

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F" MUMBAI**

BEFORE SHRI ABY T VARKEY, HON'BLE JUDICIAL MEMBER

AND

SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

**ITA NO.2880/MUM/2023
(ASSESSMENT YEAR: 2015-16)**

Udayan Grover Panch Mahal Panch Sristhi Complex Powai, Mumbai - 400072 PAN: ACLPG0572G	v.	National Faceless Appeal Centre Delhi {ACIT – 26(3), BKC, Mumbai}
(Appellant)		(Respondent)

Assessee Represented by	:	Shri Vimal Punmiya
Department Represented by	:	Ms. Kavitha Kaushik
Date of conclusion of Hearing	:	23.01.2024
Date of Pronouncement	:	07.02.2024

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld. CIT(A)"] dated 21.07.2023 for the A.Y.2015-16.

2. Assessee is in appeal before us raising following grounds in its appeal: -

"1) On the facts and circumstances of the case the Ld CIT erred in treating this sale consideration of Rs. 4,59,10,500/- on account of sale of the shares of green crest financial services private limited As a bogus accommodation entry further also erred in treating the genuine Long term capital gain on sale of shares as taken for the purpose of bringing in assessee s own unaccounted income under the shelter of exempt LTCG under section 10(38) of the act and accordingly Treated the same as unexplained credits and added the same to the income of assessee under section 68 R.W.S. 115BBE of The act.

2) On the facts & circumstances of the case the Ld CIT erred in making an addition of Rs. 1,25,00,000 an treated as unsecured loan u/s 68 of the income tax act 1961

3) On the facts & circumstances of the case the Ld CIT erred in making an addition of Rs. 62,81,903 an treated as interest expenditure u/s 57 of the income tax act 1961

3. We proceed to adjudicate the issues raised by the assessee ground wise.

4. Brief facts of the case are, assessee is an individual earns income from salary, income from business, income from capital gain arising out of investment in securities and income from other sources. Assessee has filed his return of income for A.Y. 2015-16 on 27.08.2015 declaring total income at ₹.93,31,370/-. The return of income was selected under scrutiny and accordingly statutory notices under section 143(2) and 142(1) of the Income-tax Act, 1961 (in short "Act") were issued and served on the assessee.

5. The case has been brought under scrutiny assessment based the on the information received from DDIT (Inv.) Unit Kolkata in respect of bogus LTCG claimed by the assessee on sale of penny stock script. The assessee had submitted before the Assessing Officer all the documents pertaining to sale and purchase of shares of M/s. Marigold Glass Industries Limited like demat account statement, copy of share application form, Allotment letter, Copy of Share certificate, demat statement of dematerialization, copy of bank statement reflecting payment and receipt of shares purchased and sold along with relevant contract notes including detailed submission to prove the genuineness of the transaction.

6. Assessing Officer issued summons under section 131 of the IT Act to the assessee and the statement of the assessee was recorded under oath on 05.12.2017. Assessing Officer in his order from Page No. 3 to 17 has elaborately analysed various parameters with regard to claim of Bogus long term capital gain such as offline purchase of non-listed shares, unrealistic purchase price, details of trade data and exit providers, Money trail by Investigation Wing, Kolkata, Trade pattern and order placing mechanism, Role of broker, SEBI report and its finding with regard to accommodation entry providers (for the sake of brevity the same is not reproduced below). Subsequently, Assessing Officer

issued notice under section 142(1) of the Act requiring assessee to explain with evidences why the Long Term Capital Gain should not be treated as non-genuine and sale consideration received on the penny stock should not be taxed as an unexplained cash credit under section 68 of the Act.

7. In response, assessee filed its submissions vide letter dated 15.12.2017, for the sake of clarity it is reproduced below (As reproduced by Assessing Officer in assessment order): -

"The reply of the assessee is received in this office on 15.12.2017. The submissions made by the assessee and the judicial pronouncements cited therein have been carefully considered and not found tenable. The assessee could not specify that despite poor fundamentals of companies why the assessee bought this penny stock. Further, the assessee was not able to substantiate why he has made the said investment at a premium to the face value despite no fundamentals supporting the premium paid. The assessee did not give any explanation with regard to the adverse findings made by the SEBI, Investigation Wing, Kolkata and with regard to the information gathered u/s 133(6) of the I.T. Act.

The assessee's contention that the evidence cited by the revenue could not be cross examined lacks force. The assessee has not brought out any facts which are different from the findings narrated in the show cause notice dated 16.12.2016. Reliance in this regard is placed on the decision of ITAT Mumbai in the case of M/s. Golden Tobacco Ltd. V/s CIT(65 ITD 380) wherein it had held as under:

"we have taken a view that adverse evidence and material, relied upon in the order, to reach the finality should be disclosed to the assessee. But this rule is not applicable where the material or evidence used is of collateral nature. We have also taken a view that right to cross-examine the witness, who made adverse reports is not an invariable attribute of the requirement of the dictum,

"audi alterant partem". More ever, all the exit providers and operators are Kolkata based and the assessee has raised issue of cross examination only at the fag end, in the submission filled on 15.12.2017.

The assessee in his reply dated 15.12.2017 stuck to his point regarding the genuineness of trade and long term capital gain. However, in the facts & circumstances, the contention of the assessee regarding the genuineness the trade and the long term capital gain are not tenable.

8. After considering the submissions of the assessee, Assessing Officer observed that the transaction of LTCG is a manipulated transaction done by assessee in connivance with the operators to evade taxes on his unaccounted income and relying on statement made by operators treated the LTCG as non-genuine, according to him LTCG declared by the assessee of ₹.4,59,10,500/- as unexplained income u/s.68 of the Act, he came to conclusion by observing as under: -

"21. Findings and conclusion

21.1 From the discussion in the preceding paras it clearly emerges that capital gains booked by assessee in his books were pre-arranged method to evade taxes and launder money. The assessee resorted to a pre-conceived scheme to procure capital gains by way of price difference in share transactions not supported by market factors. Cumulative events in such transactions of shares revealed that same were devoid of any commercial nature and fell in realm of not being bona fide and, hence, impugned capital gain is not allowable.

The assessee has not been able to prove either the rationale behind investment in these shares or the unusual rise and fall of share prices to be natural and based on the marker forces. It is evident that such share transactions were closed circuit transactions and clearly structured one. The net worth of the penny stock company is negligible. Even though the net worth of the company and the business activity of the company is negligible the share prices have been artificially rigged to unusual business

activity of the company is negligible the share prices have been artificially rigged to unusual high. The parties to whom these shares had been shown to sold for a huge profit are found to be paper entities operated by known entry providers. The transactions entered by the assessee involve the series of preconceived steps, the performance of each of which is depending on the others being carried out. The true nature of such share transactions lacked commercial contents, being artificially structured transactions, entered into with the sole intent, to evade taxes.

Legal Precedence:

A. *The Hon'ble Bombay High Court in the latest judgment dated 10th April, 2017 [ITA No.18/2017] in the case of Sanjay Bimalchand Jain Vs. PCIT-1, Nagpur on the issue of Bogus LTCG from Penny stocks had held as under*

"The assessee has not tendered cogent evidence to explain how the shares in an unknown company worth Rs.5 had jumped to Rs.485 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 assessee had indulged in a dubious share transaction meant to account for the undisclosed income in the garb of long term capital gain. The gain has accordingly to be assessed as undisclosed credit u/s 68. The assessee had indulged in a dubious share transaction meant to account for the undisclosed income in the garb of long term capital gain."

The Income Tax Appellate Tribunal had earlier dismissed the appeal file by Sanjay Bimalchand Jain.

B. *In the case of Sumati Dayal reported in 214 ITR 801 the Hon'ble Supreme Court had held that matter had to be considered by applying the test of human probabilities. Having regard to the facts and circumstances as elaborately discussed in this order and inference could reasonably drawn that by all human probabilities, it is very difficult to accept that the assessee has done a genuine transaction with respect to his claim of capital gain. Therefore, after the application of the test of human probabilities, it is very difficult to conclude that the long term capital gain earned by him is genuine one.*

C. *Further, reliance is also placed on the judgment in the case of CIT Vs Independent Media Pvt Ltd. {2012 24 Taxmann 276 Delhi, wherein it was held that addition u/s 68 is inevitable on unearthing of sham transactions. No further evidence needed to prove their sources. The Hon'ble Delhi High Court categorically held*

that under such circumstances, the Assessing Officer will not be under any duty to further show or establish that the monies emanated from the coffers of the assessee. To place such a burden on him, an impossible one at that would be quite contrary to the ratio led down by the various judgments of the Supreme Court.

.....

As the explanation furnished by the assessee regarding the amount of Rs. 4,59,10,500/- credited in his books (shown as consideration from sale of shares of M/s. Greencrest financial Services Ltd..) is found to be unsatisfactory, the same is hereby held as 'unexplained cash credit' in the books of the assessee and accordingly added to the total income of the assessee in accordance with the provisions of section 68 of the IT Act, 1961. Therefore, the amount of Rs. 4,59,10,500/- shown to have received by the assessee towards consideration for sale of shares of M/s. Greencrest Financial Services Ltd. during the year is added to the total income of the assessee as 'unexplained cash credit'. By making potentially inadmissible claim of non genuine Capital Gains, the assessee has furnished inaccurate particulars of income within the meaning of section 271(1)(c). Hence, penalty proceedings u/s. 271(1)(c) rws 274 of the Income-tax Act, 1961 are initiated separately.

(Add: Rs. 4,59,10,500/-)

9. Aggrieved, assessee preferred an appeal before the Ld. CIT(A) and filed detailed submissions. Detailed submissions filed before Ld. CIT(A) are reproduced below: -

"Applicability of sec. 68

The provisions of section 68 are deeming provisions and are applicable only in the circumstances where a sum is found credited in the books maintained by the assessee for any previous year and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the assessing officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year. The plain and simple reading of the section 68 unambiguously demonstrate that the section is applicable only in the circumstances where the assessee maintains books of accounts, amount is credited in such accounts and either the

explanation about the source and nature of income is not given by the assessee or the explanation is not satisfactory. It is submitted that the assessee is under no legal obligation to maintain books of accounts and nothing has been brought on record by the AO to establish that the assessee had maintained books and the credit was found in the books maintained by the assessee. However, the assessee submits that the assessee not only explained that the sum credited in his bank account was out of sale consideration received on account of sale of shares but also identified the parties from who the amounts were received and the entire trail of transfer of funds and transfer of share through the Demat Account. The assessee also explained the acquisition of shares and the source of payment towards their purchase. None of these facts have been controverted or proved false. The purchase of shares has been accepted and so as their split on account of revised face value. The genuinity/existence of the companies of which shares were acquired/sold was also not doubted as they were all traded on recognized stock exchange. In nut shell the source of credit of amounts and the nature of transaction was well established with documentary evidences which have not been controverted or proved false. The only objection of the learned assessing officer id that the value of the shares has increased many fold. So the objection is not on the source or nature but on the issue as to how could they appreciated so much. It is submitted that this is nothing but the suspicion of the learned AO. The assessee had furnished the Name, Address, PAN no and all documents related to acquisition and sale of shares with Demat Account to prove that the shares were purchased and sold. The assessee had also furnished its bank statement to show that the money was received through banking channels. It is submitted that the assessee has discharged the primary onus cast upon him to prove the genuineness of transactions and the receipt of funds credited. During the assessment proceedings, the learned AO recorded assessee's statement on oath and found nothing suspicious or questionable moreover none of the contents have been controverted by the AO. In view of the fact the source and nature of receipt and genuineness of transaction is proved beyond doubt the application of section 68 itself is not justified and therefore the addition by applying these provisions is also not justified.

Sunil Prakash vs. ACIT (ITAT Mumbai) March 8, 2017 (Date of pronouncement)

JVR forging ltd vs Asst. CIT (2017)184 TTJ (Chd.) 283

ITO vs Jatin Investment Pvt. Ltd. In ITA No.4325 & 4326/Del/2009 order dated 27.05.2015

In the present case, the amount in question was neither a loan nor the deposit, it was also not on account of share application money, and the said amount was on account of sale of investment therefore the provisions of Section 68 of the Act were not applicable.

Meenu Goel vs. ITO (ITAT Delhi) March 19, 2018 (Date of pronouncement)

Capital gains from penny stocks cannot be assessed as unexplained cash credit u/s 68 if the assessee has produced documentary evidence to prove the source, identify and genuineness of the transaction and the AO has not found any fault with it. The fact that the Investigation Dept has alleged that there is a modus operandi of bogus LTCG scheme is not relevant if the same is not substantiated.

Smt. Nirmala Yadav vs Ito (2017)183TTJ 769 (Jodh)

Held before invoking section 68, maintenance of the accounts by the assessee itself and finding credit of the subjected amount therein are the conditions precedents and without satisfying them, the Assessing Officer cannot invoke section 68. No addition could be made under sec.68 where the assessee did not maintain any books of accounts and the subject amount was not found in her books of accounts which was precondition and amount was found deposited in assessee's bank account.

Submissions of merits

The assessee had purchased two lakhs equity shares of M/s. Marigold Glass Industries Ltd under a preferential allotment for a price of Rs.24,00,000/- having face value of Rs.10 with premium of Rs.2 per equity shares. The purchase consideration was paid by account payee cheques drawn on HDFC bank. There is no dispute with regard to purchase of the said shares. Later on due to split in face value 2,00,000 shares were converted into twenty lakhs shares. The name of the company was also changed and now known as Greencrest Financial Services Ltd. There is no dispute on these issues too. During the financial year related to the assessment year in question, the assessee sold 6,92,500 shares of total holding for a price of Rs. 4,59,10,500/- and received the sale consideration through proper banking channel on various dates. The shares were also transferred to the buyers through Demat Account. There is no dispute either to the sale of shares and their transfer. The capital gain on sale of shares being from taxation the assessee claimed exemption under sec.10(38) of the Income Tax

Act. The matter was taken up for scrutiny and an order under section 143(3) was passed.

The learned AO in assessment order passed u/s 143(3) of the Income Tax Act, 1961 has discussed in detail the general concept of penny stocks etc. and certain prior investigation conducted by investigation wing which has formed main basis to reject the exemption u/s 10(38) of the Act as claimed by assessee and invoke section 68 against long term capital gains earned by assessee on sale of shares of company M/s Greencrest Financial Services Limited. The AO in said order has discussed specific facts of instant case as to long term capital gains earned by assessee, statements recorded by investigation wing Kolkata from various persons, show cause notice issued to assessee and its reply by assessee and final views of AO on the same are summed up in the assessment order wherein AO has invoked section 68 of the Act to tax the full amount recd. On sale of shares as alleged unexplained cash credit as alleged income earned from undisclosed sources where AO has concluded the same in his order, if views of AO is summarized then crux of the same is astronomical long term capital gains earned by assessee defies common sense and is against the principle of human probability and surrounding circumstances which according to AO in background of investigation conducted by investigation wing Kolkata casts heavy and serious doubts on genuineness of long term capital gains earned by assessee. According to AO the long term capital gains earned by assessee is in nature of an accommodation entry and pre-arranged affair and as both the assessing officer had held that transaction in question are not genuine.

The assessee submits that the issues involved in these appeals have already been decided in favour of the assessee by the plethora of decisions passed by the Hon'ble Supreme Court & Hon'ble High Courts and ITAT wherein, similar views of lower authorities on basis of probabilities and stated investigation wing information, have been consistently overruled and exemption claimed u/s 10(38) of the Act has been restored once basic documents relating to transaction are put in place and same remained thoroughly undoubted by any direct enquiry on part of AO.

Reliance is placed on the following judicial pronouncement amongst others

- 1. PREM PAL GANDHI (2018)401 ITR 253 (P&H)*
- 2. Principal CIT vs Rungta Properties in ITA No.105 of 2016 dated 08 May, 2017 (Calcutta High Court)*

3. *M/s. Alipine Investments in ITA No.620 of 2008 dated 26th August, 2008*
4. *M/s. GTC Industries 164 ITD Page 1(ITA No.5996/Mum/1993) "E", BENCH MUMBAI (SPECIAL BENCH)*
5. *Navneet Agarwal, Legal Heir of Late Kiran Agarwal(I.T.A No. 2281/Kol/2017) "C" BENCH : KOLKATA*
6. *Jagmohan Agarwal I.T.A. No. 604/Kol/2018 "D" BENCH , KOLKATA*
7. *CIT V. Bhagwati Prasad Agarwal [2009- TMI-34738 (Cal HC) in ITA No. 22 of 2009 dated 29.4.2009*
8. *CIT vs. Vishal Holding and Capital Pvt. Ltd vide order dated 9th August, 2010 (Del)*
9. *CIT vs. Pooia Agarwal (Rajasthan High Court) September 11, 2017 (Date of pronouncement)*
10. *Arun Kumar vs. ACIT (ITAT Delhi) November 5, 2018 (Date of pronouncement)*
11. *DCIT vs. Saurabh Mittal (ITAT Jaipur) August 29, 2018 (Date of pronouncement)*
12. *Prakash Chand Bhutoria vs. ITO (ITAT Kolkata)*
13. *Pr CIT vs. Paradise Inland Shipping Pvt. Ltd (Bombay High Court)*
14. *ITO vs. Arvind Kumar Jain HUF (ITAT Mumbai)*
15. *In CIT vs. Shyam R. Pawar (2015) 54 taxmann.com 108 (Bom.),*
16. *CIT vs. Mukesh Ratilal Marolia (Bombay High Court) September 7, 2011*
17. *(Special Leave to Appeal (Civil) No(s).20146/2012 of the department in this case was dismissed by the Apex Court)*
18. *ITO vs. Indravadan Jain (HUF) (ITAT Mumbai) May 27, 2016 (Date of pronouncement)*
19. *Sunita Jain vs. ITO (ITAT Ahmedabad)*
20. *ACIT vs. Vineet Sureshchandra Agarwal (ITAT Ahmedabad)*
21. *Surya Prakash Toshniwal HUF vs. ITO (ITAT Kolkata)*
22. *Farrak Marker vs. ITO (ITAT Mumbai)*
23. *Arvind Asmal Mehta vs. ITO (ITAT Mumbai)*

24. *Cannon Industries (P) Ltd .v. DCIT (2015) 167 TTJ (Mum.)(Trib.)*
25. *ITO v. Deepak Popatlal Gala (Mum.)(Trib)(ITA no. 5920/Mum/2013, dt.17.03.2015) (AY. 2010-2011)*
26. *Ramesh Kumar & Co. v. ACIT (Mum.)(Trib.)*
27. *ACIT v. RamilaPravin Shah (Mum.)(Trib.)*

List of additional cases relied upon

1. *Tansukhrai Bodulat v. ITO [1962] 46 ITR 325*
2. *.Rajan Kumar Manchanda vs State of Karnataka 1990 SCC (Cri)537*
3. *Pyarelal Mittal vs Assistant Commissioner Of Income Tax 291 ITR 214(Gauhati)*
4. *CIT vs Simon Craves Ltd(1967)105 ITR 212(SC)*
5. *Dheeraj Lal Girdharilal vs CIT (1954)26 ITR 736 (SC)*

(1) Assessee's statement was recorded on oath and it has become now an affidavit. As per various Supreme Court rulings it is settled law that affidavit is a legal enforceable piece of evidence and cannot be ignored .None of the statement of the assessee has been controverted or proved false and hence the contents remained unchallenged and therefore has evidential value

(2) `It has been held in 212 ITR 199 (Orissa), that where the assessee has established the source of credits, , the assessee can be said to have discharged the onus cast on him and the onus now shift on the Department.

(3) The Calcutta High Court in case of CIT vs. Kamdhenu Vyapar Co 263 ITR 692 held that there is an inbuilt duty of the I.T.O.to help the assessee by issuing Summons to the depositors to justify or otherwise confirm the creditworthiness of depositors.

(4) It is the duty of the Assessing Officer and the authorities up to and including the hon'ble Tribunal to consider all the facts and record which is before them and which is in its command (which can be made available by him by exercising his authority) and then record its findings on all contentions. The enquiry too must be conducted in accordance with the rules of natural justice.

(5) As held in Jalan Timbers vs. CIT (1997) 223 ITR 11 (Gauhati)- cogent reasons are necessary for rejection of evidence.

(6) *Even if assessee requests for confrontation of back material and AO do not provide so, said back material will become unreliable and consequential addition will be not tenable at law.*

Submission on the addition of Rs. 1,25,00,000 under section 68 and disallowance on interest of Rs. 62,81,903 under section 57.

