO could have further examined the receipt of shares in the Demat account of the assessee as to whose account is debited for transferring the shares in the Demat account of the assessee. He should have also examined whether the shares are transferred in the Demat account of the assessee are from the same person who has sold the shares on online trading platform of the Bombay stock exchange. This

information could have been availed from the depository.

- viii. We have also been informed that there is standard operating procedure set up by the department for the guidance of assesseeing officer to investigate the peeny stock cases. None of those steps were found in this case

All these information could have been obtained by the assessing officer by issue of 133 (6) notice to the depository as well as to the stock exchange and the respective broker. However, despite having the basic information available with the assessing officer he has chosen to sit and become a mute spectator. When the assessee has provided the complete information, which would have been available with the assessee in the documentary format, the role of the assessing officer starts as an investigator of the information furnished by the assessee, when he recorded the reason, he formed a prima facie reason to believe that there is an escapement of income. He should have converted his reason into the fact by making an investigation on the information provided by the assessee. For the reasons best known to the assessing officer, he did not do anything on the information provided by the assessee. He merely made the addition holding that assessee has not shown justification for purchase of shares at a very high price. The assessee has submitted a complete month -wise chart of highs and lows of the share of the company. Assessee purchased those shares in the month of December 2007. The purchase price of the assessee is ₹ 35 per share. The high price of that script on the Bombay stock exchange in December 2007 was ₹ 37.85 per share and low price was 29.5 per share. The assessee sold all these shares in the month of August 2010 when the all-time high price of the share was 122.4 per share

and low was ₹ 91 per share, sale price shown by the assessee was rupees 110/-per share. The all-time high of the above script was in the month of February 2011 when the share price of this company reached ₹ 205 per share. Both the transaction of the purchase of the share in sale of the share was on stock exchange on online trading platform. But no doubt, the fictitious long-term capital gain as proved by the report of the investigation wing, would also have been on the online platform. The sale of shares will have to be on online platform of recognized stock exchange to obtain benefit of section 10 (38) of the act. The reason of the learned assessing officer for making an addition in para number 10.1 and 10.2 is merely rejection of the submission of the assessee without confronting the assessee with any investigation.

32. The learned authorised representative has also shown us the financial of the above company of which assessee has sold the shares. It is shown before us that the revenue from operation of the above company for the year ended on 31st of March 2012 is ₹ 1 97,85,04,467/- and similarly the revenue for 31st of March 2011 is Rs. 143,89,32,805/-. He also showed us the profits of the company for both the years, which is in the range of ₹ 75 lakhs. The learned authorised representative has also tabulated a detailed chart showing the financials of the company for last several years. He also referred that there is no allegation against the company about any wrongdoing either in the securities market or under The Companies Act. He further submitted that the profit and loss account the assessee has shown payment of tax and therefore it is also income tax assessee. He submitted that for year ended on 31st of March 2012 company that company has paid a tax of ₹ 24.50 lakhs and for the earlier year 26.14 lakhs. Therefore, it cannot be said to be penny stock company at all. The learned assessing officer has not

brought on record any material to show that this company is not having the genuine shareholding.

33. However we disagree with the argument of the Id AR that assessee if he is a habitual investor cannot enter in to the penny stock transaction of obtaining bogus long term capital gain. Assessee has shown that he has earned long term capital gain in many companies in subsequent year, but many of those companies are also in the list of penny stock prepared by the Investigation wing such as UNNO Industries . Therefore we reject that argument.
34. In these circumstances, the addition in the hands of the assessee is not sustainable when the details furnished by the assessee were not at all controverted by bringing cogent material and investigation made thereon by the Id AO. The assessee has shown the long-term capital gain exempt u/s 10 (38) of the act amounting to ₹ 3,866,678. The purchase value of those shares was ₹ 1,756,121/-. The learned AO has made the addition of the full value of the consideration received by the assessee on sale of those shares amounting to ₹ 5,643,084/-. Thus, ground number two of the appeal of the assessee is allowed.
35. In the result, appeal of the assessee is partly allowed.
Order pronounced in the open court on 29/06/2020.

-Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 29/06/2020
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)

5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi