

आयकर अपीलीय अधिकरण, न्यायपीठ – “C(SMC)” कोलकाता,  
**IN THE INCOME TAX APPELLATE TRIBUNAL “C(SMC)” BENCH: KOLKATA**  
 (समक्ष) श्री ऐ. टी. वर्की, न्यायीक सदस्य )  
 [Before Shri A. T. Varkey, JM]

**I.T.A. No. 2333/Kol/2018**  
**Assessment Year: 2014-15**

Shri Vivek Jhunjunwala (PAN: AGTPJ1833H)	Vs.	Income-tax Officer, Wd-63(4), Kolkata
Appellant		Respondent

Date of Hearing	18.12.2018
Date of Pronouncement	15.02.2019
For the Appellant	Shri Soumitra Choudhury, Advocate
For the Respondent	Shri Satyajit Mondal, Addl. CIT

**ORDER**

**Per Shri A.T.Varkey, JM**

This appeal filed by the assessee against the order of Ld. CIT(A)-19, Kolkata dated 07.09.2018 for AY 2014-15.

2. The main issue is in respect of ground nos. 3 and 4 of assessee's appeal is against the action of Ld. CIT(A) in confirming the addition made by the AO u/s. 68 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) in respect of short term capital gain and disallowance of claim for short term capital loss.

3. Briefly stated facts are that the assessee is an individual. According to AO, the assessee claimed short term capital gain of Rs.3,07,339/- on sale of shares of M/s. Sulabh Engineers Ltd. ( M/s. SEL) as well as short term capital loss of Rs.3,30,578/- on sale of scrips of M/s. SRK Industries. According to assessee, he had purchased 100 shares for Rs.47,533/- of M/s. SEL on 03.01.2013 and thereafter sold the same on 22.10.2013 for Rs.1,38,672/- and on 05.11.2013 @ Rs.1,34,216/- and on 06.11.2013 at Rs.1,04,526/- and on 08.11.2013 at Rs.10,079/- and on 07.11.2013 at Rs.10,069/- thus made gain totaling to

Rs.3,97,564/-. It was brought to AO's notice that 200 shares of M/s. SEL was purchased and splitted on 04.02.2013 in the ratio 1:10 thus became 2000 shares. The assessee also claimed to have purchased shares of SRK Industries on 07.11.2013 numbering 2400 shares for Rs.4,37,138/- and sold it on 13.03.2014 for Rs.11,06,560/- thus claimed short term capital loss of Rs.3,30,578/-. In order to support the aforesaid transaction and claim as aforestated, the assessee had filed the contract note of purchase of M/s. SEL which reflects that assessee had purchased 200 shares on 03.01.2013 and 15.01.2013 (100 each) for Rs.42,692.13 and Rs.47,533.05 respectively. The DP statement for the period 01.04.2013 to 31.03.2014 and 01.04.2012 to 31.03.2013 were filed before the AO and the ledger account for the period commencing from 02.02.2013 to 31.03.2014 and 01.04.2012 to 31.03.2013 was also filed in the paper book. Contract note of purchase of M/s. SRK Industries was also filed which revealed that that assessee has purchased 2400 shares of M/s. SRK Industries for Rs.4,37,138.33 and contract note of sale of shares of M/s. SRK Industries reflects that 2400 shares were sold on 13.03.2014 for Rs.1,06,560.08. The bank statement of HDFC was filed before AO for the period from 01.04.2013 to 31.03.2014 shows that the entire transaction took place through the bank account. It was also brought to the notice of AO note that the assessee had purchased the shares through M/s. SSJ Finance & Securities Pvt. Ltd. which is recognized member of the Bombay Stock Exchange Ltd. SEBI Registration No. INB010960458 of M/s. SEL and sold also through the same broker. Scrips of M/s. SRK Industries was also purchased and sold through the same broker. However, the AO was of the opinion that huge rise in the shares of M/s. SEL was not real and it is a stage managed, pre-arranged transaction wherein the assessee's own money has been converted/laundered through the use of a syndicate/racket which sells the scrips of M/s. SEL for a very low price to assessee and after twelve months rigs/artificially inflates the price wherein pre-arranged companies with whom assessee's cash is delivered, purchases the shares of M/s. SEL of a very high price thus the assessee earns huge LTCG which the assessee later claims to be exempt income. According to AO, the modus operandi as suggested above has been revealed after in depth study by the Investigation Wing of the Department as well as by other agencies like SEBI etc. Thereafter, even though the assessee