The assessee had taken various loans totally amounting to Rs.11,47,54,556/- out of the total loans , loans amounting to Rs.1,25,00,000/- were taken from three companies namely JMD Telefilms Industries, Blue circles services Ltd and JMD Sounds Ltd. All the parties are companies registered under the companies act and also having permanent account no. The entire loan of Rs. 1,25,00,000/- was taken by account payee cross cheques and in support of that the assessee has already filed the copies of the bank statements showing the amount credited to assessee's bank account with HDFC Bank (pl refer to page no. 58 and 59 of the paper book attached). On receiving these loans the assessee gave loans to other parties namely Grover Metal Alloys Ltd. and IPPL and earned a sizeable amount on account of interest and consequently offered for taxation. The assessee further submits that the assessee had deducted TDS on the interest payable to the parties from whom the said loans were obtained. In nutshell, parties were identified loans were taken through proper banking channels , TDS was deducted all the parties were companies which were registered under companies act and they were Income Tax assessee. To summarize the assessee had discharged the onus cast on him and it was for the AO to prove that the explanation of the assessee was false and not tenable. Nothing was brought on record to prove that the explanation was not satisfactory except some inferences made on suspicion and conjecture. The learned AO has made his addition solely on the reasons that the companies belong to Jagdish Purohit Group which was involved in providing accommodation entries. The AO was also of the opinion that the said group was running various shell companies but nothing was brought on record to prove that the loans taken by the assessee was an accommodation entry. Nothing was brought on record to prove as to what consideration was provided by the assessee to take this accommodation entries. The learned AO failed to appreciate that the entire interest paid on the loans was subjected to TDS provisions and other applicable sections of the Income Tax Act. The assessee submits that the AO did not disprove the bank transactions between the parties , did not dispute their existence and also did not dispute the genuineness of the transaction and it is therefore submitted that the learned AO failed in controverting the evidences furnished by the assessee or at least disprove them by bringing some cogent evidence on record . The assessee finally submits that no addition can be made on surmises or conjecture and hence the addition

deserves to be deleted. With regard to the disallowance of the interest of Rs. 62,81,903/- the learned AO has stated that the interest paid to those parties who have been charged with alleged fraudulent and manipulative activities and hence the loans were treated as unexplained cash credits. Therefore the interest, according to the AO was not allowable. It is submitted that the total loans were not restricted to Rs. 1,25,00,000/- but the assessee had obtained a total loan of Rs. 11,47,00,000/- and had earned an income of Rs. 1,42,59,612/- and paid interest of Rs. 1,08,59,003/- on the loans taken and therefore a net income of Rs.34,00,609/- was offered for taxation. At the cost of repetition it is once again submitted that the TDS provisions were applicable on the interest transactions whether received or paid and hence there is no chance to question or guess or make suspicions on these transactions and therefore the disallowance of interest is totally arbitrary , unjustified and without any basis and hence the addition made under this head also deserves to be deleted.

In view of above submissions, evidences and various judicial pronouncement relied upon by the assessee it is prayed that the impugned assessment order be declared a nullity as being without jurisdiction and the addition of Rs. 4,59,10,500/- made on account of treating capital gain as unexplained cash credit, Rs. 1,25,00,000/- made on account of treating unsecured loans as unexplained cash credit and Rs. 62,81,000/- disallowed under section 57 totally amounting to Rs. 6,46,91,500/- may kindly be deleted and the income declared by the assessee may be accepted."

10. After considering detailed submissions of the assessee and findings of the Assessing Officer, Ld. CIT(A) dismissed the grounds raised by the assessee observing as under: -

"7.0 GROUND NO.1:TRANSACTIONS IN PENNY STOCK:

7.1 to 7.3

DECISION-I:

7.4 During the course of appellate proceedings, the assessee contended that the AO made addition u/s 68 of the Act without considering the fact that the assessee fulfilled all the ingredients for claiming exemption u/s.10(38) of the Act. Also, it is submitted that,

during the course of assessment proceedings, the assessee filed all the details to substantiate the genuineness of transactions pertaining to purchase and sale of shares of M/s.Greencrest Financial Services Ltd. However, the AO disbelieved the transactions based on the information received from Investigation Wing, Kolkata. Accordingly, the assessee is of the opinion that transactions pertaining to LTCG cannot be termed as sham. In this regard, the assessee filed documentary evidence in the form of sample contract notes and ledger account of the assessee as appearing in the books of the broker M/s. India Advantage Ltd., bank statement of the assessee highlighting receipt from the broker, copy of transaction details with the broker, etc.

7.5 I have considered the ground of appeal, written submissions and documentary evidence filed by the assessee and examined the same in the light of evidence brought on record by the AO in support of treating the tax exempt LTCG as sham transaction. In this regard, it is a known fact that transactions such as purchase and sale of shares of penny stock companies are being used for the purpose of money laundering activities wherein shares of no value or negligible value are purchased and held for more than twelve months and transferred thereafter at an exorbitant price to convert the same into tax exempt LTCG u/s. 10(38) of the Act.

7.6 In the instant case, the assessee has selected the shares of M/s.Greencrest Financial Services Ltd. (earlier known as M/s. Marigold Glass Industries Ltd.)for the purpose of converting his unaccounted income into tax exempt LTCG. This particular modus operandi adopted by the assessee has been subject matter of investigation by various authorities, including Income Tax Department, SEBI etc., In respect of income tax cases, various Courts have held in favour of the Department observing that penny stock transactions should be judged by applying the theory of preponderance of probabilities in place of paper evidence furnished by the assessee.

7.7 In the instant case also, the assessee has tried to put across his view point by way of producing paper evidence which cannot be accepted on face of it without considering the exact nature of transactions and the purpose for which the assessee indulged in such transactions. In view of this, it is imperative to analyze whether the assessee has adduced adequate evidence to prove the genuineness of the transactions with regard to trading in shares of penny stock company which resulted in conversion of unaccounted income of the assessee into tax exempt LTCG.

7.8 At the outset, it is an admitted fact that, as explained elsewhere in this order, during the course of assessment

proceedings, the AO came to know that the assessee had transacted in shares of penny stock company wherein the share price of the company was manipulated in such a way that within a period of less than 23 months, the assessee had ended up in creating huge amount of tax exempt LTCG of Rs.4,49,74,987/-, the details of the same are tabulated below for ready reference

Sr. No.	Name of the stock	Purchase price (in Rs.)	STT paid (in Rs.)	Sale price (in Rs.)	Profit (in Rs.)
1	M/s.Greencrest Financial Services Ltd.	8,31,000	1,04,513	4,59,10,500	4,49,74,987

7.9 Further, in the impugned assessment order, the AO has analysed the facts of the case in detail and recorded a finding of fact that in respect of the penny stock company there are no real assets and no business activities carried out. Also, through accommodation entries, the price rigging was done to increase the scrip price significantly. Accordingly, after considering the facts and circumstances of the case, it is observed that the assessee fraudulently used the penny stock company in order to introduce his unaccounted income in the guise of LTCG with a mala fide intention to claim tax exemption u/s. 10(38) of the Act and evade legitimate taxes.

*7.10 As such, a detailed analysis of the facts brought out on record by the AO would reveal the fact that the explanation offered by the assessee and corresponding documentary evidence produced to support the same are not reliable and, therefore, devoid of merit. Thus, the same cannot be considered as the admissible evidence in the eyes of the law. Under the circumstances, on an objective analysis and appreciation of all the facts and surrounding circumstances of the case, I would like to apply the '**Theory of Human Probabilities**' and '**Theory of Preponderance of Probabilities**' in precedence over unreliable and inconsistent direct evidence filed by the assessee. Thus, I am of the considered opinion that assessee has created bogus LTCG to the extent of Rs.4,49,74,987/- by using the **penny stock** company as a conduit.*

7.11 At this juncture, it may be noted that merely because transactions were made through recognized stock exchange & demat account, funds were routed through banking channels and strictly followed the legally required paper work/documentation, the

assessee cannot hide the real intention behind indulging in such transactions.

Judicial Precedents on penny stocks:

7.12 *In this regard, I would like to rely upon various case laws on the subject, wherein **Hon'ble ITAT** and various **High Courts/ Supreme Court** have consistently held that transactions in **penny stock** companies wherein the assesseees have claimed exemption of LTCG u/s. 10(38) of the Act, cannot be considered as genuine transactions. A list of such cases is given as under:*

1). ITO Vs. Shamim M Bharwani (2016) 69 Taxmann.com 65 (Hon'ble ITAT B-Bench, Mumbai):

*In this case, on similar set of facts and circumstances involving transactions in **penny stocks**, the **Hon'ble Jurisdictional ITAT Mumbai** made an observation that the share which was traded in the range of Rs. 21/- to Rs.22/- in May 2005 witnessed a sudden spurt and rose to Rs. 465/- and registered a peak of Rs. 490/-, all this within a couple of months. The assessee sold the shares at Rs.487/- per share on 22.07.2005. In view of this, the Hon'ble ITAT observed that there are serious doubts about the genuineness of the sale price and the resultant gain. Further, the Tribunal held that mere documentary evidence in the face of unusual events surrounding the case cannot be accepted as conclusive evidence. It was further observed by the Tribunal that the case should have been judged by applying the theory of **preponderance of probabilities** instead of relying only on one kind of evidence. Accordingly, the addition made by the AO u/s. 68 of the Act was sustained.*

7.13 *In the instant case also, the share price of M/s. Greencrest Financial Services Ltd. was jacked up from Rs.8.92/- per share in the month of January 2012 to Rs.260/- per share in the month of June 2014. As such, the market price of the share has risen approximately **33 times within a span of 30 months**.*

7.14 . *At this juncture, it is also interesting to observe that the net worth of the company has risen to 47.12 crores from 6.06 crores between March 2011 to March 2015 i.e., within a duration of 4 years, whereas the earnings per share had dwindled to Rs.0.03/- from Rs.0.05/- and the turnover of the company reported to be Rs.0.76 crore in March 2011.*

7.15 *As demonstrated above, the typical characteristics of a **penny stock** are all found in the case of stock under reference i.e., M/s. Greencrest Financial Services Ltd., As such, the decision*

of Hon'ble Jurisdictional ITAT Mumbai in the case of ITO Vs. Shamim M Bharwani(supra)is squarely applicable to the facts of the case.

2). Dayaram Khandelwal Vs. Pr CIT & Sourabh Khandelwal Vs. Pr. CIT in WP. No. 1918/2018 & WP No. 1922/2018 dated 01.03.2018 (MP High Court)

3). Sanjay Bimalchand Jain Vs. Pr.CIT[2018] 89 Taxmann.com 196(Bom)

4 PCIT Vs. Usha Devi Modi (2023)151 taxmann.com 119 (Cal.)

5 Malvika Atul Shah Vs. ITO (2023) 147 taxman.com 381 (Guj.)

6. PCIT Vs. Nandkishore Agarwala (2022)143 taxmann.com 402 (Cal.)

7. Dinesh Kumar or Tulsyan (HUF) Vs. ITO (2023) 149 taxmann.com 98 (ITAT Pune)

8. Abhishek Gupta Vs. ITO (2023) 147 taxmann.com 21 (ITAT Indore)

9. Suman Poddar Vs. ITO (2019) 112 taxmann.com 330 (SC)

10. DCIT Vs. Pawan Kumar Malhotra (2010) 2 ITR (T) 250 (Delhi ITAT):

11. CIT Vs. Smt. SanghamitraBharali (2014) 361 ITR 481 (Gauhati (Cal.))

12. Success Tours & Travels Pvt. Ltd. [2017] 80 Taxmann.com 262 (Cal.)

13. Ratnakar M. Pujari, Mumbai vs ITO, Ward 25(3)(3), I.T.A. No.995/Mum/2012 Date of Order 03.08.2016

7.16 As such, a detailed analysis of the facts brought out on record would reveal the fact that the explanation offered by the assessee and corresponding evidence produced to support the same are not reliable and, therefore, devoid of merits. Thus, the same cannot be considered as admissible evidence in the eye of the law. Under the circumstances, on an objective analysis and appreciation of all the facts and

surrounding circumstances of the case, I would like to apply the 'Theory of Human Probabilities' and 'Theory of Preponderance of Probabilities' in precedence over unreliable and inconsistent direct evidence filed by the assessee. In this regard, reliance is placed on the following decisions of Hon'ble Supreme Court and Delhi High Court wherein it was held that apparent was not real in all the cases and emphasized the importance of the surrounding circumstances and application of the test of 'Human Probabilities' to prove that the apparent was not real.

- *Sumati Dayal Vs CIT [1995] 214 ITR 801(SC)*
- *CIT Vs. Durga Prasad More [1971] 82 ITR 540 (SC)*
- *CIT Vs. P. Mohana Kala & others [2007] 291 ITR 278 (SC)*
- *CIT Vs. Ms. Mayawati [2011] 338 ITR 563 (Del.)*
- *Sarita Aggarwal Vs. ITO [2015] 373 ITR 586 (Del.)*

7.17 Further, in support of circumstantial evidence taking precedence over direct evidence, I would like to place reliance on the decision of Hon'ble Supreme court in the case of Collector of Customs Vs. Bhoormul [1974] SCC (2) 544

7.18 Accordingly, after applying the 'Theory of Human Probabilities' and placing reliance on the above mentioned case laws, I treat the transactions made by the assessee through penny stock as sham transactions and, therefore, the resultant LTCG claimed as exempt u/s. 10(38) of the Act is not allowable. Hence, I hold that the entire amount of sale proceeds said to be received from sale of shares of penny stock company of Rs.4,59,10,500/- should be treated as undisclosed income of the assessee. Therefore, the AO has rightly brought the same to tax as unexplained cash credits u/s. 68 of the Act. Thus, the ground of appeal filed by the assessee on this issue is dismissed.

11. Aggrieved with the above order, the assessee filed the present appeal before us and at the time of hearing, with regard to Ground No.1, Ld.AR of the assessee brought to our notice relevant facts relating

to the case and filed its written submissions challenging the findings of the Ld. CIT(A), for the sake of clarity it is reproduced below: -

- i. The Ld AO on the basis of scrutiny assessment in the case u/s 143(2) and by issuing notice u/s 142(1) dated 10.08.2017 based on some information received from DDIT(Inv.), Kolkata that during investigation carried out in connection with bogus LTCG claimed on penny stocks, it was found that the assessee had also obtained such accommodation entries in the form of bogus LTCG of Rs. 4,59,10,500/- during the FY 2014-15 relevant to AY 2015-16 and for availing such accommodation entries.
- ii. The Ld. AO on the basis of irrelevant materials and statement statements of operator of M/s Marigold Glass Industries Limited wherein he has admitted of being a bogus entry provider and has provided bogus LTCG entry. The LTCG shown by the assessee from share transactions is treated as bogus and added as unexplained cash credit of **Rs. 4,59,10,500/-**

A. WHY ADDITION MADE BY AO. IS NOT SUSTAINABLE

In Assessment year **i.e. AY 2015-16** Assessee sold shares and booked the Long Term capital gain. Summary is given as under.

The brief facts of transaction are as under:

Name of scrip: Marigold Glass Industries Limited now known as Greencrest Financial Services Limited)

Date of Purchase	No. of shares Purchased	Date of split of shares	Ratio of split of shares	No. of shares after split
07.09.2012	2,00,000	05.06.2014	1:10	20,00,000

Particulars	Amount / Value / Dates
Date of Sale	21.08.2014 to 18.12.2014
Sale Consideration	4,59,10,500/-
Cost of Purchase	8,31,000/-
Less: Tax	1,04,513/-
Long Term Capital Gain exempt under section 10(38) of the IT Act	4,49,74,987/-

Share Demat A/c was at India Advantage Securities Ltd.

Shares sold through India Advantage Securities Ltd.

STT was paid.

- **It is pertinent to not that the Ld. Assessing Officer has been very imprecise about naming the operator (s) basis whom the investigation was carried out.**

Para 9 of the Assessment Order states that –

During the course of Investigation of LTCCG Scam, the investigation wing, Kolkata has covered more than 25 Entry operators. These operators have formed a group of Jamakharchi companies, for facilitating bogus LTCCG/STCCG. Many entry operators have been covered U/S 133A and 132 of the Income Tax Act. One of the **operator Shri Devesh Upadhyay whose statement was recorded on oath u/s 131 of the I.T. Act on 01.05.2015**. As per the statement the following companies are controlled and managed by Devesh Upadhyay to facilitate bogus LTCCG/STCCG which are also the exit providers in this case:

SL No.	PAN	EXIT PROVIDERS
1	AADCH4164L	HEADFIRST VINTRADE PRIVATE LIMITED
2	AADCI5139E	INDRAWATI NIRMAN PRIVATE LIMITED
3	AAECC9285A	CHEROOT VANUYA PRIVATE LIMITED
4	AAECDB010E	DHYANESHWAR DEALERS PVT LTD
5	AAF CG47731	GOLDENSIGHT TRADERS PRIVATE LIMITED
6	AAHCP3861E	PHAGUN BROKING & CONSULTANCY PRIVATE LIMITED
7	AAHCPS209Q	PADMAWATI TRADEVIN PRIVATE LIMITED

Further, Shri Devesh Upadhyay has also mentioned the names of the companies which were used for routing and providing accommodation entries to beneficiaries which are also the exit providers in the case of the assessee.

SL No.	PAN	EXIT PROVIDERS
	AADCD7140G	DEVATMA DISTRIBUTORS PRIVATE LIMITED
	AAECK7329P	KAPEESHWAR VINTRADE PRIVATE LIMITED
	AAHCM8752F	MAHAMANI TRADELINK PRIVATE LIMITED

Para 15 of the Assessment Order states that -

15 Role of brokers & their help to operators for providing the arranged LTCCG:

The Investigation Wing, Kolkata has carried out the investigation about the role of brokers in this entire process. As narrated out in the modus operandi, it was seen that it is essential to the exit providers to open an account with brokers & purchase the shares in huge quantities from beneficiaries so that safe exit can be provided. It is also seen that most of the beneficiaries are big businessmen & require tax free funds in form of LTCCG in huge quantity. Due to this reason the sizeable amount required to be maintained as balance in the exit provider's account with broker. It is seen that Investigation Wing, Kolkata & others have recorded the statements of brokers/persons related with the brokers. The confession by Shri Devesh Upadhyay as mentioned above, is also a circumstantial I evidence against assessee that assessee's LTCCG is arranged one.

.....

Para 17 of the Assessment Order states that –

Para 17. Findings of the Investigation Wing.

17.1 Kolkata Investigation Directorate had undertaken investigation into 84 penny stocks (Sunrise Asian being one of it) and has given detailed findings indicating bogus LTCCG/STCL entries claimed by large number of beneficiaries. The modus operandi involving operators, intermediaries and the beneficiaries has been detailed in the investigation report prepared and disseminated by the Kolkata Directorate. Similar investigations were also conducted by the Directorate of Investigation at Mumbai and Ahmedabad.

17.2 The basic aim of this dubious scheme was to route the unaccounted money of LTCCG Beneficiaries into their account/books in the garb of Long Term Capital Gain. This entry of LTCCG 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 LTCCG. For implementing this scheme, shares of some Penny Stock Companies were used. The same modus is adopted for providing accommodation entry of bogus Loss.

17.3 Once the period of 1 year has passed and the share prices have been sufficiently rigged, the beneficiaries sell their shares at the inflated prices on the Stock Exchange. A point worth

noticing here is that the purchase of the shares is not made by the public but by the bogus entities managed and controlled by the promoter of the penny stock company or the operator which are referred to as "Exit Providers". The unaccounted money of the beneficiaries is routed to these bogus entities "Exit Providers" and the shares held by the beneficiaries are bought by these bogus entities from the money which is the unaccounted money of the beneficiaries. Sometimes, the shares of the LTCG beneficiaries are purchased by the beneficiaries of LOSS who later sell their shares when the price falls and hence book bogus LOSS in their books. All these transactions are done on the stock exchange and as the sale of shares are done after a holding of one year they fall into the category of Long Term Capital Gain which is an exempt income as per the IT Act, 1961.

Para 18 of the Assessment Order states that –

18. Findings in the case of Assessee.

18.1 Data obtained from various sources was thoroughly verified and analysis was done as per share market fundamentals. After analysis and due examination of records, it was found that long term capital gain of Rs. 4,49,74,987/- shown in the return as the sale of shares of 'Greencrest Financial Services Ltd' was pre-arranged method employed by the assessee in connivance with operators to evade taxes.

18.2 As discussed above, the assessee traded in single scrip and has made huge profits. All the financial details of company for the relevant period were verified. Balance sheet, profit and loss account, trading pattern of this scrip in share market and financial analysis of this scrip was undertaken.. The finding that transactions in shares of M/s. Greencrest Financial Services Ltd shown by the assessee are non-genuine is further cemented in consequence to the inquiries conducted u/s. 133(6) of the Act in respect of the Exit-Providers and in the light of action taken by SEBI against them. Also as stated in the preceding paragraph, the investigation wing, Kolkata had also given specific findings in respect of the exit providers involved in this case. The analysis has been discussed in detail in the aforesaid paras. The analysis has been discussed in detail in the aforesaid paragraphs.

Upon reading the above, we are unable to understand what the Ld. Assessing Officer is trying to say. The Ld. Assessing Officer is unclear about who the operator / exit provider is.

The Companies mentioned in the Para 15 of the Assessment Order under 'Share Brokers' as reproduced above, are not the same Companies in which the assessee has invested.

Further the operators / exit providers named in the list in Para 9 of the Assessment Order 'Exit Providers' as reproduced above, do not match with the operator mentioned in Para 15 of the Assessment Order under 'Findings of Investigation wing'.

The entire assessment is based on the statements and oath of the operators who are nowhere related to the Company in which the assessee has invested. The Ld. Assessing Officer has vaguely mentioned operators who are nowhere related to the assessee's case.

The Ld. Assessing Officer mentions about connivance of assessee with the operators Para 18 of the Assessment Order

*.....it was found that long term capital gain of Rs. 4,49,74,987/- shown in the return as the **sale of shares of 'Greencrest Financial Services Ltd' was pre-arranged method employed by the assessee in connivance with operators***

The Ld. Assessing Officer has not been able to provide any evidence about the mutual connivance of the assessee and the operators.

We observe that the basis of assessment itself are unclear and the Ld. Assessing Officer is uncertain about the proofs that are relied upon. If the basis of the Assessment Order itself are not true or baseless the addition and the rejection of exemption are bad in law. As addition do not stand then there shall not be any demand.

SUMMARY

- a) The revenue relied on the findings of the Directorate of Investigation of Kolkata and transaction details of the shares done by assessee from stock exchange and on responses of companies who were exit providers to beneficiaries in the scrip of M/s Greencrest Financial Services Limited which established that M/s Greencrest Financial Services Limited is a mere bogus company / paper company and individuals named above are the operator of the Company, their statements were recorded.
- b) It was noticed that these companies were engaged in issuing bogus bills for providing long term capital gain/loss, speculation loss/profit etc. It was noticed by the Ld. AO that the assessee has purchased shares of M/s Greencrest Financial Services Limited.
- c) On this basis the assessee's case was brought under assessment without any tangible material on record and on basis of information and statement of third party.

THE SUMMARY TO DETAILS, FACTS AND EXPLANATIONS IN THE CHRONOLOGICAL ORDER OF THE TRANSACTIONS OF LONG TERM CAPITAL GAIN TO ESTABLISH THE GENUINENESS OF THE TRANSACTION EXEMPT UNDER SECTION 10(38) ARE AS UNDER:

- i. The appellant is an investor in securities for last several years.
- ii. The assessee received a letter from M/s. Marigold Glass Industries Ltd. (now known as Greencrest Financial Services Limited) to Udayan Grover informing about their Preferential Equity Shares Issue of Rs. 10/- each at a premium of Rs. 2/- per share on 1.11.2012. **(Pg No. 12-13 of Paper Book)**
- iii. The said issue of Preferential Equity Shares have been approved by the SEBI.
- iv. On 07.08.2012, the assessee received a letter of approval from M/s. Marigold Glass Industries Ltd. for the proposed allotment of Preferential Equity Shares along with bank details for making payment on or before 18 September 2012. **(Pg No. 14-15 of Paper Book)**
- v. The Appellant has made investment in the Preferential Equity Shares in **M/s. Marigold Glass Industries Ltd.**, a Profit making company. The Appellant had applied for **2,00,000 Preferential Equity Shares in the FY. 2012-13** of Rs. 10/- each fully paid up at a Premium of Rs. 2/- per share, thus **paid Rs. 12/- per share** as cost of acquisition aggregating to **Rs. 24,00,000/-**.
- vi. The Appellant has paid the full consideration on 07.09.2012 by account payee cheque and as such the payment was made through proper banking channel. **(Pg No. 16 of Paper Book)**
- vii. The assessee received a copy of allotment letter dated 15.09.2012 confirming allotment of 200000 shares. The shares were issued with a lock-in period of one year from the date of issue. The assessee has to compulsorily hold the Preferential Equity Shares from 14.09.2012 to 13.09.2013. **(Pg No. 17 of Paper Book)**
- viii. The assessee received a share certificate dated 14.09.2012 towards the purchase of Preferential Equity Shares. **(Pg No. 44 of Paper Book)**

- ix. The Appellant then dematerialized the shares and the same got credited in his demat account. **(Pg No. 19-20 of Paper Book)**
- x. On 02.05.2014, the Company M/s. Marigold Glass Industries Ltd. changed to M/s. Greencrest Financial Services Limited
- xi. M/s. Greencrest Financial Services Limited announced a split issue of shares. The face value of its shares were split from Rs 10 to Re 1 each in June 2014. **part of paper book pg. 21-22.**
- xii. The Appellant then, through his share broker, **sold the Shares after holding for 22 months at the Bombay Stock Exchange** and delivered the shares in demat form to the stock exchange clearing house and also received the sale consideration from the recognized stock exchange during the FY. 2014-15 relevant for AY. 2015-16.
- xiii. The shares were sold through India Advantage Securities Ltd. who were registered share brokers of Bombay Stock Exchange and Copies of sale bills / contract notes issued by India Advantage Securities Ltd. is part of paper book **(Pg No. 28-82 of Paper Book)**
- xiv. The said sales consideration duly came in Banking Channel and reflected in Bank Statement. **(Pg No. 84-92 of Paper Book)**
- xv. There are no evidences that assessee given cash to any entry operators.
- xvi. The assessee also submitted copy of Demat Account where the said share inwards and outwards clearly reflected in Transaction statement issued by India Advantage Securities Ltd.**
- xvii. The Ld. AO is silent on the Shares DEMAT Account and has not considered important evidences.
- xviii. The shares were sold through recognised stock exchange on which the appellant has paid Security Transaction Tax (STT) and other statutory taxes. The same were paid through proper banking channel. It is well known that when the shares are sold at online platform the stock exchange, the seller of the shares does not know as to whom the shares are being sold. The shares are transferred in DMAT form to the stock exchange clearing house and the seller only receives sales consideration from the stock exchange through the share broker. Therefore, neither the seller knew the purchasers, nor the purchasers knew the seller. **In absence of any corroborative evidence that both Seller and Purchaser have indulged into some clandestine transactions, there is not even a remote possibility of hobnobbing.** Therefore, the appellant cannot be said to be a part of the group indulging into rigging of share prices of the script as alleged by the Ld AO.
- xix. During the course of assessment proceedings the appellant submitted following documents to substantiate his claim of long term capital gain which is exempted under section 10(38) of the Act:-
- Copy of share allotment
 - Copies of sale bills
 - Copy of bank statement
 - Copy of demat account
 - Copy of contract notes

- xx. At the Bombay Stock Exchange, the price of the shares of M/s Greencrest Financial Services Limited had continuously been in the range of Rs. 9 - 248 per share from January 2012 to January 2015 a period of more than 3 year.
- xxi. However, one point to be noted that the finding of the Ld. AO is wrong and shows that the Ld. AO has no knowledge about the share transactions.** The Ld.AO has relied on mere information by Investigation Directorate wing.
- xxii. It is pertinent to mention that the Appellant sold the shares during the month of August 2014 to December 2014 in the FY. 2014-15 from a price range of Rs. 62/- to 68/- per share and the price of the shares were in the same range for next 34 month even after the shares were sold by the Appellant. In fact the price had gone to as high as Rs. 70/- during the month of September 2015, a year later.
- xxiii.** The Appellant has purchased the shares directly from the Company under Private Placement and sold at Bombay Stock Exchange through its share brokers. The shares were received directly from the company and then dematerialized and on sale, the demat shares were delivered to the clearing corporation of BSE through its share broker.
- xxiv.** The Ld. AO denied the claim of long-term capital gain on sale of shares under section 10(38) and made addition of LTCG under section 68. The shares had been directly allotted by the company and the payment had been made through account payee cheques duly disclosed by assessee in the earlier year and said purchase of shares was evidenced not only from the bank statement but also by the allotment of shares. **Thus, possession of the shares was not in doubt at all because same was also reflected in Demat account.**
- xxv.** Not only that, the sale of shares was also evidenced from transaction undertaken through registered stock at a specific trade time in BSE and after the sale of shares, the net receipts had been credited to the assessee's bank account. Hence, the nature of the transaction was clearly purchase and sale of shares and the source of the credit, from the material facts on record were quite evident that it was from the sale of shares. As there was no tangible material brought on record to convert these transactions then it is very difficult to treat the sale proceeds of the shares as unexplained cash credit to be added under deeming provisions of section 68. There was no evidence or any whisper that some unaccounted money had been routed and addition of sale proceeds needs to be deleted.

RELIANCE IS ALSO PLACED ON FOLLOWING CASE LAWS:-

SN	CITATION	OBSERVATION
1.	[2015] 54 taxmann.com 108 (Bombay) HIGH COURT OF BOMBAY Commissioner of Income-tax-13 v. Shyam R. Pawar* DECEMBER 10, 2014	Section 68 of the Income-tax Act, 1961 - Cash credit (Share dealings) - Assessment years 2003-04 to 2006- 07 - Assesse declared capital gain on sale of shares of two companies - Assessing Officer, observing that transaction was done through brokers at Calcutta and performance of concerned companies was not such as would justify increase in share prices, held said transaction as bogus and having been done to convert unaccounted money of assessee to accounted income and, therefore, made addition under section 68 - On appeal, Tribunal deleted addition observing that DMAT account and contract note showed credit/details of share transactions; and that revenue had stopped inquiry at particular point and did not carry forward it to discharge basic onus - Whether on facts, transactions in shares were rightly

SN	CITATION	OBSERVATION
		held to be genuine and addition made by Assessing Officer was rightly deleted - Held, yes [Para 7] [In favor of assessee]
2.	[2014] 41 taxmann.com 118 (Hyderabad - Trib.) IN THE ITAT HYDERABAD BENCH 'A' Income-tax Officer, Ward 2, Nizamabad v. Smt. Aarti Mittal* NOVEMBER 6, 2013	Section 10(38) of the Income-tax Act, 1961 - Capital gains - Exemption of, on transfer of securities [Genuineness of transactions] - Assessment year 2006- 07 - Assessee filed its return declaring long term capital gains on shares traded in Calcutta Stock Exchange - Since sale transactions took place through authorized stock exchange and securities transaction tax was paid, assessee claimed entire sale proceeds arising out of transaction as long term capital gain exempt from tax under section 10(38) - Assessing Officer did not believe transactions in question as genuine and treated entire sale proceeds as 'Income from Other Sources' - Commissioner (Appeals) opined that in absence of any positive evidence, merely on basis of suspicion, transactions could not be held to be not genuine - Commissioner (Appeals) thus set aside addition made by Assessing Officer - It was noted that even though enquiry with Chennai Stock Exchange (CSE) revealed that no purchase had taken place through it, since transactions were in physical form and done through off market, question of same being routed through floor of a recognized stock exchange did not arise - It was also apparent that assessee having purchased shares in question, converted them in D-mat form and thereupon sale of those shares was carried out through CSE after paying Securities Transaction Tax - Whether on facts, transactions of purchase and sale of shares were to be regarded as genuine in nature and, therefore, assessee's claim was rightly allowed - Held, yes [Para 23] [In favor of assessee]
3.	[2017] 77 taxmann.com 260 (Ahmedabad - Trib.) IN THE ITAT AHMEDABAD BENCH 'B' Pratik Suryakant Shah v. Income-tax Officer, Ward- 10 (3), Ahmedabad* OCTOBER 21, 2016	Section 10(38), read with section 147, of the Income-tax Act, 1961 - Capital gains - Income arising from transfer of long-term securities (Bogus transactions) - AY 2006-07 - Assessee purchased 3000 shares of company 'T' through a stock broker - These shares were transferred to assessee's demat account - However, said stock broker submitted before authorities that he was providing accommodation entries for taking profit or loss by showing purchase or sales of shares and securities commission from beneficiary parties and that assessee was one of beneficiary of such accommodation entries - Assessing authorities reopened assessment of assessee - Whether since shares of said company were listed in BSE/NSE and these were also transferred to demat account of assessee, assessee's claim of exemptions of long-term capital gain on sale of shares could not be denied on basis of submission of said broker - Held, yes [Paras 17 and 18] [In favor of assessee]
4.	ACIT vs. Vineet Sureshchandra Agarwal (ITAT Ahmedabad) ITA	Bogus capital gains from penny stocks: The fact that the Stock Exchanges disclaimed the transaction is

SN	CITATION	OBSERVATION
	No. 1442/Ahd/2013 & CO No. 209/Ahd/2013 Assessment Year: 2005-06	irrelevant because purchase and sale of shares outside the floor of Stock Exchange is not an unlawful activity. Off-market transactions are not illegal. It is always possible for the parties to enter into transactions even without the help of brokers. Therefore, it is not possible to hold that the transactions reported by the assessee were sham or bogus
5.	Surya Prakash Toshniwal HUF vs. ITO (ITAT Kolkata) ITA No.1213/Kol/2016 Assessment Year :2005-06	Bogus capital gains from penny stocks: Long-term capital gains claimed exempt u/s 10(38) cannot be treated as bogus unexplained income if the paper work is in order. The fact that the Company whose shares were sold has violated SEBI norms and is not traceable does not mean that the assessee is at fault
6.	CIT vs. Mukesh Ratilal Marolia (Bombay High Court) INCOME TAX APPEAL NO. 456 OF 200 7 7th September 2011	S. 10(38)/ 68: Long-term capital gains on sale of "penny" stocks cannot be treated as bogus & unexplained cash credit if the documentation is in order & there is no allegation of manipulation by SEBI or the BSE. Denial of right of cross-examination is a fatal flaw which renders the assessment order a nullity
7.	Smt. Sunita Jain, V/s. Income Tax Officer, Ward10 (3), Ahmedabad ITA. Nos: 501 & 502/AHD/2016 Assessment Year: 2008-09	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
8.	ITO-24(3)(1) V/s M/s Arvind Kumar Jain HUF ITA No. 4862/MUM/2014 Assessment Year: 2005-06	Where assessee's broker share transaction was bone fide in all respect, merely because share broker was tainted violating SEBI regulations, would not make assessee's share transactions bogus.
9.	Kamla Devi S. Doshi V/s. The Income Tax Officer Ward 16(3)(1), I.T.A. No.1957/Mum/2015 Assessment Year: 2006-07	Bogus penny stocks capital gain: The s. 131 statement implicating the assessee is not sufficient to draw an adverse inference against the assessee when the documentary evidence in the form of contract notes, bank statements, STT payments etc prove genuine purchase and sale of the penny stock. Failure to provide cross-examination is a fatal error
10.	Shri Sunil Prakash V/s. ACIT - 15(2) I.T.A./6494/Mum/2014, Assessment Year: 2005-06	S. 68 bogus gains from penny stocks: If the AO relies upon the statement of a third party to make the addition, he is duty bound to provide a copy of the statement to the assessee and afford the opportunity of cross-examination. Failure to do so vitiates the assessment proceedings. A transaction evidenced by payment/receipt of share transaction value through banking channels, transfer of shares in and from the Dmat account, etc cannot be treated as a bogus transaction so as to attract s. 68
11.	Pramod Kumar Lodha vs. ITO (ITAT Jaipur)	S. 10(38) Bogus long-term gains from penny stocks: The transaction cannot be treated as bogus until and unless a finding is given that the shares were acquired by the assessee from the person other than the broker claimed by the assessee. The enquiry conducted by the Investigation Indore is not a conclusive finding of fact in view of the fact that the

SN	CITATION	OBSERVATION
		shares were duly materialized & held in the d-mat account. Merely supplying of statement to the assessee at the fag end of the assessment proceedings is not sufficient to meet the requirement of giving an opportunity to cross examine. The AO cannot proceed on suspicion without any material evidence to controvert or disprove the evidence produced by the assessee
12.	<i>Navneet Agarwal vs. ITO (ITAT Kolkata)</i>	Bogus Capital Gains From Penny Stocks: In order to treat the capital gains from penny stocks as bogus, the Dept has to show that there is a scam and that the assessee is part of the scam. The chain of events and the live link of assesses action giving her involvement in the scam should be established. The Dept cannot rely on alleged modus operandi & human behavior and disregard the evidence produced by the assessee. All imp judgements referred
13.	<i>ACIT vs. Vineet Sureshchandra Agarwal (ITAT Ahmedabad)</i>	Bogus capital gains from penny stocks: The fact that the Stock Exchanges disclaimed the transaction is irrelevant because purchase and sale of shares outside the floor of Stock Exchange is not an unlawful activity. Off-market transactions are not illegal. It is always possible for the parties to enter into transactions even without the help of brokers. Therefore, it is not possible to hold that the transactions reported by the assessee were sham or bogus
14.	<i>Meenu Goel vs. ITO (ITAT Delhi)</i>	Bogus Capital gains from penny stocks: Capital gains from penny stocks cannot be assessed as unexplained cash credit u/s 68 if the assessee has produced documentary evidence to prove the source, identity and genuineness of the transaction and the AO has not found any fault with it. The fact that the investigation dept has alleged that there is a modus operandi of bogus LTCCG scheme is not relevant if the same is not substantiated

Reliance is also placed on following case laws where such purchase and sale were allowed.

1. C.I.T Vs. Mukesh Marolia ITA 456 of 2007-Bombay HC
2. Muksh R Morolia V/s Add CIT(2006)6 SOT 247
3. ITO V/s. Mrs. Rasila N Gala ITA No.1773/Mum/2010
4. CIT V/s Kan Singh Rathore ITA 192of 2014 (Rajasthan HC)
5. M/s SBD Estate Private Limited V/s. ITO 584/Mum/2015
6. Ms Farrah Marker V/s ITO ITA No.3801/Mum/2015 order dated 27/04/2016
7. Mr.Arvind Asmal Mehta V/s ITO ITA No.2799/Mum/2015 order dated 29/02/2016
8. Smt Jyoti D Shah V/s ITO ITA No.1843/Mum/2012

9. ITO V/s Deep Darshan Properties Pvt Ltd.2117 & 2118/Mum/2014
10. CIT-13 V/s Shyam R.Pawar (2015) -54 Taxmaan.com108- Bombay High Court
11. Jafferli K.Rattonsej vs DCIT ITA No.5068 Mum 2009
12. Kamla Devi S. Doshi ITA No. 1957/Mum/2015
13. Pratik Suryakant Shah (2017)-77 Taxmann.com 260 Ahemdabad Tribunal
14. Aarti Mittal (2014) 41 Taxmann.com 118(Hyderabad Tribunal)
15. CIT Appeal order in case of Umang D Soni
16. C.I.T Mumbai Vs. Mukesh Ratilal Marolia Supreme Court - 2015 (9) TMI 854 - SUPREME COURT
17. The Commissioner of Income Tax-16. Vs. Mrs. Kesar A. Gada 2015 (1) TMI 1220 - BOMBAY HIGH COURT
18. Ramprasad Agarwal vs ITO2(3)(2), Mumbai[2018] 100 taxmann.com 172 (Mumbai - Trib.)
19. Shri Amar Nath Goenka Vs. The ACIT, Circle-20(1), New Delhi. ITA.No.5882/Del./2018
20. Mukta Gupta vs. ITO, Ward-1(4), Ghaziabad .I.T.A. No.2766/DEL/2018
21. AJAY GOEL vs .I.T.O, WARD 39(5)ITA No. 4481/DEL/2018
22. Principal Commissioner of Income-tax,(Central), Ludhiana v. Prem Pal Gandhi (P&H HC)
23. CIT VS Bhagwati Prasad Agarwal ITA No.22/Kol/2009 Calcutta High Court
24. Mr. Shyam R Pawar vs DCIT Central Circle 24 & 26 ITAT Mumbai (ITA No.5585/M/11 , 5620,5621 & 5622/M/11)
25. CIT (Jamshedpur) vs Arun Kumar Agarwal (HUF) Jharkhand HC
26. PCIT (Ludhiana) vs Sh. Hitesh Gandhi P &H HC
27. ACIT Central Circle-II, Jalandhar vs Hitesh Gandhi ITAT Amritsar [I.T.A. No.129(Asr)/2014]
28. Manish Kumar Baid and Mahendra Kumar Baid vs ACIT,Cir-35, ITA No.1236,1237/Kol/2017[Kolkata-Tribunal]
29. Shri Jignesh Desai vs Income Tax Officer 35(2),ITA No.1263/Kol/2017) [Kolkata-Tribunal]
30. Navneet Agarwal, Legal Heir of Late Kiran Agarwal vs ITO, Ward-35(3) ITA No.2281/Kol/2017 [Kolkata-Tribunal]
31. Kiran Kothari HUF vs ITO Ward 35(3), Kolkata ITA No.443/Kol/2017
32. Shri Gautam Kumar Pincha vs ITO 34(4), Kolkata (ITA No.569/Kol/2017)
33. Ketulkumar D Jaiswal vs ITO S.K. ward-4 Modasa (ITA No. 546/Ahd/2015) [Ahemdabad-Tribunal]
34. CIT-I Jaipur vs Smt Pooja Agarwal , Shri Jitendra 2017 Rajasthan High Court

35. Shri Pramod Jain, Shri Ankit Jain, Shri Sunil Jian, Naina Jain and Smt .Nisha Jain vs DCIT & ITO Wd 3(2) Jaipur [Jaipur –Tribunal]
36. Shri Vivek Agarwal vs ITO Wd 1(2), Jaipur [Jaipur –Tribunal]
37. Mr Vimalchand Gulabchand ,Mr Praveen Chand , Mr.Gatraj Jain & Sons (HUF), Mr Mahendra Kumar Bhandari vs ITO Chennai , ITA No. 2003,1721,2293,2748/CHNY/2017 [Chennai – Tribunal]
38. Anand Paul vs ACIT Circle-50 ITA No.165/Kol/2015 [Kolkata –tribunal]
39. M/s Bhoruka Engineering Industries Ltd vs DCIT Bangalore, KARNATAKA HIGH COURT
40. CIT vs Pushpa Malpani ITA No.50 of 2010 Rajasthan HC
41. M/s Amit Rastogi HUF , Shilpa Rstogi, Sadhana Rastogi, Ajay Kumar Rastogi vs ITO wd1(1) wd-2(3), Meerut ITA No.2128/2129/2131/2132/Del/2018 [Delhi-Tribunal]
42. Smt Shikha Dhawan vs ITO, Wd-4(2) ITA No.3035/Del/2018 [Delhi-Tribunal]
43. Shamim Imtiaz Hingora, Parvez Hingora, Shabeena Irfan Hingora, Arif Abdul Razak Hingora vs ITO Wd-I Jalna, ITA No.1875,1876,1877,1878/Pun/2018 [Pune-Tribunal]
44. CIT (A)-45, MUMBAI order in case of Parul Hemant Patel
45. Mukesh B Sharma Vs ITO 11(3)(2) ITA No.6249/Mum/2018
46. Deepak Nagar Vs The ACIT-17 ITA No. 3212/Del/2019
47. Kaushalya Agarwal Vs ITO 35(3) ITA No.194/Kol/2018
48. Vijayrattan Balkrishan Mittal Vs DCIT ITA No. 3427, 3428, 3429/Mum/2019
49. Amit Mafatlal Shah vs ACIT ITA No. 5793/MUM/2019
50. Dipesh Ramesh Vardhan and others vs DCIT CC 2(2) ITA No.7648, 7662, 7651, 7650 and 7649/MUM/2019
51. Nishant Kantilal Patel and Others vs. ITO ITA No 05,06,07 and 10/SRT/2019
52. Ld. Commissioner of Income Tax (Appeals) at National Faceless Appeal Center and deleted all the additions made by the Ld. AO vide Order No. ITBA/NFAC/S/250/2023-24/1053055362(1) dated 22.05.2023 to relevant Appeal No. CIT (A) 13, Mumbai/10189/2017-18

B. LEGAL POSITION ON GENERAL STATEMENT OF OPERATORS:-

ADDITION MADE ON BASIS OF STATEMENT OF THIRD PARTY i.e. OPERATORS

- 1.** The Ld. Assessing Officer has been very imprecise about the statements provided by the operators basis which the scrutiny assessment has been conducted.
- 2.** Since has mentioned name of the operators in the Assessment Order but none of those are related to the Company in which the assessee has invested. The Ld. Assessing Officer has been very unclear about the statements of the operators which are the key evidences on

which Ld. Assessing Officer has relied and based on which the entire assessment is conducted.