filed various details/documents/papers as aforesaid before the AO to show that purchase and sale of share scrips of M/s. SEL which resulted in LTCG of Rs.3,07,927/- and STCL of Rs.3,30,578/- and which was claimed was not accepted by AO. However, the AO did not agree with the claim of the assessee and added the entire claim of Rs.3,30,578/- (loss) + Rs.3,09,927/- (gain). Aggrieved, assessee preferred an appeal before the Ld. CIT(A) who was pleased to confirm the action of AO. Aggrieved, assessee is before us.

4. The Ld. AR assailing the action of the Ld. CIT(A) contended that the Ld. CIT(A) arbitrarily brushed aside all the documents produced by the assessee to substantiate the claim and has gone by the test of human probability to nix the claim of assessee, which is not legally sustainable, so he wants us to allow the claim of the assessee in this regard. Further the Ld. AR submits that the assessee has discharged the onus on him to show that the transaction is in the recognized stock exchange through recognized stock broker and on online platform and the shares were held in de mat account and sold through the banking channel. According to Ld. AR, there is no evidence/material to suggest that assessee had indulged in any activity as suggested by the AO to cause a doubt on the claim made by the assessee. According to Ld. AR, in the Investigation Report of the department is a general report and has nowhere indicted the assessee/broker/scrips or any report of SEBI to suggest that the assessee had indulged in any nefarious activity. So without any evidence assessee's claim cannot be disallowed Per contra, the Ld. DR supported the order of the Ld. CIT(A) and AO and does not want us to interfere in the order of Ld. CIT(A) and cited the order of Hon'ble Bombay High Court in Bimal Chand Jain in TAX Appeal No. 18/2017, the Ld. DR vehemently opposing the arguments of the Ld. AR completely supported the order of the lower authorities and stated that the assessee's own money has been laundered through maze of companies which are pre-arranged, stage managed and, therefore, needs to be dealt with heavy hands.

5. I note that the assessee purchased shares of M/s. SEL of 100 shares on 03.01.2013 and 100 shares on 15.01.2013 for Rs.42,692.13 and Rs.47,533.05 respectively and sold (2000 shares) between 22.0.2013 to 07.11.2013 for Rs.3,97,565/-. It was brought to my

notice that 200 shares of M/s. SEL which were purchased later got splitted on 04.02.2013 in the ratio 1:10 thus became 2000 shares. The assessee also purchased shares of M/s. SRK Industries on 07.11.2013 numbering 2400 shares for Rs.4,37,138/- and sold it on 13.03.2014 for Rs.1,06,560/- thus claimed short term capital loss of Rs.3,30,578/-. In order to support the aforesaid transaction and claim, the assessee had filed the contract note of purchase of M/s. SEL which is found placed at pages 4 and 5 of paper book wherein we note that the assessee had purchased 200 shares on 03.01.2013 and 15.01.2013 (100 each) for Rs.42,692.13 and Rs.47,533.05 respectively. The DP statement for the period 01.04.2013 to 31.03.2014 and 01.04.2012 to 31.03.2013 are found placed from paper book pages 13 to 20 and the ledger account for the period commencing from 02.02.2013 to 31.03.2014 and 01.04.2012 to 31.03.2013 are found placed from pages 21 to 28 of the paper book. Contract note of purchase of M/s. SRK Industries is placed from page 11 wherein we note that assessee has purchased 2400 shares of M/s. SRK Industries for Rs.4,37,138.33 and from perusal of page 12 of paper book, which is contract note of sale of shares of M/s. SRK Industries which shows that 2400 shares were sold on 13.03.2014 for Rs.1,06,560.08. My attention was drawn by the Ld. AR to the contract note of sale of M/s. SEL which is placed from pages 6 to 10 of paper book wherein it is noted that there is a typographical error that instead of Rs.3,97,564.82 it shows as Rs.3,79,450/- which, according to Ld. AR, is a typographical error and the correct value is Rs.3,97,564.82. I also note from pages 31 to 36 of the paper book, which is the bank statement of HDFC for the period from 01.04.2013 to 31.03.2014 that the entire transaction took place through the bank account. I also take note that the assessee had purchased the shares through M/s. SSJ Finance & Securities Pvt. Ltd. which is recognized member of the Bombay Stock Exchange Ltd, SEBI Registration No. INB010960458 and sold it also through the same broker. Scrips of M/s. SRK Industries was also purchased and sold through the same broker. The AO was of the opinion that huge rise in the shares of M/s. SEL was not real and it is a stage managed, pre-arranged transaction wherein the assessee's own money has been converted/launched through the use of a syndicate/racket which initially sold the scrips of M/s. SEL for a very low price and after twelve months rigs/artificially inflated the price wherein pre-arranged companies to

whom assessee's cash is delivered, then purchases the shares of M/s. SEL of a very high price thus the assessee earns huge LTCG which the assessee later claims to be exempt income. According to AO, the modus operandi as suggested above has been revealed after in depth study by the Investigation Wing of the Department as well as by other agencies like SEBI etc. Even though the assessee filed various details/documents/papers before the AO to show that purchase and sale of share scrips of M/s. SEL which resulted in LTCG of Rs.3,07,927/- and STCL of Rs.3,30,578/- and which was not allowed by AO and Ld CIT(A).

6. I note that the assessee has filed contract note dated 03.01.2013, bank statement for payment, demat statement, demat holding statement, broker's ledger showing receipt etc. to support his claim. The AO has heavily relied on the modus operandi which has been brought out by the Investigation Wing of the Department and some SEBI studies. I find that there is no evidence/material to suggest that the aforesaid documents filed by the assessee are false or fabricated. All the transactions of purchase and sale have happened through stock exchange through online platform and through banking channel at the prices quoted at BSE on the date of purchase/sale of scrips. The shares were held in demat account for more than a year, therefore, without any material to suggest that the assessee/broker had indulged in any activity like stage managed and/or pre-arranged as suggested by the AO, it cannot be held that the assessee's LTCG claim is bogus. Therefore, we overturn the decision of the authorities below and direct the AO to allow the claim of LTCG of the assessee.

7. For coming to aforesaid conclusion I rely on certain judicial decisions on similar facts:-

8. The case of the assessee's is similar to the decision of Hon'ble Bombay High Court, Nagpur Bench in CIT vs. Smt. Jamnadevi Agrawal & Ors. dated 23rd September, 2010 reported in (2010) 328 ITR 656 wherein it was held that:

*"The fact that the assessee in the group have purchased and sold shares of similar companies through the same broker cannot be a ground to hold that the transactions are sham and bogus, especially when documentary ITA Nos. 93 to 99/RPR/2014 & C.O. Nos. 12 to*

*18/RPR/2014 . A.Y. 2004-05 10 produced to establish the genuineness of the claim. From the documents produced, it is seen that the shares in question were in fact purchased by the assesseees on the respective dates and the company has confirmed to have handed over the shares purchased by the assesseees. Similarly, the sale of the shares to the respective buyers is also established by producing documentary evidence. It is true that some of the transactions were off-market transactions. However, the purchase and sale price of the shares declared by the assesseees were in conformity with the market rates prevailing on the respective dates as is seen from the documents furnished by the assesseees. Therefore, the fact that some of the transactions were off-market transactions cannot be a ground to treat the transactions as sham transactions. The statement of the broker P that the transactions with the H Group were bogus has been demonstrated to be wrong by producing documentary evidence to the effect that the shares sold by the assesseees were in consonance with the market price. On perusal of those documentary evidence, the Tribunal has arrived at a finding of fact that the transactions were genuine. Nothing is brought on record to show that the findings recorded by the Tribunal are contrary to the documentary evidence on record. The Tribunal has further recorded a finding of fact that the cash credits in the bank accounts of some of the buyers of shares cannot be linked to the assesseees. Moreover, yn the light of the documentary evidence adduced to show that the shares purchased and sold by the assesseees were in conformity with the market price, the Tribunal recorded a finding of fact that the cash credits in the buyers' bank accounts cannot be attributed to the assesseees. No fault can be found with the above finding recorded by the Tribunal. Therefore, the decision of the Tribunal is based on finding of facts. No substantial question of law arises from the order of the Tribunal.—Asstt. CIT vs. Kamal Kumar S. Agrawal (Indl.) & Ors. (2010) 41 DTR (Nag) (Trib) 105; (2010) 133 TTJ (Nag) 818 affirmed; Sumati Dayal vs. CIT (1995) 125 CTR (SC) 124; (1995) 80 Taxman 89 (SC) distinguished.”*