3. Since there is no clarity about the key evidences, the assessment order should be squashed.

**WITHOUT PREJUDICE TO ABOVE
RELIANCE IS PLACED ON VARIOUS JUDGMENT WHERE ADDITION MADE ON THE BASIS
OF THIRD PARTY STATEMENTS HAVE BEEN DELETED:-**

- A. The Hon'ble Supreme Court in the case of Omar Salav Mohamed Sait reported in (1959) 37 ITR 151 (SC) had held that no addition can be made on the basis of surmises, suspicion and conjectures.
- B. The Hon'ble Supreme Court in the case of Umacharan Shah & Bros. Vs. CIT 37 ITR 271 held that suspicion however strong, cannot take the place of evidence.
- C. Hon'ble Calcutta High Court in the case of CIT vs. Bhagwati Prasad Agarwal in I.T.A. No. 22/Kol/2009 dated 29.04.2009 at para 2 held as follows:
- a. "The tribunal found that the chain of transaction entered into by the assessee have been proved, accounted for, documented and supported by evidence. The assessee produced before the Commissioner of Income Tax(Appeal) the contract notes, details of his Demat account and, also, produced documents showing that all payments were received by the assessee through bank."

FURTHER RELIANCE IS ALSO PLACED ON FOLLOWING JUDICIAL PRECEDENTS:-

- (a) ITO 31(2)(2) vs. Kalpana M Ruia ITA 4130 and 4131/M/2015 (Mum-Trib)
- (b) CIT vs. Pinakin L Shah (ITA 3380 of 2010 dated 18-01-2012)(Bom)
- (c) Smita P Patil Vs. ACIT-CC-1 (ITA Nos. 1407, 1408 & 1409/PN/2012)
- (d) Arvind Asmal Mehta vs. ITO (ITA No.2799/Mum/2015)(Mum-Trib)
- (e) Smt. Sarita Devi vs. ITO (ITA No.1228/Hyd/2016)(Hyd-Trib)

THE LD. AO HAVE NOTHING ON RECORD TO SUGGEST THAT:-

- (a) Traded Shares (Scrips) were not listed on stock exchange.
- (b) Traded Shares (Scrips) are of bogus companies.
- (c) Demat / Bank account not in the name of assessee or do not exist.
- (d) Enquiry with Depository Participant ie NSDL/CDSL As share is purchased and sold through Stock Exchange.
- D. **ASSESSMENT IS COMPLETED ON SUSPICION, WHIMS, ASSUMPTION AND SURMISES,
WITHOUT PROVIDING COPIES OF MATERIAL RELIED UPON, WITHOUT PROVIDING
OPPORTUNITY TO CROSS EXAMINE PERSON WHOSE STATEMENT RELIED UPON IS
AGAINST THE PRINCIPLE OF NATURAL JUSTICE AND LIABLE TO BE ANULLED:**

The Learned Assessing Officer from page 95 onwards in para 17 Under the Heading "Conclusion" repeated the same contentions in the report as his own reasoning for making the addition under the Summary of the Points of the discussion have been broadly given under sub-headings Sale of

shares and unusual rise in the price, Findings of Investigation wing, Analysis of transactions, Failure of Assessee to discharge her onus, Financial analysis of the penny stock companies, Order of the SEBI, Cash trail in the accounts of the entry providers and arranged transactions.

- i. The shares are purchased from the company directly through allotment.
- ii. In assessee's case the shares were sold through M/s Harjivandas Nemidas Securities Pvt. Ltd on BSE and how the assessee will know about the exit provider when he only gives direction of sale to his broker to sell, on what basis will assessee know that the shares have been purchased by whom and where and when and in which quantity.
- iii. What arrangement is the Assessing Officer speaking about, he cannot just by mentioning that some arrangement was made and say prices were rigged and cash was routed back without any proof or any tangible material on record.
- iv. The evidences discussed in the order give rise to suspicion only and does not indicate and support the finding arrived at by the learned Assessing Officer. The learned Assessing Officer is working on probability which has no legs and not supported by any cogent material in his possession suspicion howsoever may be strong cannot take place of evidence. No doubt this may lead to some kind of suspicion in the mind of the Assessing Officer but the Assessing Officer should have made proper enquiry and bring cogent material on record to support and justify his stand before making addition to the total income of the appellant. The assessment cannot be made on the basis of whims, suspicion, assumption and surmises. The addition made to the total income of the appellant has to be supported by documentary evidences. Thus the learned Assessing Officer is wrong in arriving at the conclusion that the appellant has manipulated the transactions in connivance with operators to evade the taxes on his unaccounted income. The learned Assessing Officer should have made proper enquiry and establish beyond doubt that transactions made by the appellant is nothing but accommodation entries.
- v. It is submitted that the appellant has not been provided with any material on the basis of which observation is made that appellant have obtained accommodation entries. The appellant claim that there is no such material in possession of the Assessing Officer which support such observation. This observation is made on the basis of suspicion, assumption and surmises.
- vi. During the course of assessment the appellant produced copies of contract notes in support of long term capital gains earned by him. He has also produced copies of bank statement to justify that all payments/receipts are made by account payee cheques as per provisions of Income Tax Act. Thus the appellant has complied with provisions of the Act and produced prime and vital document which is in his possession to substantiate the long term capital gain and to rebut that these are not in the nature of accommodation entries.
- vii. It is submitted that the learned Assessing Officer failed to collect and bring on record the evidences from operators. If at all said evidences are collected, copies of same have not been provided to the appellant before using the same against the appellant. The evidences which are collected back of the appellant and not provided copies thereof or not confronted with should not be admitted as evidence while framing assessment.
- viii. The learned Assessing Officer in assessment order relied upon statement of operators. According to him in said statement operators has certified that he was indulged in providing accommodation entries but has not mentioned names of persons to whom he has provided the said entries.

- ix. The learned Assessing Officer failed to provide copy of said statement and list of beneficiaries of accommodation entries to verify whether name of the appellant is included in said list or not. In absence of copy of statement and list of beneficiaries the appellant could not verify the correctness of said observation of Assessing Officer and the appellant could not rebut his allegation.
- x. The appellant submit that without providing copies of statement and list of beneficiaries on which assessment is based upon is against the principle of natural justice and said assessment kindly be annulled.

RELIANCE IS PLACED ON THE FOLLOWING CASE LAWS / JUDICIAL PRONOUNCEMENTS FOR ADDITIONS DELETED WHICH WERE MERELY BASED ON INFORMATION NOT DISCLOSED TO THE ASSESSE IS IN VIOLATION OF PRINCIPLES OF NATURAL JUSTICE

The Ld. AO have relied on statement made by operators. However, this statement has not been supplied to the appellant and hence this is in violation of fundamental rules of justice. This has also been upheld by various judicial pronouncements. Reliance is placed on following:

SN	Case Citation	Observation/ Held
1.	<i>M/S ANDAMAN TIMBER INDUSTRIES V/s CCE CIVIL APPEAL NO. 4228 OF 2006</i>	<i>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</i>
2.	<i>Lalchand Bhagat Ambica Dav V/s CIT (37 ITR 28)(SC)</i>	<i>Assessment made without disclosing to the assessee the information supplied by the department and without giving any opportunity to the assessee to rebut the information is violation of fundamental rules of justice.</i>
3.	<i>DHAKESWARI COTTON MILLS LTD. v. CIT [1954] 26 ITR 777</i>	<i>An assessment so made without disclosing to the assessee the information supplied by the departmental representative and without giving any opportunity to the assessee to rebut the information so supplied and declining to take into consideration all materials which the assessee wanted to produce in support of case constituted a violation of the fundamental rules of justice and called for interference on our part.</i>
4.	<i>SETH GURUMUKH SINGH v. CIT [1944] 12 ITR 393</i>	<i>The Tribunal violated certain fundamental rules of justice in reaching its conclusions. Firstly, it did not disclose to the assessee what information had been supplied to it by the departmental representative. Next, it did not give any opportunity to the assessee to rebut the material furnished to it by him, and lastly, it declined to take all the material that the assessee wanted to produce in support of its case. The result was that the assessee had not had a fair hearing. The estimate of the gross rate of profit on sales, both by the ITO and the Tribunal, was based on surmises, suspicions and conjectures.</i>
5.	<i>Jai Karan Sharma v/s DCIT [2012] 23 taxmann.com 300 (Delhi)</i>	<i>It is a fundamental principle of natural justice that no material should be relied upon against a party without giving him an opportunity of explaining the same</i>
6.	<i>Hamish Engineering Industries (P.) Ltd. V/s DCIT [2009] 120 ITD 166 (MUM. Trib.)</i>	<i>Whether since statements recorded from three parties on which Assessing Officer relied for purpose of assessment, had not been provided to assessee, order of Assessing Officer was bad in law to that extent - Held, yes</i>
7.	<i>Kishinchand Chellaram v/s CIT [1980] 4 Taxman 29 (SC)-</i>	<i>ITO, on the basis of letters from bank manager, not shown to assessee, treated amount so remitted as income from undisclosed sources—Tribunal, relying on letters of bank</i>

SN	Case Citation	Observation/ Held
		<i>manager, upheld ITO's action—Whether tribunal justified—Held, on facts, no.</i>
8.	<i>C Vasantlal & Co. vs. CIT [1962] 45 ITR 206 (SC)</i>	<i>It was open to an income tax officer to collect materials to facilitate assessment even by private enquiry. But if he desires to use materials so collected, the assessee must be informed of the materials and must be given an adequate opportunity of explaining it.</i>

Suspicious cannot take place the evidence

1. DCIT v. Shri Rajeev G. Kalathil, (Mum) (Trib) (ITA No. 6727/M/2012 dt.20/8/2014
2. K.P. Varghese v. ITO, (1981) 131 ITR 579 (SC);
3. CIT v. Roman & Co., (1968) : 67 ITR 11 (SC);
4. CIT v. Calcutta Discount Co. Ltd.', (1973) 91 ITR 8 (SC);
5. Umacharan Shaw & Bros v. CIT', (1959) 37 ITR 271 (SC)

Income assessed without evidence is bad-in-law.

Income assessed by revenue without supporting material is not justified.

1. CIT V. BHUVANENDRA 303 ITR 235 (MAD.)
2. VINOD SOLANKI VS. UOI (233) ELT 157 (S.C.)
3. CIT V. KASHIRAM TEXTILE MILLS (P) LTD [2006]284 ITR 61 (GUJ)-
4. SARASWATHI OIL TRADERS V. CIT [2000] 254 ITR 259 (SC)

Income cannot be assessed on mere statement basis. For assessment there has to be some evidence.

Income cannot be assessed on mere retracted statement If not material to prove

1. Meghraj Jain V. UOI (Bombay High Court)
2. *KailashbenManharlalChokshi v. CIT* [2008] 174 Taxman 466 (Guj.)
3. *M. Narayanan & Bros. v. Asstt. CIT* [2011] 201 Taxman 207 (Mag.)
4. Bansal High Carbons (P)Ltd. 2009) 223 CTR 179 (Del).
5. Sanjeev Kumar Jain (2009) 310 ITR 178 (P&H)
6. CIT vs. K. Bhuvanendra and others (2008) 303 ITR 235 (Mad.)
7. Abid Malik Vs UOI, (2009)TIOL272HC Del-FEMA)
8. CIT vs. Uttamchand Jain 320 ITR 554 (Bom),
9. Srinivas Naik (2009)117 ITD 201 (Bang)

Addition cannot be made on assumption basis.

There must be some material on record as evidence for addition. Addition made on the basis of presumption cannot be sustained in law.

1. *CIT v. Roman & Co., (1968) : 67 ITR 11 (SC)*
2. *CIT v. Calcutta Discount Co. Ltd. (1973) 91 ITR 8 (SC)*
3. *Omar Salay Mohamed Sait V/s CIT 1959 37 ITR 151 (SC)*
4. *DhirajlalGirdharilal V/s CIT (26 ITR 734) (SC)*
5. *Dr. Anita Sahai V/s DIT (266 ITR 597) (All)*
6. *MODI Creations Pvt. Ltd. V/s ITO [2011] 13 taxmann.com 114 (Delhi)-It will have to be kept in mind that section 68 only sets up a presumption against the assessee whenever unexplained credits are found in the books of account of the assessee. It cannot but be gainsaid that the presumption is rebuttable. In refuting the presumption raised, the initial burden is on the assessee. This burden, which is placed on the assessee, shifts as soon as the assessee establishes the authenticity of transactions as executed between the assessee and its creditors.*
7. **CIT- IV v. Shree Rama Multi Tech Ltd [2013] 34 taxmann.com 32 (Gujarat):**
Expenditure cannot be disallowed on account of 'bogus purchase' only on basis of assumption and presumption
8. *View taken in Modi creation Pvt. Ltd. Is also taken in following decision.*
 - i. *CIT v/s Divine Leasing & Finance Ltd. 158 Taxmann 440 (Delhi) (2007).*
 - ii. *Nemichand Kothari V/s CIT (136 Taxman 216) (Gau.) (2004).*
 - iii. *CIT V/s Value Capital Services (P) Ltd. 307 ITR 334 (Delhi)(2008).*

Thus, the addition made on the basis of bad-assessment order is also bad-in-law and requires to be deleted.

C. CASE LAWS RELIED BY LD. AO DISTINGUISHED

1. The Ld. AO in the assessment order has laid reliance on following case laws as under and the same has been distinguished: -

SN	Various case laws relied by Ld. AO	Case of Assessee
1.	In front of the Hon'ble Delhi Bench of the ITAT in the case of Haresh Win Chaddha v. DDIT (2011) 43 SOT 544 (Delhi)	... that there is no presumption in law that the AO is supposed to discharge an impossible burden to assess the tax liability by direct evidence only and to establish the evasion beyond doubt as in criminal proceedings. Further it was held that the AO can assess on consideration of material available on record, surrounding circumstances, human conduct, preponderance of probabilities and nature of incriminating information /evidence available on

		record.
2.	In the case of Sumati Dayal v. CIT (1995) 214 ITR 801 which had come up before the Hon'ble Supreme Courtthe assessee had shown certain amounts in the capital accounts in books claiming same to be winnings from horse races. She filed Sworn statement to effect that she started going for races only towards end of year 1969 and had no experience in races but she purchased jackpot tickets on combination worked out by her on basis of advice given by her husband. She had allegedly won 16 jackpots besides trebles. Assessing Officer disbelieved here version and taxed amount as income from undisclosed sources. The settlement commission by its majority order upheld assessment order holding that it was reasonable to infer, on facts, that assessee did not participate in races but purchased winning tickets after events with unaccounted money.....
3.	In the case of CIT v. Smt. Jasvinder Kaur (2013) 357 ITR 638 (Gauhati) which had come up before the Gauhati High Court	the Assessing Officer noticed that the capital gains shown by assessee were more than 24 times of purchase value in just 22 months of purchase. He asked the assessee to furnish details of transactions including demat account, bank statement etc. Since the assessee could not produce any evidence of purchase & sale of shares, Assessing Officer treated said income as income from undisclosed sources. The Hon'ble Tribunal allowed the claim of assessee on ground that there was no material on record to show that what assessee had claimed as regards value of shares was factually incorrect. On an appeal by the Revenue, the Hon'ble Gauhati High Court held that the Tribunal had wrongly placed burden of proving correctness of return of income which assessee had filed on revenue, whereas it was for assessee to show, by placing all materials including profits of two companies that, if not arithmetically, there was, at least, reasonable possibility of value of shares having risen as high as had been shown by assessee.
4.	The Mumbai Bench of ITAT has in the case of ITO v. Shamim M. Bharwani (ITA No. 4906/Mum/2011; AY 2006-07; Order dated 27.03.2015)	held that despite documentary evidence and broker's confirmation, genuineness of penny stock. transactions has to be determined on the basis of preponderance of human probabilities. If the assessee is unable to explain intriguing facts and circumstances, genuineness of transaction cannot be accepted.

Based on these crucial facts, the Hon'ble Supreme Court and Hon'ble Gauhati High Court, the Hon'ble ITAT Delhi, the Hon'ble ITAT Mumbai rendered the decision in favour of the revenue. None of these factors are present in the facts of the assessee. Hence it could be safely concluded that the decision of Hon'ble Courts is factually distinguishable with the assessee's case."

12. Further, Ld.AR of the assessee has submitted various documentary evidences in support of the above said transaction and he brought to our notice contract notes of sales of shares, details of cheque issued by stock broker of the assessee towards sales, bank statements in support of the realisation of the sale proceeds and he submitted that the Long Term Capital Gain earned by the assessee is genuine and not an arranged one as alleged by the tax authorities.

13. Further, he submitted that Assessing Officer and Ld. CIT(A) have not pointed out any discrepancies in the documentary evidences submitted by the assessee. Ld.AR of the assessee submitted that without pointing out any discrepancies in the documentary evidences submitted by the assessee the Assessing Officer has heavily relied on the investigations carried out by the Directorate of Investigation. The predetermined action with specific intention is one of the circumstances evidences leading to the conclusion that the Long Term Capital Gain earned is not genuine. Further, assessee has not declared any Short Term Capital Gain or business income or exempt income of share transactions in the previous assessment years.

14. On the other hand, Ld. DR objected to the submissions of the Ld.AR of the assessee and relied on the orders of the lower authorities by submitting that there are substance in the findings of the lower authorities.

15. Considered the rival submissions and material placed on record, The Assessing Officer observed that assessee had made huge profit out of this investment because of this, it makes the script as suspicious and penny stock. We cannot agree to the above observation, merely because of huge profit, it does not make the script a penny stock. Further, it is fact on record that the financials of the company are not commensurate with the purchase and sale price in the market. The assessee has purchased the shares directly from the company on preferential allotment, subsequently, D-mated the scrips and sold the same in the stock exchange. It clearly raises several doubt on the purchase and sales transactions recorded in this case. However, there is no discrepancies in the documents filed by the assessee claiming the deductions u/s 10(38) of the Act. At the same time, even though all the characteristics of the penny stock exists in the present case, still the revenue has not brought on record any materials linking the assessee in any of the dubious transactions relating to entry, price rigging or exit

providers. Even in the SEBI report, there is no mention or reference to the involvement of the assessee. We can only presume that the assessee is one of the beneficiary in this transactions merely as an investor who has entered in investment fray to make quick profit. Even the assessing officer has applied the presumptions and concept of human probabilities to make the additions without their being any material against the assessee. We observe that the Hon'ble Bombay High Court in the case of Pr. CIT v. Ziauddin A Siddique in Income Tax Appeal No. 2012 of 2017 dated 04.03.2022 held as under: -

"1. The following question of law is proposed:

"Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in deleting the addition of Rs.1,03,33,925/- made by AO u/s 68 of the I.T. Act, 1961, ignoring the fact that the shares were bought/acquired from off market sources and thereafter the same was demated and registered in stock exchange and increase in share price of Ramkrishna Fincap Ltd. is not supported by the financials and, therefore, the amount of LTCG of Rs.1,03,33,925/- claimed by the assessee is nothing but unaccounted income which was rightly added u/s 68 of the I. T. Act, 1961?"

2. We have considered the impugned order with the assistance of the learned Counsels and we have no reason to interfere. There is a finding of fact by the Tribunal that the transaction of purchase and sale of the shares of the alleged penny stock of shares of Ramkrishna Fincap Ltd. ("RFL") is done through stock exchange and through the registered Stock Brokers. The payments have been made through banking channels and even Security Transaction Tax ("STT") has also been paid. The Assessing Officer also has not criticized the documentation involving the sale and purchase of shares. The Tribunal has also come to a finding that there is no allegation against assessee that it has participated in any price rigging in the market on the shares of RFL.