*12. The Hon'ble High Court of Rajasthan in CIT vs. Smt. Pushpa Malpani - reported in (2011) 242 CTR (Raj.) 559; (2011) 49 DTR 312 dismissed the appeal of department observing 'Whether or not there was sale of shares and receipt of consideration thereof on appreciated value is essentially a question of fact. CIT(A) and Tribunal have both given reasons in support of their findings and have found that at the time of transactions, the broker in question was not banned by SEBI and that assessee had produced copies of purchase bills, contract number share certificate, application for transfer of share certificate to demat account along with copies of holding statement in demat account, balance sheet as on 31st March, 2003, sale bill, bank account, demat account and official report and quotations, of Calcutta Stock Exchange Association Ltd. on 23rd July, 2003. Therefore, 'the prese/itdppeal does not raise any question of law, much less any substantial question of law.”*

**9. The Hon’ble High Court of Punjab and Haryana in the case of Anupam Kapoor 299 ITR 0179 has held as under:-**

*“The Tribunal on the basis of the material on record, held that purchase contract note, contract note for sates, distinctive numbers of shares purchased and sold, copy of share certificates and the quotation of shares on the date of purchase and sale were sufficient material to show that the transaction was not bogus but a genuine transaction. The purchase of shares was made on 28th April, 1993 i.e.. asst. yr. 1993-94 and that assessment was accepted by the Department and there was no challenge to the purchase of shares in that year. It was also placed before the relevant AO as well as before the Tribunal that the sale proceeds have been accounted for in the accounts of the assessee and were received through account payee cheque. The Tribunal was right in rejecting the appeal of the Revenue by holding that*

*the assessee was simply a shareholder of the company. He had made investment in a company in which he was neither a director nor was he in control of the company. The assessee had taken shares from the market, the shares were listed and the transaction took place through a registered broker of the stock exchange. There was no material before the AO, which could have lead to a conclusion that the transaction was simpliciter a device to camouflage activities, to defraud the Revenue. No such presumption could be drawn by the AO merely on surmises and conjectures. In the absence of any cogent material in this regard, having been placed on record, the AO could not have reopened the assessment. The assessee had made an investment in a company, evidence whereof was with the AO. --Therefore, the AO could not have added income, which was rightly deleted by the CIT(A) as well as the Tribunal. It is settled law that suspicion, howsoever strong cannot take the place of legal proof. Consequently, no question of law, much less a substantial question of law, arises for adjudication.— C. Vasantlal & Co. vs. CIT (1962) 45 ITR 206 (SC), M.O. Thomakutty vs. CIT (.1958) 34 ITR 501 (Ker)) and Mukand Singh vs. Sales Tax Tribunal (1998) 107 STC 300 (Punjab) relied on; Umacharan Shaw & Bros. vs. CIT (1959) 37 ITR 271 (SC) Applied; Jaspal Singh vs. CIT (2006) 205 CTR (P & H) 624 distinguished”*

10. The Co-ordinate Bench of Ahmedabad in ITA Nos. 501 & 502/Ahd/2016 had the occasion to consider a similar issue which was wherein the assessment was framed on the strength of the statement of a broker. The relevant part reads as under:-

“14. The entire assessment is based upon the statement of Shri Mukesh Choksi. It is an undisputed fact that neither a copy of the statement was supplied to the assessee nor any opportunity of cross-examination was given by the Assessing Officer/CIT(A). The Hon’ble Supreme Court in the case of Andaman Timber Industries in Civil Appeal No. 4228 of 2006 was seized with the following action of the Tribunal:-