3. *Therefore we find nothing perverse in the order of the Tribunal.*

4. *Mr. Walve placed reliance on a judgment of the Apex Court in Principal Commissioner of Income-tax (Central)-1 vs. NRA Iron & Steel (P.) Ltd. but that does not help the revenue in as much as the facts in that case were entirely different.*

5. *In our view, the Tribunal has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raises any substantial question of law.*

6. *The appeal is devoid of merits and it is dismissed with no order as to costs."*

16. Further, the Hon'ble Delhi High Court in the case of Pr. CIT v. Smt Krishna Devi in ITA 125/2020 dated 15.01.2021 held as under: -

"8. *Mr. Hossain argues that in cases relating to LTCG in penny stocks, there may not be any direct evidence in the hands of the Revenue to establish that the investment made in such companies was an accommodation entry. Thus the Court should take the aspect of human probabilities into consideration that no prudent investor would invest in penny scrips. Considering the fact that the financials of these companies do not support the gains made by these companies in the stock exchange, as well as the fact that despite the notices issued by the AO, there was no evidence forthcoming to sustain the credibility of these companies, he argues that it can be safely concluded that the investments made by the present Respondents were not genuine. He submits that the AO made sufficient independent enquiry and analysis to test the veracity of the claims of the Respondent and after objective examination of the facts and documents, the conclusion arrived at by the AO in respect of the transaction in question, ought not to have been interfered with. In support of his submission, Mr. Hossain relies upon the judgment of this Court in Suman Poddar v. ITO, [2020] 423 ITR 480 (Delhi), and of the Supreme Court in Sumati Dayal v. CIT, (1995) Supp. (2) SCC 453.*

9. Mr. Hossain further argues that the learned ITAT has erred in holding that the AO did not consider examining the brokers of the Respondent. He asserts that this holding is contrary to the findings of the AO. As a matter of fact, the demat account statement of the Respondent was called for from the broker M/s SMC Global Securities Ltd under Section 133(6) of the Act, on perusal whereof it was found that the Respondent was not a regular investor in penny scrips.

10. We have heard Mr. Hossain at length and given our thoughtful consideration to his contentions, but are not convinced with the same for the reasons stated hereinafter.

11. On a perusal of the record, it is easily discernible that in the instant case, the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites, the AO observes that the quantum leap in the share price is not justified; the trade pattern of the aforesaid company did not move along with the sensex; and the financials of the company did not show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an agreement to convert unaccounted money by claiming fictitious LTCG, which is exempt under Section 10(38), in a pre-planned manner to evade taxes. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income Tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of providing entries of bogus LTCG. However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued

under Sections 133(6)/131 of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh. Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from de-mat account and the consideration has been received through banking channels." The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material that could support the case put forth by the Appellant, the additions cannot be sustained.

12. Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and

preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent. With regard to the claim that observations made by the CIT(A) were in conflict with the Impugned Order, we may only note that the said observations are general in nature and later in the order, the CIT(A) itself notes that the broker did not respond to the notices. Be that as it may, the CIT(A) has only approved the order of the AO, following the same reasoning, and relying upon the report of the Investigation Wing. Lastly, reliance placed by the Revenue on Suman Poddar v. ITO (supra) and Sumati Dayal v. CIT (supra) is of no assistance. Upon examining the judgment of Suman Poddar (supra) at length, we find that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. On such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the factual matrix at hand. Similarly, the case of Sumati Dayal v. CIT (supra) too turns ITA 125/2020 and connected matters Page 10 of 10 on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue.

13. The learned ITAT, being the last fact-finding authority, on the basis of the evidence brought on record, has rightly come to the conclusion that the lower tax authorities are not able to sustain the addition without any cogent material on record. We thus find no perversity in the Impugned Order.

14. In this view of the matter, no question of law, much less a substantial question of law arises for our consideration.

15. Accordingly, the present appeals are dismissed."

17. Even otherwise, the Coordinate Bench of the Tribunal in the case of Minkal K. Doshi v. ITO in ITA No.1093/MUM/2020 dated 24.02.2023 dealt with identical scrip wherein the assesseees have also earned Long

Term Capital Gain at the high volume and the Tribunal ultimately decided the issue in favour of assessee. For ready reference, the conclusion drawn by the ITAT is reproduced below: -

"6. Having heard both the parties and after perusal of the records, it is noted that the assessee is a Chartered Accountant by profession and works in M/s. Shreepati Built Investment. And when summoned before the AO, he has submitted that he was a regular investor in shares like M/s. Power Grid, M/s. Adani Port, M/s. Coal India and M/s. Reliance Power etc. (supra). The assessee's statement has been recorded by the AO which has been reproduced by the AO from page 8 to 14 of the assessment order; and that he was allotted preferential shares of M/s. Greencrest Financial Services Ltd. (earlier known as Marigold Glass Industries Ltd.) and to support the same had filed allotment advice from M/s. Marigold Glass Industries Ltd which is found placed at page no. 1 of the PB; and the bank account shows payment of Rs.18,00,000/- towards purchase of shares of the above company on 06.09.2012 (refer page no. 2 & 3 of the PB). The Ld. AR also brought to my notice that the Demat statement (CDSL statement for the period 01.12.2013 to 31.12.2013) shows holding of 150,000 equity shares of M/s. Marigold Glass Industries Ltd in Demat Format (refer page no. 4 to 5 of the PB). And the Ld. AR also brought to my notice CDSL statement for the period 01.03.2015 to 31.03.2015 showing holding of 14,64,000/- equity shares of M/s. Greencrest Financial Services Ltd. in Demat Format after sale of 36000 equity shares on 11.12.2014 (refer page no. 6 to 7 of the PB). The Ld. AR also brought to my notice contract note from Broker M/s. Ashika Stock Broking Ltd. for sale of 36,000 equity shares of M/s. Greencrest Financial Services Ltd. out of 15,00,000/- equity shares (refer page no. 8 to 9 of the PB). The Ld. AR also brought to my notice the Bank statement showing receipt of Rs.25,65,533/- on 17.12.2014 against the sale of 36000/- equity shares (refer page no. 10 of the PB). Thus, the assessee has brought to my notice that the assessee has purchased for Rs.18,00,000/- Rs. 1,50,000/- shares of Marigold Glass Industries Ltd. And which fact has been reflected in his Demat Account and later which was split in to 15,00,000 shares and out of which assessee has sold 36,000 shares the same through its broker Ashika Stock Broking. And all transactions are supported by primary documents and the consideration have passed through the banking channel. It is noted that there was no adverse SEBI order against broker and the broker is still trading in the BSE. The Ld. AR brought to my notice that the assessee has no connection with Shri Devesh Upadhyaya and Shri Jagdish Purohit

(entry operators at Kolkata). And according to him, just because few operators have done some nefarious activities, the assessee cannot be blamed and cannot be denied the gain LTCG merely on the basis of suspicion. Therefore, relying on the decision of the Hon'ble Bombay High Court and Co-ordinate bench decision of the Tribunal in similar cases (especially decision of the Hon'ble Mumbai Tribunal in the case of Shyam R Pawar v DCIT in ITA No. 5585/Mum/2011 dated 04.05.2012), wherein the Tribunal in that case noted that the shares were purchased by the assessee (Shyam R. Power), which continued to be with him till the end of the year. Further the assessee had sold the shares in first lot of 7500 on 19.02.2003 for Rs. 10,00,000 and Rs.6,83,125 on 05.03.2003 and 06.03.2003 for a total consideration of Rs.9,10,025. Similarly the assessee sold 12,500 shares of Mantra Online Ltd. on 25.02.2003. Besides this, Demat account showed the transactions of credit of 20,000 shares of Mantra Online Ltd. on 31.01.2003 and sale of these shares on 20.02.2003 of 7,500 shares and on 22.02.2003 of 12,500 shares. And that assessee had also filed bill along with contract notes from the two brokers which gave details of transactions with the exact time of transaction depicting trade time. This Tribunal noted that at no point of time, the department had been able to pin point that there was an accommodation of cash getting converted into regular payment. The revenue, in that case, had heavily relied on the discrepancy pointed out by CSE, regarding client code misuse, but at no point of time the revenue was able to prove that the sale of the impugned shares was bogus/sham. Even the details received from CSE did not mention that on the specified dates, the transaction as asserted by assessee did not take place. The Tribunal observed, that department failed to show that the payee brokers did not have funds to make payments to the assessee or that their existence was suspect or that the transaction was not genuine. It was noted by the Tribunal that although investigation was conducted by the department on brokers, M/s Prakash Nahata & Co. and Bubna Stock B. S. Ltd., and even found that cash was deposited in the account of Prakash Nahata & Co. in the bank and gave full summary of the details, nowhere did the name of that assessee figured in that list. The Tribunal therefore, noted that the burden was on the department to nail the assessee through proper evidence, that there was some cash transaction with these suspected brokers, on whom there was an investigation being conducted by the department. Based on these observations the addition made on account of bogus long-term capital gain was deleted by the Tribunal. Subsequently, this decision of the Tribunal was challenged by the revenue before the Hon'ble Bombay High Court in the case of CIT v. Shyam Pawar - 54 taxmann.com 108 (Bom.). The appeal of the Department was dismissed with the following observations of the court:

"6. It is in that regard that we find that Mr. Gopal's contentions are well founded. The Tribunal concluded that there was something more which was required, which would connect the present assessee to the transactions and which are attributed to the Promoters/Directors of the two companies. The Tribunal referred to the entire material and found that the investigation stopped at a particular point and was not carried forward by the Revenue. There are 1,30,000 shares of Bolton Properties Ltd. purchased by the assessee during the month of January 2003 and he continued to hold them till 31 March 2003. The present case related to 20,000 shares of Mantra Online Ltd. for the total consideration of Rs.25,93,150. These shares were sold and how they were sold, on what dates and for what consideration and the sums received by cheques have been referred extensively by the Tribunal in para 10. A copy of the DMAT account, placed at pages 36 and 37 of the appeal paper book before the Tribunal showed the credit of share transaction. The contract notes in Form-A with two brokers were available and which gave details of the transactions. The contract note is a system generated and prescribed by the Stock Exchange. From this material, in para 11 the Tribunal concluded that this was not mere accommodation of cash and enabling it to be converted into accounted or regular payment. The discrepancy pointed out by the Calcutta Stock Exchange regarding client code has been referred to. But the Tribunal concluded that itself, is not enough to prove that the transactions in the impugned shares were bogus/sham. The details received from Stock Exchange have been relied upon and for the purposes of faulting the revenue in failing to discharge the basic onus. If the Tribunal proceeds on this line and concluded that inquiry was not carried forward and with a view to discharge the initial or basic onus, then such conclusion of the Tribunal cannot be termed as perverse. The conclusions as recorded in para 12 of the Tribunal's order are not 'vitiating by any error of law apparent on the fact of the record either."

7. In an identical case, the addition on account of long term capital gain on sale of shares was deleted by holding it to be a genuine transaction in the case of Mukesh Marolia v. Addl. CIT-6 SOT 247 (Mum). Even in the said case, the AO had held that the long term capital gain shown by the assessee was unexplained since in the said case broker had confirmed in a statement before the AO that he never sold any shares to the assessee. However, taking note of the evidence as available on record, the Tribunal held that the AO had not disproved the genuineness of the transactions. The said decision of the Tribunal was later upheld by

the Hon'ble Bombay High Court in the case of CIT v. Mukesh Marolia - ITA 456 of 2007 dated 07.09.2011. And the SLP against the said decision filed by the Department has also been dismissed by the Hon'ble Supreme Court in SLP (Civil) No. 20146/2012 dated 27.01.2014.

8. *Reliance was also placed on the decision of this Mumbai Tribunal in the case of ITO v. Indravadan Jain (HUF) (ITA No. 4861/Mum/2014) dated 27.05.2016 wherein an identical issue was involved, and in the said case, the long term capital gains claimed by the assessee was denied by the AO and treated as unexplained cash credit u/s 68 of the Act on the basis of action taken by SEBI against the broker through whom the assessee had sold shares. The Tribunal after taking into consideration the facts involved held that action taken against the broker by SEBI cannot be a ground to treat the transaction of the assessee as non-genuine and upheld the action of Ld. CIT(A) in deleting the addition made by the AO. The relevant extract of the order is reproduced as under:*

"8. We have considered rival contentions and carefully gone through the orders of authorities below and found from the record that the AO has treated the share ' transaction as bogus on the plea that SEBI ins initiated investigation in respect of Ramkrishna Fincap Put. Ltd. The AO further stated that investigation revealed that transaction through M/s Basant Periwai and Co. on the floor of stock exchange was more than 83%. We found that as far as initiation of investigation of broker is concerned, the assessee is no way concerned with the activity of the broker. Detailed finding has been recorded by CIT(A) to the effect that assessee has made investment in shares which was purchased on the floor of stock exchange and not from M/s Basant Periwai and Co. Against purchases payment has been made by account payee cheque, delivery of shares were taken, contract of sale was also complete as per the Contract Act, therefore, the assessee is not concerned with any way of the broker. Nowhere the AO has alleged that the transaction by the assessee with these particular broker or share was bogus, merely because the investigation was done by SEBI against broker or his activity, assessee cannot be said to have entered into ingenuine transaction, insofar as assessee is not concerned with the activity of the broker and have no control over the same. We found that M/s Basant Periwai and Co. never stated any of the authority that transaction in M/s Ramkrishna Fincap Pvt. Ltd. on the floor of the stock exchange are ingenuine or mere accommodation entries. The CIT(A) after relying on the various decision of the coordinate bench wherein on similar facts and circumstances

issue was decided in favour of the assessee came to the conclusion that transaction entered by the assessee was genuine. Detailed finding recorded by CIT (A) at para 3 to 5 has not been controverted by the department by bringing any positive material on record. Accordingly, we do not find any reason to interfere in the findings of CIT(A). Moreover, issue is also covered by the decision of jurisdictional High Court in the case of Shyam R. Pawar (supra), wherein under similar facts and circumstances, transactions in shares were held to be genuine and addition made by AO was deleted. Respectfully following the same vis-a-vis findings recorded by CIT(A) which are as per material on record, we do not find any reason to interfere in the order of CIT(A)."

9. *In similar case, the issue was decided in favour of the assessee in the case of Commissioner of Income-tax, Jamshedpur vs. Arun Kumar Agarwal (HUF) 210 Taxman 205 (Jharkhand High Court). In this case, the AO on the basis of finding in the SEBI enquiry, consequent to which eleven stock brokers & their trading were suspended by the Kolkata Stock Exchange from buying & selling the securities ii) investigation by the CIT (Inv.) in the case where modus operandi adopted by the brokers of the assessee was also identical with one adopted by M/s Ahilya Commercial Pvt. Ltd., held that transaction of the purchase of the share and sale thereof is not genuine and is a sham transaction. Hon'ble Jharkhand High Court while dismissing the appeal of revenue held as under:*

"Even in a case where the share broker was found involved in unfair trade practice and was involved in lowering an rising of share price, and any person, who himself is not involved in that type of transaction, if purchased the share from that broker innocently and bonafidely and if he shows his bona fide in the transaction by showing relevant material, facts and circumstances & documents, then merely on the basis of the reason that share broker was involved in dealing in share of a particular company in collusion with other or in the manner of unfair trade practice against the norms of SEBI and stock exchange, then merely because of that fact a person who bonafidely entered into share transaction of that company through such broker then only by assumption such a transaction cannot be held to be a sham transaction."

10. *Hon'ble Jharkhand High Court further held as under:*

"It is not disputed by the revenue before us that the share of these assessee were already shown in the balance sheet submitted by the assessee, and therefore, in that situation, how the revenue condemning the transaction even on the ground of steep rise in the shares. If within a period of one year, the share price had risen from Rs.5 to 55 and from 9 to 160 and one person was holding the shares much prior to that start of rise of the share price, then how can it be inferred that such a transaction entered into a sham transaction few years ago and prepared for getting the benefit after few years when share will start rising steeply. In the present case even there was no reason for such suspicion when the shares purchased years before the unusual fluctuation in the share price. Hence, the appeal of department dismissed CIT(A) and ITAT while allowing the appeal held as under;

It is also not in dispute that assessee disclosed the shares in their possession in earlier return and statement of accounts and they are duly entered into the books of the accounts of the assessee which was duly proved by the bank statement."

11. *I find that in the case at hand before me, relevant evidence were produced to suggest that the transactions (purchase and sale of shares) were undertaken and thereafter the same was reflected in the Demat Account; and the transactions have taken place through banking channel and through registered broker of Stock Exchange; and there is no evidence to disprove these relevant documents which support the claim of assessee (LTCG). Therefore, the claim of LTCG on the scrip under question cannot be disallowed based on general enquiry conducted by department unless the involvement of assessee is shown in the illegal activities, without which, the impugned action to disallow the claim of assessee cannot be sustained.*

12. *Further, I agree with the submission of the assessee that the assessee's case is distinguishable from the case of Sanjay Bimalchand Jain L/h Shantidevi B Jain v CIT of Mumbai High Court, Nagpur Bench in Income tax Appeal No. 18/2017.*

13. *Therefore, in view of the decisions of the jurisdictional High Court and other decisions of Tribunal, and in the factual back*

ground discussed (supra), I find that the addition of Rs.24,66,000/- under section 68 of the Act made by the AO is unsustainable and therefore direct the AO to delete the same and allow the LTCG income of Rs.24,58,602/- as exempt under section 10(38) of the Act. Assessee gets relief as afore-stated. And consequently the brokerage charge added of Rs 12,730/- is also deleted. Ground nos.1 is allowed."

18. Therefore, we respectfully follow the ratio of the above decisions.

In this case also, the Assessing Officer and Ld.CIT(A) has applied the concept of Human probabilities and held the above said scrip to be a penny stock without bring on record how the assessee is involved in any of the scrupulous activities or directly linked to one of the person who has involved in manipulation/rigging of share prices, entry operator or exit provider. Therefore, there is no material with the tax authorities to substantiate their findings that the impugned transaction is non-genuine. Therefore, we are inclined to allow the ground raised by the assessee. Accordingly the Ground No.1 raised by the assessee is allowed.

19. With regard to Ground No. 2 which is in respect of addition of ₹.1,25,00,000/- treated as unsecured loans under section 68 of the Act, during the course of assessment proceedings, Assessing Officer made additions of ₹.1,25,00,000/- u/s. 68 of the Act, on account of unexplained cash credit, by observing as under: -

"In the return of income filed for A.Y. 2015-16, the assessee had shown unsecured loans amounting to Rs. 11,47,54,556/- outstanding as on 31.03.2015. Hence, vide notice u/s 142(1) dated 08.12.2017 the assessee was inter alia asked to furnish details of loans taken and interest paid thereon. On going through the submission made by the assessee in response to the above on 11.12.2017 it is observed that five of the said lenders were pertaining to the Jagdish Purohit Group which has been instrumental in providing accommodation entries on a mass scale through hundreds of shell companies. The transactions shown by the assessee with these parties have *been tabulated hereunder:*

NO.	Name of the Parties	Outstanding as on 31-03-2015	Loan taken during the year	Interest paid during the year
1	Blue Circle Services Ltd. (PAN: AAACB2131L)	31,91,071	30,00,000	2,12,301
2	JMD Telefilms Industries Ltd (PAN: AAACA4340C)	—	65,00,000	1,68,658
3	Global Infratech & Finance Ltd. (PAN: AAABCA4255H)	1,12,16,297	---	9,33,827
4	Unisys Software Ltd (PAN: AABCC1191Q)	3,59,50,410	--	48,79,740
5	JMD Sounds Ltd (PAN: AABCJ1907H)	—	30,00,000	87,377
			1,25,00,000	62,81,903

It was also found that two of the above parties, M/s. Blue Circle Services Ltd & M/s Global Infratech Finance have been identified as penny stocks by the department wherein mass manipulations in terms of obtaining bogus capital gain have been unearthed. Hence, a Show-cause notice dated 21.12.2017 was issued to the assessee u/s 142(1) of the IT Act, 1961, asking him to explain as to why unsecured loans taken from exit providers/dubious entities should not be added to the total income as "unexplained cash credit" and that the interest paid thereon should not be disallowed u/s 37(1)/57 of the Act and was asked to submit the detailed reply. The assessee was asked to justify his claim with, facts, figures & supporting documentary evidences.

22. B The reply filed by the assessee in response to the above notice is received in this office on 28.12.2017. The assessee has accepted that loan amounting to Rs. 1,25,00,000/- was taken from the three aforesaid parties. Further, the assessee has pointed out that the loans have been accepted by crossed account payee cheques. The amount was in turn lended to M/s. Grover Metal Alloys Ltd as advances which were again paid through account payee cheques. Further, the assessee has also stated that he has

earned gross interest income of Rs. 1,42,59,612/- and has incurred interest cost amounting to Rs. 10859003/- and offered the net interest income of Rs. 3400609/- for taxation. The assessee has requested that such interest income as mentioned in the aforesaid table should not be disallowed u/s 57.

The submissions made by the assessee have been carefully examined and not found tenable. It is seen from the records and the investigation report prepared by the Investigation wing, Kolkata that all the aforesaid parties pertain to the Jagdish Purohit Group are engage in providing accommodation entries. In fact, M/s JMD Sound Ltd has been declared shell company by the Income Tax Department and the shares of Blue Circle Services Ltd. Global Infratech & Unisys Software are indentified as penny stock companies wherein mass manipulation in respect of long term capital gains have been unearthed in the search operations conducted throughout the country by the Income Tax Department. Shri Jagdish Purohit is his statement recorded on oath on 21.01.2015 has accepted that he is managing 246 companies through which he has been providing accommodation entries/loans. Further, he has stated that he is a director in Unisys Software Ltd, JMD Telefilms Ltd etc. The relevant portion of the investigation report is reproduced below which clearly identifies the promoter/operator of the companies involved in providing accommodations entries:

Thus, the dummy companies have been clearly identified and the promoters are such companies have given statement that they have been managing these companies for providing accommodation entries. The assessee's contention that all these loans have been taken through account payee cheques and passed through banking channels is not sufficient to prove the genuineness of such transactions as the director of these companies has himself accepted that he was involved in various nefarious activities. Further, the assessee's contention that these loans were further lended to M/s Grover Metal Alloys Ltd does not in any way give it a color of genuineness.