*“6. The plea of no cross examination granted to the various dealers would not help the appellant case since the examination of the dealers would not bring out any material which would not be in the possession of the appellant themselves to explain as to why their ex factory prices remain static. Since we are not upholding and applying the ex factory prices, as we find them contravened and not normal price as envisaged under section 4(1), we find no reason to disturb the Commissioners orders.”*

15. The Hon’ble Apex Court held as under:-

*“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 exfactory 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.*

*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.*

*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.*

*We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal."*

16. On the strength of the aforementioned decision of the Hon'ble Supreme Court, the assessment order has to be quashed.

17. Even on facts of the case, the orders of the authorities below cannot be accepted. There is no denying that consideration was paid when the shares were purchased. The shares were thereafter sent to the company for the transfer of name. The company transferred the shares in the name of the assessee. There is nothing on record which could suggest that the shares were never transferred in the name of the assessee. There is also nothing on record to suggest that the shares were never with the assessee. On the contrary, the shares were thereafter transferred to demat account. The demat account was in the name of the assessee, from where the shares were sold. In our understanding of the facts, if the shares were of some fictitious company which was not listed in the Bombay Stock Exchange/National Stock Exchange, the shares could never have been transferred to demat account. Shri Mukesh Choksi may have been providing accommodation entries to various persons but so far as the facts of the case in hand suggest that the transactions were genuine and therefore, no adverse inference should be drawn.

18. In the light of the decisions of the Hon'ble Supreme Court in the case of Andaman Timber Industries (supra) and considering the facts in totality, the claim of the assessee cannot be denied on the basis of presumption and surmises in respect of penny stock by disregarding the



direct evidences on record relating to the sale/purchase transactions in shares supported by broker's contract notes, confirmation of receipt of sale proceeds through regular banking channels and the demat account.

19. Accordingly, we direct the A.O. to treat the gains arising out of the sale of shares under the head capital gains- "Short Term" or "Long Term" as the case may be. The other grievance of the assessee becomes infructuous."

11. The assessee has furnished all evidences in support of the claim of the assessee that it earned LTCG on transactions of his investment in shares. The purchase of shares had been accepted by the AO in the year of its acquisition and thereafter until the same were sold. The off market transaction for purchase of shares is not illegal as was held by the decision of *Co-ordinate Bench of this Tribunal in the case of Dolarrai Hemani vs. ITO in ITA No. 19/Kol/2014 dated 2.12.2016* and the decision by Hon'ble Calcutta High court in *PCIT Vs. BLB Cables & Conductors Pvt. Ltd. in ITAT No. 78 of 2017 dated 19.06.2018 wherein all the transactions took place off market and the loss on commodity exchange was allowed in favour of assessee*. The transactions were all through account payee cheques and reflected in the books of accounts. The purchase of shares and the sale of shares were also reflected in Demat account statements. The sale of shares suffered STT, brokerage etc. In the facts and circumstances of the case, it cannot be held that the transactions were bogus. The following judgments of Hon'ble Jurisdictional High Court:-

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

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

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

*by the company for the transactions in commodity was placed at page 88 of the paper book. On the other hand the ld. DR relied in the order of the lower authorities.*

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

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

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

**iii) CIT V. Lakshmangarh Estate & Trading Co. Limited [2013] 40 taxmann.com**

**439 (Cal)** – In this case the Hon’ble Calcutta High Court held that on the basis of a suspicion howsoever strong it is not possible to record any finding of fact. As a matter of fact suspicion can never take the place of proof. It was further held that in absence of any evidence on record, it is difficult if not impossible, to hold that the transactions of buying or selling of shares were colourable transactions or were resorted to with ulterior motive.

**iv) CIT V. Shreyashi Ganguli [ITA No. 196 of 2012] (Cal HC) –** In this case the

Hon’ble Calcutta High Court held that the Assessing Officer doubted the transactions since the selling broker was subjected to SEBI’s action. However the transactions were as per norms and suffered STT, brokerage, service tax, and cess.