Along with submission made on 11.12.2017, copies of confirmation of these parties, a relevant part of their bank statements and acknowledgment of their return of income filed for A.Y. 2015-16 were also submitted. It is seen that M/s Blue Circle Services Ltd. (Shown to have given a loan of Rs. 30,00,000/-) had shown a loss of Rs. 16,16,48,120/- for the A.Y. 2015-16. M/s JMD Sounds Ltd (loan advanced Rs. 30,00,000/-) had shown a meager income of Rs. 6,98,528/- for the A.Y. 2015-16. In the case of M/s. Global

Infratech & Finance Ltd, neither copy of the acknowledgement of return of income was filed nor copy of bank statement submitted. In none of the cases, copies of balance sheet, profit & loss a/c etc have been filed. A perusal of bank statements of these parties indicates huge and frequent transactions, a trademark characteristic of the accommodation entry providers.

In order to discharge the onus cast in terms of provisions of section 68 of the I.T. Act, the assessee has to establish the identity of the said parties, genuineness of the transactions and financial capacity of the said lenders. In the particular case of assessee, in the light of adverse findings made regarding the said lenders, the assessee was bound to give irrefutable evidences to substantiate the genuineness of the said loan transactions. However, in the facts and circumstances of the case, it clearly emerges that the assessee had failed to discharge this onus.

.....

It is seen that the assessee has taken loans during the year, amounting to Rs. 30,00,000/- from M/s Blue Circle Services Ltd., Rs. 65,00,000/- from JMD Telefilms Ltd and Rs. 30,00,000/- from JMD Sounds Ltd. The total amount of loan shown to have received by the assessee during the year is worked out at Rs. 1,25,00,000/-. **The cumulative conclusion, in the light of the facts of the case discussed above, when distilled through the judicial rulings referred to above, is that the assessee's claim of receipt of unsecured loans totaling to Rs. 1,25,00,000/- during the year from the above three parties is not genuine and represents income of the assessee from undisclosed sources brought under the garb of receipts by way of loans. Hence, the same are treated as "unexplained cash credit" in the books of the assessee and added accordingly to the total income u/s.68 of the Income-tax Act, 1961.**

As the assessee could not prove genuineness of aforesaid loans, it is held that the assessee has furnished inaccurate particulars of income and penalty proceedings u/s. 271(1)(c) are initiated separately for the same.

(Add: Rs. 1,25,00,000/-)

20. Aggrieved assessee preferred an appeal before Ld. CIT(A) and filed detailed submissions, after considering the detailed submissions

Ld.CIT(A) dismissed the ground raised by the assessee observing as under: -

"8.0 GROUND NO. 2: ADDITION TOWARDS UNSECURED LOANS U/S.68 OF THE ACT OF Rs.1,25,00,000/-:

8.1 ...

8.2 Further, the AO identified three of the parties/lenders i.e., M/s. Blue Circle Services Ltd., M/s. Unisys Software Ltd. and M/s. Global Infratech Finance Ltd., as penny stock companies, and M/s. JMD Telefilms Industries Ltd. and M/s. JMD Sounds Ltd. were categorized by the Income Tax Department as shell companies. In view of this, the AO disbelieved the loan transactions and proposed to treat the same as accommodation entries availed through paper/shell companies in respect of the following three unsecured loan transactions:

Sr. No.	Name of the Party	Loan taken during the year (In Rs.)
1	Blue Circle Services Ltd.	30,00,000/-
2	JMD Telefilms Industries Ltd.	65,00,000/-
3	JMD Sounds Ltd.	30,00,000/-
	Total	1,25,00,000/-

.....

DECISION-II:

8.5 I have given my thoughtful consideration to the submissions made by the assessee and examined the same in the light of the documentary evidence placed on record. At the outset, it is an admitted fact that, as per the enquires conducted by the Investigation Wing, Kolkata, it was unearthed that Jagdish Purohit Group had provided accommodation entries through paper/shell companies to various beneficiaries in the guise of share capital, share application money, unsecured loans, purchases/sales, etc. This fact was confessed by Sri Jagdish Purohit in his statement

recorded on oath on 21.01.2015. Further, as per the enquiry report received from the Investigation Wing, the above mentioned three parties were found to be part of Jagdish Purohit Group. As such, based on investigation already conducted by the Investigation Wing, prima facie, the transactions the assessee had with the above mentioned three parties i.e., unsecured loans, are found to be bogus and non genuine.

Burden of Proof:

*8.6 At this juncture, it is important to note that, it is trite law that, whenever there is an amount outstanding in the "liabilities" side of the balance sheet towards unsecured loans, the **burden of proof** lies on the assessee to prove the genuineness of the transactions by way of fulfilling the following conditions:*

Identity of the creditors

Creditworthiness of the creditors; and

Genuineness of the transactions.

8.7 However, in the instant case, out of the three basic ingredients which are required to be proved in order to demonstrate the genuineness of the transactions, the assessee could fulfill only one i.e., identity of the creditors but failed to fulfill the balance two most important conditions stated above i.e., (1) creditworthiness of the loan creditors; and (2) genuineness of the transactions. Under the circumstances, I am of the considered opinion that the assessee has failed to prove the genuineness of unsecured loans. In this regard, reliance is placed on the following decisions:

- 1. Kalekhan Mohammad Hanif Vs. CIT [1963] 50 ITR 1 (SC)*
- 2. Govindarajulu Modaliar Vs. CIT [1958] 34 ITR 807 (SC)*
- 3. CIT Vs. Deviprasad Viswanath Prasad [1969] 72 ITR 194 (SC)*

In all the above mentioned cases, it is held by Hon'ble Supreme Court that the onus of proving the source of any money received by the assessee lies on the assessee himself. Further, if there is any entry in the books of account of the assessee, it is necessary for the assessee to establish the genuine source of that money and to prove that it does not bear the nature of the income.

8.8 *In the instant case, the assessee has failed to discharge the onus of proving the creditworthiness of the loan creditors and genuineness of the transactions. Under the circumstances, the Department need not prove such amount as forming part of income and the same would by default become income of the assessee u/s. 68/69 of the Act, as the case may be.*

1. *Sudhir Kumar Sharma (HUF) Vs. CIT [2014] 224 Taxman 128 (P & H HC)*
2. *Arun Kumar J Muchhala Vs. CIT [2017] 339 ITR 256 (Bom. HC)*

.....

Theory of human probabilities:

8.17 *As such, a detailed analysis of the facts brought out on record would reveal the fact that the explanation offered by the assessee and corresponding evidence produced to support the same are not reliable and, therefore, devoid of merit. Thus, the same cannot be considered as admissible evidence in the eyes of the law. Under the circumstances, on an objective analysis and appreciation of all the facts and surrounding circumstances of the case, I would like to apply the 'Theory of Human Probabilities' and 'Theory of Preponderance of Probabilities' in precedence over unreliable and inconsistent direct evidence filed by the assessee.*

8.18 *'In this regard, reliance is placed on the following decisions of Hon'ble Supreme Court and Hon'ble Delhi High Court wherein it was held that apparent was not real in all the cases and emphasized the importance of the surrounding circumstances and application of the test of 'Human Probabilities' to prove that the apparent was not real.*

1. *Sumati Dayal Vs. CIT [1995] 214 ITR 801(SC)*
2. *CIT Vs. Durga Prasad More [1971] 82 ITR 540 (SC)*
3. *CIT Vs. P. Mohana Kala & others [2007] 291 ITR 278 (SC)*
4. *CIT Vs. Ms. Mayawati [2011] 338 ITR 563 (Del.)*
5. *Sarita Aggarwal Vs. ITO [2015] 373 ITR 586 (Del.)*

8.19 *Thus, by virtue of the ratio laid down by the Hon'ble Supreme Court (supra), the Income Tax Authorities are entitled to look into surrounding circumstances in order to find out the real*

intention behind the apparent transactions. While doing so, test of 'Human Probabilities' would assume a vital significance.

8.20 Also, I would like to place reliance on the ratio laid down by the Hon'ble Supreme Court in the following cases wherein it has been held that the essence and substance of a transaction should prevail over its form:

- 1. Karanpura Development Co. Ltd vs. CIT [1962] 44 ITR 362 (SC)*
- 2. CIT vs. Panipat Woollen & General Mills Co. Ltd. [1976] 103 ITR 66 (SC)*

8.21 Reliance is also placed on the decision of the Hon'ble Bombay High Court in the case of Smt. Nayantara G. Agrawal vs. CIT [1994] 207 ITR 639 (Bom.)

8.22 Further, reliance is placed on the following decisions of the Hon'ble Supreme Court wherein it is held that when the assessee is indulged in evasion of taxes by employing colourable devices, court can remove the veil to find out the real nature of the transaction:

- 1. McDowell and Co. Ltd. vs. CTO [1985] 154 ITR 148 (SC)*
- 2. CIT vs. B.M. Kharwar [1969] 72 ITR 603 (SC).*

8.23 In support of circumstantial evidence taking precedence over direct evidence, I would like to place reliance on the decision of the Hon'ble Supreme Court in the case of Collector of Customs Vs. Bhoormul [1974] SCC (2) 544

8.24. Accordingly, after applying the 'Theory of Human Probabilities', and the concept of 'substance over form' aided with various case laws mentioned above, in the instant case, the claim of the assessee that the loan transactions are genuine lacks bona fides.

8.25. Thus, in view of the aforementioned factual matrix and settled position of law, I am of the considered opinion that the assessee has failed to discharge the onus cast on him with regard to creditworthiness of the loan creditors and genuineness of the transactions to the extent of Rs.1,25,00,000/-. Accordingly, I don't find fault with the AO in treating the same as unexplained cash credits u/s.68 of the Act. Thus, the ground of appeal raised by the assessee on this issue is dismissed.

21. Aggrieved with the above order, the assessee preferred an appeal before us. At the time of hearing, Ld.AR of the assessee brought to our notice relevant facts relating to the above grounds of appeal and filed its written submissions. For the sake of clarity, it is reproduced below: -

"Why the addition is not sustainable

1. Assessee took genuine loan for business.
2. The appellant requested the assessing officer to give the statement recorded u/s. 132(4) and further requested for cross examination. The assessing officer without considering any evidences and submissions made, treated the loan of Rs. 1,25,00,000/-, as unexplained cash credit.
3. During the course of assessment proceedings, all credible evidences were furnished before the Ld. AO establishing the case of the appellant on merits. However, till the conclusion of the assessment proceedings the Ld AO has not been able to discredit any of the evidences brought on record.
4. Addition was made only on the basis of statement provided by third party without any iota of evidences discrediting the evidence furnished by the appellant.
5. Statement of Shri Jagdish Purohit has been retreated which cannot use as reliable evidences.
6. The appellant has filed all the details like statement of income of lender, its financials, bank statements, PAN Card and audited accounts of lender. These documents as mentioned above conclusively proves that the lender is existing with established identity, have capacity and creditworthiness to provide loans and the loans given by the lender was genuine. The identity of the lender is undisputed and cannot be questioned since the lender is having valid PAN and have submitted its financial statement regularly and is regularly assessed to tax. Hence, all the details as required by the Ld AO for establishing the identity/existence of the lender, creditworthiness and financial capacity of the lenders, genuineness of the transactions were duly filed. By filing all these documents, the appellant has satisfactorily discharged the onus cast upon him. We further wish to state that the amount received as loan was duly supported by documents, and the Ld AO has not doubted the identity and existence of the lenders. The acceptance of loans and the repayment of loans are through account payee cheques. **Interests have been paid regularly after deducting TDS and have also filed quarterly TDS returns.**

7. Addition made without confronting with the statement mentioned, referred and relied in the Assessment Order and without allowing opportunity of cross examination.

During the relevant assessment year, the respondent company has taken loans from the following parties:

Sr. No.	Name of the Loan Party	Amount (Rs.)	Interest (Rs.)
1	Blue Circle Services Ltd PAN: AAACB2131L	30,00,000	2,12,301
2	JMD Telefilms Industries Ltd PAN: AAACA4340C	65,00,000	1,68,658
3	Global Infratech & Finance Ltd.(PAN: AAABCA4255H)		9,33,827
4	Unisys Software Ltd (PAN: AABCC1191Q)		48,79,740
5	JMD Sounds Ltd (PAN: AABCJ1907H)	30,00,000	87,377
	Total	1,25,00,000	62,81,903

1. At the outset it is submitted that, Learned Assessing Officer has ignored following vital facts outlined as under:
 - a. The applicant had received short term loans of Rs. 1,25,00,000/- during the F.Y 2014-15 for running its business activities. **Interest was paid to the lender for the time interval between receipt and re-payment of loan.**
 - b. The appellant had no business in past with Jagdish Purohit, whose statement has been made the basis of re-opening of **completed assessment of Assessee u/s. 143(3).**
 - c. Interest was paid by the assessee to the said lenders and TDS was duly deducted. It was alleged that Mr. Jagdish Purohit has admitted before the I T authorities that he had been indulged in the Business of providing accommodation entries in the form of capital gain, loans, sale and purchases etc.
 - d. **Shri Jagdish Purohit has retracted the statement made.** Copy of Re-traction statement filed by Shri Jagdish Purohit to the officer of Hon'ble CBDT, Delhi.
 - e. The Respondent Company's books of Accounts are **Audited** and were submitted to the learned Assessing officer and there were no adverse remarks of the Auditors in the said Report. Therefore, the transaction entered into by the assessee company cannot be doubted.
2. The Learned Assessing Officer had heavily relied on the statement of Mr. Jagdish Purohit. These statements were recorded at the back of the Respondent. Further the learned assessing officer has not provided the statement of Shri Jagdish Purohit, this same statement has been made the basis of addition. The request to provide statement of Shri Jagdish Purohit was not fulfilled by the Learned Assessing officer.
3. **Retraction statement** was filed by Mr. Jagdish Purohit to the office of Hon'ble CBDT Delhi, on the basis of which re-opening has been made. The said retraction statement was been submitted at the time of above captioned Assessment of the respondent.

4. The Respondent had received loan from the said lender Companies which are duly registered under the provision of Companies Act and the lender companies are filing return of income regularly.
5. The Respondent had received unsecured loan during the said assessment year and had repaid the total dues, further the entire transactions of receipts and payments were made by account payee cheques.
6. The Respondent had also filed confirmation of the said lender companies and submitted the copy of Acknowledgment of Income Tax return of the lender companies, where **the said lenders had offered income by way of interest paid by the Respondent to the lenders with TDS claim**. It is clear that the said lenders had shown interest income received in its entirety and it is not wrong to assume that the department has already accepted such income in the hands of the said lenders as total interest received by the lenders and has not assessed income by way of so called entry commission as has been alleged. Thus on one hand when it comes to charge of income the amount is assessed as total income treating the income as genuine whereas when it comes to allowance of same expenditure the same is treated as been disallowed treating it as non-genuine.
7. The learned assessing officer has failed to appreciate the facts that Respondent had obtained only temporary loan which has been **repaid**. Thus what is required to be seen is as to whether the said lenders had sufficient funds to advance Respondent. If for the sake of argument, it is understood that the said lender companies were companies of Mr. Jagdish Purohit and then in that case whether the said Mr. Jagdish Purohit was capable of advancing such amount even without receiving cash is a vital question which should be asked and verified. On appreciation of the fact and as per statement of various persons recorded it is quite clear that even without receiving cash beforehand the said lender companies were capable of advancing such amount.

8. Section 68 of the Act reads as under: -

“Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year :”

It is settled position that to prove the genuineness of the transaction, the burden lies on the assessee and to discharge the onus, the assessee must prove the following –

- I. Identity of the Creditor
- II. Capacity of the Creditor
- III. Genuineness of the Transaction

Once the above conditions are proved prima facie by the assessee and the assessee has adduced evidence to establish prima facie the aforesaid, the onus shifts on the department.

Three conditions enshrined in section 68 are clearly proved by the documents submitted during the assessment proceedings as under :-

I. To prove the identity

- a) Name, Address, PAN, Income-tax Jurisdiction, etc. of the lender companies;
- b) Copy of Audit Report and Balance Sheet of the lender companies.

The Company's Income-tax Jurisdiction details and financials of the lender's companies proved the identity as well as financial capacity i.e. creditworthiness of the lender's companies. Hence, the aforesaid documents has proved the identity of the lenders.

II. To prove the creditworthiness

The Respondent has submitted the Balance Sheet, Profit & Loss a/c and Return of Income for lenders.

The financials of the lenders companies proved the identity as well as financial capacity i.e. creditworthiness of the lender's companies.

- a) Copy of Audited Balance Sheet of the Lender Company
 - b) Relevant Bank Statement
 - c) Copy of Ledger Account
1. Further, the Respondent submit that the Company's Income-tax Jurisdiction details and financials of the lender's companies proved the identity as well as financial capacity i.e. creditworthiness of the lender's companies.
 2. The AO treated unsecured loan as unexplained cash credit under section 68 of the Act on the alleged ground that the Respondent has not brought on record to prove the identity, genuineness of the transactions and creditworthiness of the investors without appreciating that the Respondent has submitted the copies of director report, balance sheet, bank statements, etc. clearly brought out the nature of the transactions, amount involved and scope of the transaction.
 3. The Respondent submit that the Respondent has discharged its onus of proving the identity of the parties, genuineness of the transactions and the creditworthiness of the lender. Therefore, the Respondent humbly submit that the addition made under section 68 of the Act be deleted.

III. To prove the Genuineness

The Respondent has submitted the Extract of Bank Statement of all above mentioned lenders, duly highlighting the entries of loan given by them to the Respondent company.

- a) Transaction through Account Payee Cheques.
- b) Bank Statement of the Respondent and Lender Companies
- c) Loan Confirmation

Your honor can refer the **page nos. 114-143 of the Paper Book**; the details in length were submitted. Each and every lender has confirmed the transaction with the Respondent company. Therefore, the findings given by the Ld. AO were in contradiction of section 68 of the Act.

By submitting the above details, the Respondent has discharged his primary onus of proving the unsecured loan as Genuine Transaction. However, the Ld. Assessing Officer without considering the facts and circumstances of the case erred in making addition of Rs. 1,25,00,000/- being the amount received towards loan u/s. 68 as Unexplained Cash Credit without having any jurisdiction.

Thus all the ingredients of S.68 of the Act were fully proved and established before the learned Assessing Officer.

However, the onus of the appellant is limited to the extent of proving the source from which he received the cash credit. The creditworthiness of the creditor has to be judged vis-à-vis the transaction which had taken place between the appellant and the creditor, and it is not the burden of the appellant to find out the source of creditworthy capacity in order to prove the genuineness of the transaction.

As held by the Hon. Gauhati High Court in the case of **C.I.T. v. Smt. Sanghamitra Bharali (2014) 361 ITR 481 (Gau)**. The aforesaid points were also affirmed in the past by the Apex Court in the case of **C.I.T. v. Orissa Corporation P.Ltd. reported in (1986) 159 ITR 78 (SC)** wherein it is held as under:

Held, that in this case the respondent had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assesseees. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices under section 131 at the instance of the respondent, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were creditworthy. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the respondent could not do anything further. In the premises, if the Tribunal came to the conclusion that the respondent had discharged the burden that lay on it, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion was based on some evidence on which a conclusion could be arrived at, no question of law as such arose. The High Court was right in refusing to state a case.

In view of all these facts, what is required is to prove 3 things as held by the Courts in case of Cash Credits u/s. 68 of the I.T.Act, 1961.

In the case of appellant, Identity of the person is proved beyond doubt as the loanee have been borne on the Register of Income Tax Department as its permanent account number is filed before the Assessing Officer and is regularly filing its Return of Income. Capacity of the person is also proved beyond doubt as the loanee had given the loans through Banking

Channel and the repayment is also made through Banking Channel. Besides, Copy of Bank Pass Books of both the parties also available as it has been produced by the appellant before the A.O. The appellant also repaid the loan by banking channel. **Also, the creditors have confirmed having paid the loans in response to notice u/s. 133(6) of the I.T.Act,1961.** The Genuineness of the transaction is proved by producing the loan confirmations from the above party, as also the ledger extracts .There was nothing proved against the appellant by the Ld A.O.

We further state that the Ld. AO has not at all considered any of the submissions filed. The order contains a speculative fiction about how Shri Jagdish Purohit conducted his business and provided accommodation entries.

It is incumbent on the AO to act judiciously in appreciating the explanation and evidence placed before him by the appellant. An approach of not considering the material and evidence would vitiate assessment proceedings. Any rejection of an explanation by an AO is an inference drawn basically from the facts and does not involve any legal principle.

The appellant submits that the AO is cast upon with great deal of accountability while rejecting the explanations offered by the assessee and deciding to make additions of cash credits. He is duty bound to bring in outweighing evidence and material to the contrary to substantiate an addition. No arbitrary approach of rejecting appellant's explanation is allowed under the law.

As per the rule of evidence the burden of showing that the apparent was not real is on the person who claims it to be so. Accordingly, it is for the revenue to disprove explanation offered by an appellant which is apparently consistent with the facts of the case. No easy going would be available for the Ld. AO in rejecting appellant's explanation, unless contrary evidence that can outweigh the material and evidence supplied by the appellant is brought on record.

It is further submitted that if the parties had received the summons but did not appear, the appellant could not be blamed – **CIT v U M Shah, proprietor, Shrenik Trading Co (1973) 90 ITR 396 (Bom) / ITO vs. Mayur Agarwal (2010) 133 TTJ 1 (Agra) TM.**

The AO has further failed to prove that the loans are nothing but income in the hands of appellant.

The appellant further submits that loans are receipts not chargeable to tax and hence cannot be taxed.

It is respectfully submitted that the Assessing Officer had not even expressed that he is not satisfied with the evidences produced by the assessee. Besides, the learned Assessing Officer did not make any type of enquires , as various tribunals have held that receiving information from the DIT(Inv.) is only a starting point for enquiries to be held ; and not the final conclusion. In this case what the A.O. has done is only making an addition on the basis of

information received without making any further enquiries. Even the A.O. himself does not appear to have been satisfied with the issue of addition to be made to the income disclosed.