There is no iota of evidence over the transactions as it were reflected in demat account. The appeal filed by the revenue was dismissed.

**v) CIT V. Rungta Properties Private Limited [ITA No. 105 of 2016] (Cal HC)** – In this case the Hon'ble Calcutta High Court affirmed the decision of this tribunal , wherein, the tribunal allowed the appeal of the assessee where the AO did not accept the explanation of the assessee in respect of his transactions in alleged penny stocks. The Tribunal found that the AO disallowed the loss on trading of penny stock on the basis of some information received by him. However, it was also found that the AO did not doubt the genuineness of the documents submitted by the assessee. The Tribunal held that the AO's conclusions are merely based on the information received by him. The appeal filed by the revenue was dismissed.

**vi) CIT V. Andaman Timbers Industries Limited [ITA No. 721 of 2008] (Cal HC)** – In this case the Hon'ble Calcutta High Court affirmed the decision of this Tribunal wherein the loss suffered by the Assessee was allowed since the AO failed to bring on record any evidence to suggest that the sale of shares by the Assessee were not genuine.

**vii) CIT V. Bhagwati Prasad Agarwal [2009- TMI-34738 (Cal HC) in ITA No. 22 of 2009 dated 29.4.2009]** – In this case the Assessee claimed exemption of income from Long Term Capital Gains. However, the AO, based on the information received by him from Calcutta Stock Exchange found that the transactions were not recorded thereat. He therefore held that the transactions were bogus. The Hon'ble Jurisdictional High Court, affirmed the decision of the Tribunal wherein it was found that the chain of transactions entered into by the assessee have been proved, accounted for, documented and supported by evidence. It was also found that the assessee produced the contract notes, details of demat accounts and produced documents showing all payments were received by the assessee through banks. On these facts, the appeal of the revenue was summarily dismissed by High Court.

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

- (i) *Baijnath Agarwal vs. ACIT* – [2010] 40 SOT 475 (Agra (TM))
- (ii) *ITO vs. Bibi Rani Bansal* – [2011] 44 SOT 500 (Agra) (TM)
- (iii) *ITO vs. Ashok Kumar Bansal* – ITA No. 289/Agra/2009 (Agra ITAT)
- (iv) *ACIT vs. Amita Agarwal & Others* – ITA Nos. 247/(Kol)/ of 2011 (Kol ITAT)
- (v) *Rita Devi & Others vs. DCIT – IT(SS))A Nos. 22-26/Kol/2p11* (Kol ITAT)
- (vi) *Surya Prakash Toshniwal vs. ITO* – ITA No. 1213/Kol/2016 (Kol ITAT)
- (vii) *Sunita Jain vs. ITO* – ITA No. 201 & 502/Ahd/2016 (Ahmedabad ITAT)
- (viii) *Ms. Farrah Marker vs. ITO* – ITA No. 3801/Mum/2011 (Mumbai ITAT)
- (ix) *Anil Nandkishore Goyal vs. ACIT* – ITA Nos. 1256/PN/2012 (Pune ITAT)
- (x) *CIT vs. Sudeep Goenka* – [2013] 29 taxmann.com 402 (Allahabad HC)
- (xi) *CIT vs. Udit Narain Agarwal* – [2013] 29 taxmann.com 76 (Allahabad HC)
- (xii) *CIT vs. Jamnadevi Agarwal* [2012] 20 taxmann.com 529 (Bombay HC)
- (xiii) *CIT vs. Himani M. Vakil* – [2014] 41 taxmann.com 425 (Gujarat HC)
- (xiv) *CIT vs. Maheshchandra G. Vakil* – [2013] 40 taxmann.com 326 (Gujarat HC)
- (xv) *CIT vs. Sumitra Devi* [2014] 49 Taxmann.com 37 (Rajasthan HC)
- (xvi) *Ganeshmull Bijay Singh Baid HUF vs. DCIT* – ITA Nos. 544/Kol/2013 (Kolkata ITAT)
- (xvii) *Meena Devi Gupta & Others vs. ACIT* – ITA Nos. 4512 & 4513/Ahd/2007 (Ahmedabad ITAT)
- (xviii) *Manish Kumar Baid* ITA 1236/Kol/2017 (Kolkata ITAT)