In the case of **C.I.T.v. Varinder Rawley (2014) 366 ITR 232 (P&H)**, the Court held that "where the assessee shows that the entries regarding credit in a third party's account were in fact received from third and are genuine, In that case, the sum cannot be charged as the assessee's income in the absence of any material to indicate that it belongs to the assessee", particularly in a case where no summons u/s.131 is issued against the third party. The Court further held as under:

"Held, dismissing the appeal, that the assessee received the amount by way of an account payee cheque. The amount was returned by way of an account payee cheque. The transactions were reflected in the bank accounts of the assessee as well as of the Creditor. The Creditor was an income-tax assessee. Its permanent account number card was placed on record. The assessee had sufficiently discharged the burden which lay upon it to explain the nature and source of the credit entry appearing in its accounts and the burden clearly shifted to the Department to prove to the contrary to hold that in spite of the assessee's explanation, the entries could still be held to represent the assessee's income. The Assessing Officer failed to invoke the provisions under Section 131 of the Act, the Tribunals had rightly concluded that it was sufficient to delete the addition.

Besides, the Hon'ble Bombay High Court in the case of **Orient Trading Co. Ltd. v. C.I.T. (1963) 49 ITR 723 (Bom)** (Para 9) which has been referred by the P&H High Court in the aforesaid decision, had held so.

Besides in the case of **C.I.T. v. Kamalaben Sureshchandra (2014) 367 ITR 692 (Guj)**, the Hon'ble Gujarat High Court held that deletion by the CIT (A) was based on appreciation of evidence on record, and hence such decision has to be upheld by the Court.

Besides, the Gujarat High court in the case of **C.I.T.v Sachitel Communication Pvt. Ltd. (2014) 227 Taxman 219 (Mag) (Guj)** held that - "Where the assessee proved the identity of the Creditor and capacity to pay and that payment was made through the Banking Channel, no addition could be made as unexplained Cash Credits."

The **Hon'ble Gujarat High Court** in the case of **C.I.T. v. Patel Ramniklal Hirji (204) 222 Taxman 15 (Mag)** held as under: "The addition on the basis that four depositors furnished requisite details to prove their identity and showed the place of their residence. The loan was received through account payee cheques. Copies of Bank Statements were given and the details of PAN were available. All the materials duly proved the genuineness of the transaction of loan as well as creditworthiness of the depositors. Hence, the addition u/s.68 cannot be made"

It is respectfully submitted that the appellant's case is identical to this case and all the facts of the above cases are also identical. **Also the appellant has repaid the loan taken in subsequent years by account payee cheque.**

In the case of **C.I.T. v. Jaikumar Bakliwal (2014) 366 ITR 217 (Raj)**, the Hon'ble High Court held in the head notes as under: (which is identical to the facts of appellant's case)

Three things are required to be proved by the recipient of money, i.e. (1) identity of the creditors; (2) capacity of the creditor to advance money; and (3) genuineness of the transaction.

Held, dismissing the appeal that all cash creditors were assessed to income-tax and they proved a confirmation as well as their permanent account number. They had their own respective bank accounts which they had been operating and it was not the claim of the Assessing Officer and their statements under Section 131 of the Income-tax Act, 1961, were also recorded on oath. There was no clinching evidence and the AO has further failed to prove that the loans are nothing but income in the hands of appellant.

In the case of **NEMI CHAND KOTHARI v. C.I.T. (2003) 264 ITR 254 (Gauhati)** it was held by the Gauhati High Court as under:

"A person may have funds from any source and an assessee, on such information received, may take a loan from such a person. It is not the business of the assessee to find out whether the source or sources from which the creditor had agreed to advance the amounts were genuine or not. If a creditor has, by any undisclosed source, a particular amount of money in the bank, there is no limitation under the law on the part of the assessee to obtain such amount of money or part thereof from the Creditor, by way of cheque in the form of loan and in such a case, if the creditors fails to satisfy as to how he had actually received the said amount and happened to keep it in the bank , the said amount cannot be treated as income of the assessee from undisclosed sources."

"Held, (i) that the assessee had established the identity of the creditors. The assessee had also shown, in accordance with the burden, which rested on him under section 106 of the Evidence Act, that the said amounts had been received by him by way of cheques from the creditors which was not in dispute. Once the assessee had established these, the assessee must be taken to have proved that the creditor had the creditworthiness to advance the loans. Thereafter, the burden had shifted to the Assessing Office to prove the contrary. The failure on the part of the creditors to show that their Sub-creditors had creditworthiness to advance the said loan amounts to the assessee, could not, under the law be treated as the income from undisclosed sources of the assessee himself, when there was neither direct nor circumstantial evidence on record that the said loan amounts actually belonged to, or were owned by, the assessee. The Assessing Officer failed to show that the amounts, which had come to the hands of the creditors from the hands of the sub-creditors, had actually been received by the sub-creditors from the assessee. Therefore, the Assessing Officer could not have treated the said amounts as income derived by the assessee from undisclosed sources."

(ii) That no assessment could be made contrary to the provisions of law. In the instant case, the very basis for making the assessment was under challenge. If the assessment was based

on a completely erroneous view of law, such findings could not be regarded as mere findings of facts, but must be treated as substantial questions of law. Therefore, the question raised in the appeal was a substantial question of law because it went to the very root of the assessment made.

The aforesaid view has been also considered and fortified and favorably referred to by the Allahabad High Court in the case of **C.I.T. v. Shalimar Buildwell Pvt. Ltd. (2014)220 Taxman 138 (All.)**

It is also submitted that in the following cases also the identical situation is involved.

1. Shyam R. Pawar v. D.C.I.T., ITA/5585/MUM/2011(Mum ITAT)
2. C.I.T. v. Shyam R. Pawar, ITA/1568 to1571 of 2012 (Bom)(HC)
3. C.I.T. v. SudeepGoenka, (2013) 214 Taxman 0418 (All) (HC)

The **Hon. Rajasthan High Court** in the case of **C.I.T. v. A. Lalpuria Construction P. Ltd. (2013) 215 Taxman 12 (Mag) (Raj)** have held that in the case of Accommodation entry – without giving an opportunity of cross examination merely on the basis of oral statement additions cannot be made u/s.68. It is further held that:

“The oral statement of a third party recorded by Search authorities which was never placed to be confronted by assessee and no documentary evidence was supplied to assessee, could not be considered in making addition u/s.68 on account of alleged accommodation entries.”

Besides, in the case of **C.I.T. v Kamalaben Sureshchandra Bhatti (2014) 367 ITR 692 (Guj)** also, the High Court’s held that addition u/s.68 is unwarranted.

9. It was alleged that the said Mr. Jagdish Purohit had deposed before the Income Tax Authorities that he was only an entry provider and he did not do any actual business, as far from the fact since the same Mr. Jagdish Purohit has retracted his statement made before the I T Authorities and therefore his statement made before the Income Tax Authorities loses sanctity and it could not be relied upon.
10. It is a settled law that it is mandatory for the Assessing Officer to confront the assessee with any material collected by the Assessing Officer at the back of the assessee, and in case of statement of third party recorded at the back of the assessee, **opportunity of cross examination has to be offered** to the assessee, failing which the said material/statement etc. will be rendered unreliable and additions made on the basis of such material/statement etc. shall be rendered illegal. Reference in this regard can be made from the decisions made in the following judiciary ruling:-
 - **R.B. ShreeramDurga Prasad 176 ITR 169 (SC),**
 - **KishanChandChellaram Vs. C.I.T. (1980) 125 ITR 713 (SC)**
 - **Jindal Vegetable (order of Hon'ble Delhi High Court in ITA no. 428 of 2007, 174 Taxmann 440 (Raj.)**
 - **LaxmanBhai Patel (order of Hon'ble Gujarat High Court dated 22.07.2008 in ITR no. 41/1997).**

11. Shri Jagdish Purohit was never a **DIRECTOR** as well as **SHAREHOLDER** of **lender companies**. from whom the respondent company has received the unsecured loan amounting to Rs. 1,25,00,000/- during the said Assessment Year.
12. A person (Jagdish Purohit), who is neither holding managerial berth in the lender Company nor **holding any ownership rights, cannot control the affairs of the lender Company**.
13. **Further, following legal position/ judicial rulings on the subject under consideration must be considered before arriving at any conclusion:-**
 - a. It is also settled law that where the assessee provides identity and details pertaining to the lenders/ creditors/ investor of share application money and is unable to produce them and requests the AO to issue summons u/s 131 for their attendance, it is the duty of the AO to issue such summons, failing which the addition would get deleted. Reference in this regard can be made from the decisions made in the following judiciary ruling:-
 - **N.P. Garodia (order dated 13.01.2009 of Hon'ble P & H High Court in ITA no. 808 of 2008)**
 - **Brij Pal Sharma (order dated 17.02.2009 in ITA no. 685 of 2008 of Hon'ble P & H High Court)**
 - b. Similarly as held in the case of **CIT v. Metachem Industries (2000) 245 ITR 160 (MP)** where a credit is shown to have come from a person other than the assessee, there is no further responsibility of the assessee to show that it has come from accounted source of the lender, as long as the fact that he had made the advance and was capable of making the advance are established.
 - c. It was held by the **Hon'ble Madras High Court in Hastimal (S) v. CIT (1963) 49 ITR 273** that after a lapse of decade, the assessee should not be placed upon the rack and called upon to explain not merely the origin and source of a capital contribution, but also the origin of origin and source of the source.
 - d. Recently in a similar/ identical case that of the Assessee, The honorable **ITAT Delhi** in the case of **ITO, Ward 15 (2) vs. M/s. Rakam Money Matters P. Ltd.** has held that "AO has to bring on record any valid material or evidence to discredit the evidences and the explanation given by the assessee company and cannot rely only on statement of third parties recorded by the investigation wing.
 - e. **In another landmark judgment of Hon'ble Gujarat High Court in the case of Varshaben S Patel vs. ITO,[2015] 64 taxmann.com 179 (Gujarat)** has also held in notice u/s 148 that the issue of notice u/s 148 pursuant to direction by DG Investigation is bad in law as the satisfaction has to be on your own and not a borrowed satisfaction. Head note is as under:

- f. As held in the case of **R.B. Mittal v. CIT 246 ITR 283 (AP)** in an enquiry u/s 68, the rule of *audi alteram partem* has to be observed and the Assessee must be given a fair and reasonable hearing to discharge the burden cast on him u/s 68 of the Act. Further, it is settled law that in the matter of cash credit, the initial onus lies on the Assessee to prove the genuineness of the transaction along with the identity of the lender/investor and his creditworthiness. Having done so, the Respondent in the instant case has discharged the onus cast upon it. Beyond this, for the charge of unexplained cash credit to stick, the onus lies on the AO to disprove the claim of the Assessee by establishing that the evidence filed by the assessee was false and by bringing new material on record and failure to do so would vitiate the addition made on this count.
- g. It was also held in the case of **CIT v. Bedi & Co. P. Ltd. (1998) 230 ITR 580 (SC)** that where prima-facie the inference on facts is that the assessee's explanation is probable, the onus will shift to the revenue to disprove it and the assessee's explanation in such case cannot be rejected on mere surmises. Other similar judiciary ruling are as under:-
- **Khandelwal Constructions v. CIT (1997) 227 ITR 900 (Gau.)**
 - **CIT v. Orissa Corporation Pvt. Ltd. 158 ITR 78 (SC)**
 - **CIT v. Rohini Builders 256 ITR 360 (Guj.).**
- h. It is also settled law that it is mandatory for the AO to confront the assessee with any material collected by the AO at the back of the assessee, and in case of statement of third party recorded at the back of the assessee, opportunity of cross examination has to be offered to the assessee, failing which the said material/statement etc. will be rendered unreliable and additions made on the basis of such material/statement etc. shall be rendered illegal. Reference in this regard can be made from the decisions made in the following judiciary ruling:-
- R.B. ShreeramDurga Prasad 176 ITR 169 (SC),
 - KishanChandChellaram Vs. C.I.T. (1980) 125 ITR 713 (SC)
 - Jindal Vegetable (order of Hon'ble Delhi High Court in ITA no. 428 of 2007, 174 Taxmann 440 (Raj.)
 - LaxmanBhai Patel (order of Hon'ble Gujarat High Court dated 22.07.2008 in ITR no. 41/1997).
- i. It was held in case of **ITA-.5589/Mum/2017 ACIT 30(3) Vs. M/s Shreedham Construction Pvt. Ltd.** On 22.06.18 **wherein same parties have given unsecured loan and addition was deleted-**
- "ledger confirmation, ledger account of the assessee in the books of the lender and bank statement of the lender (in the case of Athrav Business Pvt. Ltd. (page 58 to 72 of the paper book). Identically similar documents as a proof of evidence were filed from Casper*

*Enterprises Ltd. (pages 71 to 83 of the paper book), Duke Business Pvt. Ltd. (J.P. K. Trading I. Pvt. Ltd.) (pages 84 to 96 of the paper book), Olive Overseas Pvt. Ltd. (pages 97 to 110 of the paper book), Viraj Mercantile Pvt. Ltd. (pages 111 to 119 of the paper book) and Nakshatra Business Pvt. Ltd. (Pages 120 to 131 of the paper book). All these documents neither disproved by the Ld. Assessing Officer nor any evidence was brought on record to falsify the claim of the assessee or the authenticity of these documents. Thus, it can be said that the assessee discharged its onus as provided under section 68 of the Act. The interest was paid through banking channel by the assessee on such loans. It is also noted that so far as the disallowance of interest portion is concerned, the same was deleted by the Id. FAA and has not been challenged before this Tribunal by the Revenue further fortifies the case of the assessee. The loans were repaid along with interest before the date of survey i.e. 17/10/2014 and no cash was found during survey further fortifies the claim of the assessee. All the concerned parties appeared before the Ld. Assessing Officer during remand proceedings, the Ld. Assessing Officer recorded their statement and nothing adverse was pointed out even Shri Pravin Jain himself appeared before the Ld. Assessing Officer and even during remand proceedings enquiries were carried out and no adverse remark was made by the Id. Assessing Officer. The assessee as well as the other parties furnished all possible documents evidencing that the loans are not bogus. No cash was found deposited in the accounts of alleged six parties, thus, keeping in view, the totality of facts, attendant circumstances, human probabilities, and in the presence of plausible explanation by the assessee, relevant material, and requirement of fulfillment of ingredients, enshrined in section 68 of the Act, we find that onus cast upon the assessee has been duly discharged, therefore, the addition made u/s 68 of the Act, which is purely based upon presumption or the statement recorded and later on retracted by the concerned parties, therefore, **we find infirmity in the conclusion of the Ld. Commissioner of Income Tax (Appeal), resultantly, the appeal of the Revenue is dismissed.**"*

- j. It was held in case of **DCIT 12(1)(2) vs. Bairagra Builders P Ltd.**[ITA No. 4691 & 4692/Mum/2015]-

*"We have gone through the orders relied upon by the learned DR. We noted that the **decision of the Delhi High Court in the case of Bikram Singh, the assessee could not discharge the onus as laid down by section 68 of the Act.** Similarly, in the case of CIT vs. Jansampark Advertising & Marketing Pvt. Ltd. (supra), the additions have been made u/s. 68 in respect of the share capital received by the assessee from various companies and during the course of investigation, it was found that the share capital has been received from three entry operators, who are allegedly in the business of providing accommodation entries. Notices issued u/s. 131 to these parties were returned undelivered by the postal authorities with the remark "left"/ "no such person".*

Under these circumstances, the Hon'ble High Court took a view that the assessee failed to discharge the burden to prove the creditworthiness as well as the genuineness of the transactions.

Para 10. But in the impugned case, we noted that the assessee has submitted all the evidences including the confirmation of the creditors. This is not a case where the creditors have not given confirmations rather they have duly confirmed to giving loan to the assessee, the loans were received and returned through banking channels. The assessee has also submitted copies of bank accounts. The lender has not deposited cash into bank account. The assessee has duly discharged the onus with regard to identity of the lender, credit worthiness of the party and all supporting evidences as required u/s.68 of the I.T.Act. Therefore, in our opinion the decisions relied upon by the DR does not assist the Revenue to the facts of the present case.

*Para 11. We have also gone through the decisions relied upon by the learned AR. We noted that this Tribunal in similar circumstances in the case of **Komal Agrotech Pvt. Ltd. vs. ITO in ITA No. 437/Hyd/2016** vide its order dated 25.11.2016 has held as under :*

*"A plain reading of the assessment order demonstrates that the AO merely went by the Investigation done by the office of D.G.I(Investigation), Mumbai. No enquiries or investigation was carried out. No evidence to controvert the claims of the Assessee was brought on the record by the AO. Even the statement of Shri Praveen Kumar was supplied. Nothing is on record about the result if investigations done by DGIT (Inv), Mumbai. **The papers filed by the assessee do demonstrate the identity, creditworthiness and genuineness of the transaction. The addition is made merely on surmises and conjectures. In view of the above, we hold that the addition made under section 68 of the Act is bad in law.**"*

We noted that in the said case also loan had been received from M/s Javda India Impex Ltd., M/s Kush Hindustan Entertainment Ltd. and M/s Olive Overseas Pvt. Ltd

Para 12. Being consistent with the view taken by this co-ordinate Bench in case of Komal Agro tech pvt. Ltd. (supra), and in view of the facts and circumstances, we do not find any illegality or infirmity in the orders of the CIT(A). It is accordingly, confirmed for both the years under appeal."

- k. It was held in case of **Ito 4(3)(4), Mumbai vs Suchitra Fabtex P.Ltd**, [ITA No. 2979 & 2980/Mum/2017]-

"Ansh Merchandise Pvt .Ltd. (earlier known as New Planet Trading Co. Pvt. Ltd.) Thus, after careful considerations of the entire material on record, which may also be evident from the above given chart, it is found that the appellant has indeed proven the genuineness of the loans taken from all the parties referred above. Accordingly the addition made by the AO under section 68 of the Act on that count to the

tune of Rs 40,00,000/- under the heading loan as cash credit cannot be sustained. Consequently, the addition of Rs. 1,51,694/-made under section 37(1) of the Act on account of disallowance of interest on the said amount also cannot be sustained.

Para 5. I notice that the Ld CIT(A) has passed a detailed order by examining the facts relating to the issues under consideration and also applying the law settled by Hon'ble Courts in this regard. I notice that the revenue could not furnish any material on record to rebut the reasoning given by Ld CIT(A). Under these set of facts, I am of the view that the orders passed by Ld CIT(A) do not call for any interference. Accordingly, I uphold the same in both the years under consideration."

1. In a landmark decision by **Hon'ble ITAT Mumbai**, in an identical case of **ITO -10 (2) (4) Vs. M/s. Superline Construction P. Ltd.** (and many others in this consolidated order) pronounced on **30.11.2015 ITA No. 3645/Mum/2014**, the summary of the case is outlined as under :-

"The Revenue authority failed to appreciate that there is no documentary evidence against the Assessee Company to support impugned additions made solely on the basis of statement of Shri Mukesh Chokshi. The Assessing Officer failed to appreciate that as against the statements of any person recorded u/s 143(3) r.w.s. 147, the Assessee Company has fully discharged the burden of proof, onus of proof and established the identity, creditworthiness and genuineness of transaction by banking instruments with documentary evidences."

The facts of the above case are very similar to the case under consideration and ratio decided in the case is requested to be applied.

Further with the similar facts, similar judgments were pronounced and are hereby outlined as under :-

ITAT E Bench in M/s. SDB Estate Pvt Ltd vs. ITO-(5)(3)(2) in ITA No. 584/Mum/2015: AY 2008-09 has decided similar issue by observing as under:-

*"In view of the above stated legal position and in the light of reliable evidences brought on record by **assessee to substantiate identity, genuineness and creditworthiness of shareholders/ lenders**, which have not been controverted by the Revenue, the additions made solely **on the basis of general statement** of Shri Mukesh Chokshi **cannot be held to be justified and the same are accordingly ordered to be deleted.**"*

In the result, appeal of the assessee is allowed in part, in terms indicated hereinabove."

Further ITAT-"D" Bench has decided the following cases in favour of the assessee on similar issues.

- a) ITO – 10(2)(1) vs. M/s. Deep Darshan Properties Pvt Ltd in ITA No. 2117/Mum/2014 : AY 2006-07 and ITA No.2118/Mum/2014 : AY 2007-08
- b) ITO –10(2)(3) vs. Aajivan Computers Pvt Ltd in ITA No.2160/Mum/2014 :AY 2006-07
- c) ITO –10(2)(3) vs. Dignity Securities Trading Pvt Ltd in ITA No.2157/Mum/2014 :AY 2006-07
- d) ITO –10(2)(1) vs. M/s. Blue Hill Properties Pvt Ltd in ITA No.2119/Mum/2014 :AY 2006-07

With the facts and various Judicial rulings as discussed above, it is crystal clear that the Unsecured Loan Received by the Respondent was genuine and cannot be treated as Accommodation entry.

- m. **Jurisdictional Hon'ble ITAT, Mumbai for an identical case i.e. Arceli Realty Limited Vs. The Income Tax Officer 15(1) (1), Mumbai pronounced on 21.04.2017 ITA-6492/Mum/2016-17, the summary of the case is outlined as under:-**

".....A.O. merely relied upon the information provided by the office of DGIT(Inv.), Mumbai and did not made any independent enquiry. The papers filed by the assessee do demonstrate the identity, credit worthiness, genuineness, Source of Source of the transaction. AO did not provide Opportunity to Cross Examine the concerned person and also the department has not provided authenticity of the information to the person against whom such information is used. The addition is made merely on surmises and conjectures. The statement recorded at the back of the Respondent cannot be utilized ignoring other verifiable evidences. The Id. Assessing officer has made the addition of Rs. 20,00,000/- disregarding the evidences on record and without discharging her onus and without establishing anything contrary to the agreement of the Respondent and without verifying the Bank Account, existence of Investor and without making fruitful investigation, thus the demand was directed to be deleted."