(xix) *Mahendra Kumar Baid ITA 1237/Kol/2017 (Kolkata ITAT)*

13. The Id AR also brought to our notice that once the assessee has furnished all evidences in support of the genuineness of the transactions, the onus to disprove the same is on revenue. He referred to the judgement of *Hon'ble Supreme Court in the case of Krishnanand Agnihotri vs. The State of Madhya Pradesh [1977] 1 SCC 816 (SC)*. In this case the Hon'ble Apex Court held that the burden of showing that a particular transaction is benami and the appellant owner is not the real owner always rests on the person asserting it to be so and the burden has to be strictly discharged by adducing evidence of a definite character which would directly prove the fact of benami or establish circumstances unerringly and reasonably raising inference of that fact. The Hon'ble Apex Court further held that it is not enough to show circumstances which might create suspicion because the court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence. The Id AR submitted that similar view has been taken in the following judgments while deciding the issue relating to exemption claimed by the assessee on LTCG on alleged Penny Socks.

(i) *ITO vs. Ashok Kumar Bansal – ITA No. 289/Agr/2009 (Agra ITAT)*

(ii) *ACIT vs. J. C. Agarwal HUF – ITYA No. 32/Agr/2007 (Agra ITAT)*

14. Moreover it was submitted before me by Id AR that the AO was not justified in taking an adverse view against the assessee on the ground of abnormal price rise of the shares and alleging price rigging. It was submitted that there is no allegation in orders of SEBI and/or the enquiry report of the Investigation Wing to the effect that the assessee, the Companies dealt in and/or his broker was a party to the price rigging or manipulation of price in CSE. The Id AR referred to the following judgments in support of this contention wherein under similar facts of the case it was held that the AO was not justified in refusing to allow the benefit under section 10(38) of the Act and to assess the sale proceeds of shares as undisclosed income of the assessee under section 68 of the Act :-

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

15. I note that the Id. D.R. had heavily relied upon the decision of the Hon'ble Bombay High Court in the case of Bimalchand Jain in Tax Appeal No. 18 of 2017. We note that in the case relied upon by the Id. D.R, we find that the facts are different from the facts of the case in hand. Firstly, in that case, the purchases were made by the assessee in cash for acquisition of shares of companies and the purchase of shares of the companies was done through the broker and the address of the broker was incidentally the address of the company. The profit earned by the assessee was shown as capital gains which was not accepted by the A.O. and the gains were treated as business profit of the assessee by treating the sales of the shares within the ambit of adventure in nature of trade. Thus, it can be seen that in the decision relied upon by the Id. DR, the dispute was whether the profit earned on sale of shares was capital gains or business profit.

16. It is clear from the above that the facts of the case of the assessee are similar with the facts of the cases discussed supra wherein the co-ordinate bench of the Tribunal has deleted the addition and allowed the claim of LTCG. We, therefore, respectfully following the same ratio, set aside the order of Ld. CIT(A) and direct the AO not to treat the long term capital gain and short term capital loss as bogus and to allow the same and so, delete the consequential addition.

17. Ground no. 5 and 6 are in respect of confirming the disallowance on account of legal accounting, conveyance and telephone charges and in respect of 14A disallowance. I note that the assessee has not pressed these grounds before the Ld. CIT(A), so he was pleased to

dismiss the same. Before us also no submissions were made in respect to ground nos. 5 and 6, therefore, it stands dismissed.

18. In the result, the appeal of assessee is partly allowed.

Order is pronounced in the open court on 15th February, 2019.

Sd/-  
(Aby. T. Varkey)  
Judicial Member

Dated : 15th February, 2019

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – Shri Vivek Jhunjhunwala, M-503, Ganges Agrasian, 10, Seth Parasmal Bajaj, Liluah, Howrah-71204.
2. Respondent – ITO, Ward-63(4), Kolkata.
3. CIT(A)-19, Kolkata(sent through e-mail)
4. CIT, . Kolkata.
5. DR, ITAT, Kolkata. (sent through e-mail)

/True Copy,

By order,  
Assistant Registrar