- n. **Jurisdictional Hon'ble ITAT, Mumbai for an identical case i.e. Income Tax Officer, 12(2)(3) Vs. M/s Shreedham Construction Pvt. Ltd. On 14.11.2017 ITA-3754/3755/3756/Mum/2017, the summary of the case is outlined as under:-**

"We have considered the rival submissions of the parties and have gone through the material and the orders of the authorities below. We have noted that the assessing officer passed the assessment order on the similar lines as made for earlier year. The assessing officer has not given specific finding on the documentary evidences furnished

by the assessee. The assessing officer while passing the assessment order has not given different finding though the facts for the year under consideration were at variance.

The assessee specifically contented that they have paid interest on the loan availed and deducted TDS. The Id Commissioner (Appeals) while considering the facts noted that the assessing officer has not correctly appreciated the loan amount from Raghuvver Sales nor its share capital and reserve funds. Similar, other discrepancies were pointed out about VirajMerchantile P. Ltd, Park Tools Ltd and Utakantha Trading & Properties Ltd.

In view of the above discussion we do not find any infirmity and illegality and we have already confirmed the order passed by Id CIT(A) for AY 2008-09 and 2009-10, hence, the appeal for the year consideration is also dismissed with similar observation."

- o. The Judgment delivered by Jurisdictional Hon'ble ITAT, Mumbai for an identical case i.e., M/s Shree Laxmi Estate Pvt. Ltd. V/s. Income Tax Officer 15(3)(3) On 29.12.2017 ITA-5954/Mum/2016, the summary of the case is outlined as under:-

*"We have heard both the parties, perused the material available on record and gone through the orders of authorities below. The AO made addition towards unsecured loans received from Josh Trading Company Pvt. Ltd. and Viraj Mercantile Pvt. Ltd **on the basis of information received from Investigation Wing** which revealed that the assessee is beneficiary of bogus accommodation entries provided by Shri Praveen kumar Jain through his bogus companies..... The AO has brought out facts in the light of statement of Shri Pravin kumar Jain deposed before the Investigation Wing to make addition. Except this there is no contrary evidence in the possession of the AO to disprove the loan transaction from Josh Trading Company Pvt. Ltd. and Viraj Mercantile Pvt. Ltd. On the other hand, the assessee has furnished various details including confirmation letters from the parties, their bank statements along with their financial statements to prove identity, genuineness of transactions and creditworthiness of the parties. The assessee also furnished evidences to prove that the parties have responded to the notices issued u/s 133(6) by AO by filing various details"*

*".....It is well settled legal position that the assessee has to discharge 3 main ingredients in order to discharge the initial burden of proof, i.e. **the identity of the creditor, the genuineness of transaction and creditworthiness of the creditors.** Once the assessee discharges initial burden placed upon him, then the burden to disprove the said claim shifts upon the AO"*

*"Coming to the case laws relied upon the assessee, the assessee has relied upon the decision of **Hon'ble Bombay High Court in the case of CIT vs Gagandeep Infrastructure Pvt. Ltd (2017) 394 ITR680 (Bom).** We have gone through the case laws relied upon by the assessee in the light of facts of the present case and find that the Hon'ble High Court categorically observed that*

".....the three essential tests while confirming the pre proviso Section 68 of the Act laid down by the Courts namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was found satisfied. Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are bogus. The Apex Court in *Lovely Exports (P) Ltd. (supra)* in the context to the pre-amended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit."

14. It is not out of place to bring under your Hon'ble members kind notice, that the Respondent has discharged the onus cast upon it u/s 68 of the Act by submitting the number of documentary evidences during the course of assessment proceedings. The Ld. AO has failed to demonstrate and establish that how the impugned addition of Rs. 1,25,00,000/- was treated as **Unexplained Cash Credit**. Hence, statement of a third party cannot be relied upon without any corroborative documentary evidence on record.
15. The learned Assessing Officer has erred in making the further addition by disallowing the expenses u/s. 57 of the I.T. Act., 1961 amounting Rs. 62,18,903/- as unexplained expenditure paid in cash. This addition is hypothetical and imaginary in nature and Appellant had not paid any sort of commission for the said genuine borrowings.
16. The learned Assessing Officer further has disallowed the legitimate Interest expense paid on Borrowed fund/ Short Term Loan amounting to Rs. 62,18,903 /- without any proper base. The disallowance was made, alleging that loan was paper entry hence there was no liability to pay interest on the said Loan.

Further also Reliance Place on following case Laws:

<p>THE INCOME TAX APPELLATE TRIBUNAL "H", BENCH MUMBAI The ACIT 25(2) vs. M/s. H.K. Pujara Builders ITA No.3127/Mum/2017</p>	<p>Held that..... 8.2. With regard to non-production of Shri Jagdish Prasad Purohit by the assessee before the Ld. AO for the purpose of cross examination of him by the assessee, we hold that it is the revenue which had placed reliance on the statement of Shri Jagdish Prasad Purohit. Hence, Shri Jagdish Prasad Purohit becomes the witness of the revenue. Hence, it is the duty of the revenue to produce the party as their witness in order to enable the assessee to cross examine the said party, if it so desires. This responsibility cannot be shifted to the assessee by the Ld. AO. 8.3. In view of the aforesaid findings in the peculiar facts and circumstances of the case, we hold that the Ld. CIT(A) had rightly deleted the addition made u/s.68 of the Act and disallowance of interest on loans, which in our considered opinion, does not call for any interference. Accordingly, the grounds raised by the revenue are dismissed. 9. In the result, appeal of the revenue is dismissed.</p>
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<p>DCIT(CC)-1(3) vs. M/s Jainam Investments ITA No. 6099/Mum/2016</p>	<p>We notice from the operative portion of the order passed by Ld CIT(A) that the first appellate authority has placed reliance on various other case laws also. In effect, the Ld CIT(A) has examined the documents furnished by the assessee and has held that the assessee has discharged the initial burden of proof placed upon it u/s 68 of the Act. He has also held that the non-furnishing of documents relied upon by the AO and non-providing of opportunity to cross examine the Shri Bhanwarlal Jain and others would make the addition to fail. Even in respect of documents relied upon by the AO, the Ld CIT(A) has found the same to be inadequate to warrant the additions made u/s 68 of the Act. Hence, we are of the view that the Ld CIT(A) has passed a reasoned order by considering the facts of the case, applicable case laws and has taken a justifiable view in this matter. Hence we do not find any infirmity in the order passed by Ld CIT(A). Accordingly we confirm the order passed by Ld CIT(A) in deleting the addition of Rs.24.75 crores made u/s 68 of the Act. Since we have confirmed the order of Ld CIT(A) in deleting the addition made u/s 68 of the Act, the interest disallowance is also liable to be deleted. Accordingly we confirm the order passed by Ld CIT(A) in respect of interest disallowance also. The addition made towards commission expenses is also offshoot of the addition made u/s 68 of the Act. For the reasons stated in the preceding paragraph, we confirm the order passed by Ld CIT(A) on this issue also. In the result, the appeal filed by the revenue is dismissed.</p>
<p>DCIT 25(1) vs. M/s. YRV International ITA No. 1414/Mum/2017</p>	<p>The Ld CIT(A) has rightly pointed out these facts and accordingly concluded that the addition made by the AO was not justified. In view of the foregoing discussions, we are of the view that the decision rendered by Ld CIT(A) does not call for any interference, since the first appellate authority has rendered his decision by considering the legal principles enunciated in various case laws relied upon by him and further applying the same to the facts of the present case. Thus we notice that the Ld CIT(A) has reached his decision in a systematic manner. Accordingly we affirm the decision rendered by Ld CIT(A). In the result, the appeal filed by the Revenue is dismissed.</p>
<p>Shri Ashok Nagraj Mehta vs. ACIT Circle 19(1) ITA No. 2100/Mum/2016, and ITA No. 1645/Mum/2017</p>	<p>A perusal of the order passed by Ld CIT(A) would show that the Ld CIT(A) has examined the documents furnished by the assessee and has come to the conclusion that the assessee has discharged the initial burden of proof placed upon his shoulders u/s 68 of the Act, i.e., he has proved the identity of the creditor, creditworthiness of creditor and genuineness of transactions. Once the assessee discharges the initial burden placed upon him, then the onus shifts to the shoulder of the assessing officer to prove otherwise. In the instant case, we notice that the AO has failed to prove that the documents furnished by the assessee are wrong. The above view is supported by the decision rendered by the co-ordinate bench in the case of Reliance Corporation (supra). Hence we do not find any infirmity in the order passed by Ld CIT(A) on this issue and accordingly uphold the same. In the result, both the appeals filed by the revenue are dismissed and both the appeals of the assessee are partly allowed.</p>
<p>Asst CIT-19(1) vs. Shri Dilip Chimanlal Gandhi ITA No. 7079/Mum/2016</p>	<p>The assessee has given all the documentary evidences including confirmatory letters, bank statements and financial statements of the creditors. The Assessing Officer has not found any error therein. It has been held in number of cases that when the assessee has given all the necessary details of the loan creditors, including the</p>

	identity, creditworthiness and genuineness of the transaction, the onus upon the assessee is discharged. In these circumstances, in our considered opinion, the assessee has discharged its onus. The Assessing Officer has not rebutted any of the submission of the assessee and the documentary evidence in this regard. Hence, in our considered opinion, there is no infirmity in the order of the Id. Commissioner of Income Tax (Appeals). In the result, this appeal by the Revenue stands dismissed.
ITA No. 7049 & 7050 / Mum/2016 Jitendra M Kitawat vs. ITO 18(1)(5)	Appeals filed by the AO are rejected and the appeals of the assessee stand partly allowed.
Smt. Ritu Kamal Singhal vs. ITO- 24(3)(4), MUMBAI	"..the assessee has brought on record, PAN of the loan creditor and evidence of filing of Income Tax return. The AO has also noted that notice u/s 133(6) was issued to the lender company and reply is also received. Hence, in my considered opinion, the assessee has established the identity of the loan creditor in question. In respect of creditworthiness of the said loan creditor, the assessee has brought on record, the audited balance Sheet of the said company, relevant bank statement and as per this balance sheet, the net worth of this company is Rs. 83.34 lacs and the loan amount in question is only Rs.20 lacs. In the light of the same, it has to be accepted that the creditworthiness of the said loan creditor is also established at least prima facie. Regarding genuineness of the transaction in question, the assessee has brought on record bank statement and loan confirmation to establish that the loan was received by account payee cheque and it was returned in the next year by account payee cheque. Hence, genuineness of the transaction in question is also established at least prima facie. The AO has come to a different conclusion mainly on the basis of the statement of Shri Bhanwarlal Jain Group without providing to the assessee an opportunity of cross examination. Hence, it is seen that except the statement of Shri Bhanwarlal Jain Group, there is no adverse material brought on record by the AO. No shortcoming is pointed out in various documents brought on record by the assessee to establish the identity and credit worthiness of the loan creditor and genuineness of the transaction as noted above. Since, the AO has not provided an opportunity of cross examination of Shri Bhanwarlal Jain Group, the adverse statements of that group cannot be used against the assessee. I hold so by respectfully following this Judgment of Hon.ble apex court rendered in the case of Kishan chand Chellaram vs. CIT (Supra). Once, I exclude the same, the addition made by the AO cannot be sustained in the facts of the present case as discussed above. Hence, I delete the same. In the result, the appeal of the assessee is allowed."
ITA No. 7047/Mum/2016 Jitendra M Kitawat (HUF) vs. ITO 18(1)(5)	We find that in the cases relied upon by the assessee i.e. Sanghavi Reality Pvt.Ltd.(supra), Vikram Muktilal Vora (supra), Gujarat Construction (supra),the order of the Reliance Corpora - tion(supra) has been followed.As the fact of the case under consideration are similar to above referred cases,so,following those orders,we decide seventh ground of appeal,raised by the assessee, in its favour. Remaining grounds are of consequential in nature, hence are not being adjudicated.
[2015] 58 taxmann.com 226 (Madras) HIGH COURT OF MADRAS Commissioner of Income-tax v.	Section 68 of the Income-tax Act, 1961 - Cash credit (Burden of proof) - Assessment year 2006-07 - Assessee had obtained unsecured loans from agriculturists and submitted their names and addresses, but did not provide their PAN cards - Assessing Officer made addition under section 68 - It was found

<p>Mark Hospitals (P.) Ltd.</p>	<p>that loans were given to assessee through cheques and all creditors had confirmed that they had advanced loans mentioned against their names to assessee and, thus, identity of creditors could not be disputed - Further, all creditors were agriculturists and therefore, they did not have PAN card - Whether, on facts, no addition could be made - Held, yes</p>
<p>[2014] 42 taxmann.com 473 (Gujarat) HIGH COURT OF GUJARAT CIT -1 v. Apex Therm Packaging (P) Ltd.</p>	<p>Section 68 of the Income-tax Act, 1961 - Cash credit (Unsecured loan) - Assessment year 2007-08 - Whether when full particulars, inclusive of confirmation with name, address and PAN Number, copy of income tax returns, balance sheet, profit and loss account and computation of total income in respect of all creditors/lenders were furnished and when it had been found that loans were furnished through cheques and loan account were duly reflected in balance sheet, Assessing Officer was not justified in making addition - Held, yes</p>
<p>[2013] 36 taxmann.com 429 (Madhya Pradesh) HIGH COURT OF MADHYA PRADESH Commissioner of Income-tax-II, Indore v. Vaibhav Cotton (P.) Ltd.*</p>	<p>Section 68 of the Income-tax Act, 1961 - Cash credits [Loans] - Assessment year 2007-08 - Tribunal on its own independent analysis of matter had reached to factual conclusion about genuineness of unsecured loan transaction and in this process Tribunal had taken note of fact that detailed account of concerned parties were filed by assessee and entries in account were through account payee cheques, source of deposit in bank was not in dispute and identity of parties was established and also creditworthiness of creditors was established - Whether since finding which had been recorded by Tribunal was essentially a finding of fact and since revenue had failed to point out any error or perversity in said finding of fact, order of Tribunal was to be upheld - Held, yes</p>
<p>[2014] 45 taxmann.com 203 (Rajasthan) HIGH COURT OF RAJASTHAN Commissioner of Income-tax, Ajmer v. Jai Kumar Bakliwal</p>	<p>Section 68 of the Income-tax Act, 1961 - Cash credit (Unsecured loan from relatives) - Assessment year 2006-07 - Unsecured loan raised by assessee from relatives was added in income of assessee on ground that none of creditors were able to prove source of amount advanced to assessee and immediately before grant of loan by them cash was deposited in their accounts - However, it was admitted by Assessing Officer that all creditors were assessed to Income tax and they had provided confirmation as well as their PAN - Moreover, all payments were through account payee cheques and most of cash creditors appeared before Assessing Officer and were examined on oath - Whether since there was no clinching evidence nor Assessing Officer had been able to prove that money actually belonged to none but to assessee himself, action of Assessing Officer appeared to be based on mere suspicion and, thus, addition required to be deleted - Held, yes</p>
<p>[2013] 40 taxmann.com 285 (Allahabad) HIGH COURT OF ALLAHABAD Commissioner of Income-tax-II, Lucknow v. Shalimar Buildwell Pvt. Ltd</p>	<p>Section 68 of the Income-tax Act, 1961 - Cash credits [Unsecured loan] - Assessment year 2005-06 - Assessee had shown certain unsecured loan from 'L' HUF - Assessing Officer made addition of that amount in hands of assessee - Whether since in instant case money had come at all level through banking channel and creditworthiness and identity of donors/creditors had been proved, no addition could be made in hands of assessee - Held, yes</p>
<p>IN THE ITAT AHMEDABAD BENCH 'D' Sarjan Corporation v. Assistant Commissioner of Income-tax</p>	<p>Section 68 of the Income-tax Act, 1961 - Cash credit - Assessment year 2005-06 - When confirmation of all parties, from which unsecured loans were received by assessee, were furnished along with their permanent account numbers, copy of acknowledgement of income-tax returns, etc., and no enquiry was made by Assessing Officer, no addition could be made under sec 68 in respect of said unsecured loans</p>

<p>[2012] 23 taxmann.com 374 (Luck.) (TM) IN THE ITAT LUCKNOW BENCH (THIRD MEMBER) Vishnu Jaiswal v. Commissioner of Income-tax (Appeals)-</p>	<p>Section 68 of the Income-tax Act, 1961 - Cash credits - Assessment year 2006-07 - Assessee received unsecured loans from three parties through account payee cheques - Assessee proved identity, genuineness of transactions and also creditworthiness of creditors by producing their respective bank accounts - Assessing Officer did not examine creditors and made addition on assumption that they would not have saved any money to advance loans - Whether it was not a fit case to make addition under section 68 - Held, yes</p>
<p>[2014] 50 taxmann.com 419 (Gujarat) HIGH COURT OF GUJARAT Commissioner of Income-tax-III v. Manoj Indravadan Chokshi*</p>	<p>Section 68 of the Income-tax Act, 1961 - Cash credits (Bank deposits) - AY 2009-10 - Whether once source of cash deposit in bank account is explained, subsequent withdrawal is not required to be explained - Held, yes - Assessee explained cash deposit in bank account by submitting names of persons from whom unsecured loans were taken - Whether merely because assessee withdrew cash instead of sufficient cash balance available with him and subsequently re-deposited same in bank account for his own use, no addition could be made - Held, yes</p>
<p>[2015] 61 taxmann.com 28 (Mumbai - Trib.) IN THE ITAT MUMBAI BENCH 'E' ACIT v. Sanjay M. Jhaveri*</p>	<p>Where assessee had taken unsecured loan and duly filed confirmation letters of creditors, copies of their bank accounts and acknowledgements of returns of income filed by them, same could not be treated as undisclosed income of assessee</p>
<p>[2014] 45 taxmann.com 473 (Rajasthan) HIGH COURT OF RAJASTHAN Commissioner of Income-tax, Jaipur - II v. Morani Automotives (P.) Ltd.</p>	<p>Section 68 of the Income-tax Act, 1961 - Cash credit (Share application money) - Assessment year 2006-07 - Assessing Officer made certain addition on account of unexplained share capital contribution and unsecured loans - Assessee submitted details, confirmations, returns, affidavits, bank statements, etc. from various persons in respect of share capital contribution as also for loan advanced, which could not be collected during course of assessment proceeding - It was found that contributors were all Income tax assessee and their return of income and copies of confirmation along with PAN numbers had been furnished by assessee and also identity of cash creditors were established - Whether addition was not justified - Held, yes</p>

In terms of the above, we would request your honor to delete the addition made by Ld. A.O.”

22. On the other hand, Ld. DR objected to the submissions made by the Ld AR and relied on the order of the lower authorities.

23. Considered the rival submissions and material placed on record, we observe from the appellate order that the assessee has submitted relevant documents to prove the identity of the creditors but according

to him, assessee failed to prove the capacity and genuineness of the transactions. On careful consideration we observe that Assessing Officer has observed from the financial statements of the lender companies and he formed opinion on the basis of earning capacity and not on the basis of funds available to make to loan to others. In our view what is needed to be seen is the funds available with the lenders to make the loan to form an opinion on the capacity of the lenders not the earning capacity. These are financial entities, has to be judged on the basis of funds available in the business. With regard to genuineness of the transaction, we observe that assessee has taken unsecured loans from Blue Circle Services Ltd., JMD Sounds Ltd and JMD Telefilms Industries Ltd., and submitted the confirmations letters from them which are placed on record. At the same time, assessee also submitted bank statements and financial statements of Blue Circle Services Ltd., JMD Sounds Ltd and JMD Telefilms Industries Ltd., in the Paper Book and it is brought to our notice that assessee has repaid the unsecured loans taken by it along with interest. It is brought to our notice that the assessee has repaid to JMD Sounds Ltd current financial year itself, the same is placed on record at Page No. 128 and 129 of the paper book. Similarly, the payment of JMD Telefilms Ltd in the same financial year, the same is place on record at Page 123 and 124 of the paper book. The payment of

Blue Circle Service Ltd are paid in the subsequent assessment year along with interest. Therefore, assessee has demonstrated that assessee has taken unsecured loans and repaid the same along with interest. Normally accommodation entries are taken and the unsecured loans remain unsettled for a long period of time. However, in this case, the assessee has taken the loan and repaid the same along with interest, it clearly indicate that the loan transaction is genuine.

24. Further, it is brought to our notice that the assessment was reopened mainly on the basis of statement of Shri Jagdish Purohit and Shri Jagdish has subsequently retracted the statement given. Therefore, the genuineness has to be seen independently. Accordingly, Ground No.2 raised by the assessee is allowed.

25. With regard to ground No.3 relating to making addition of ₹.62,81,903/- under section 57C of the Act, during the course of assessment proceedings, Assessing Officer made addition of interest expenses observing as under: -

"23. Further, it is seen from the details submitted by the assessee that interest amounting to Rs. 62,81,903/- has been paid to the parties mentioned in the aforesaid table during the financial year 2014-15 relevant to A.Y. 201516. These companies have been charged with entering into fraudulent & manipulative activities in

the stock exchange in respect of bogus capital gains/capital losses. They were also found to be engaged in money laundering and providing accommodation entries. Furthermore, the assessee had failed to substantiate genuineness of these transactions and credit worthiness of the said lenders.

In this instant case, the loans shown to have been received by the assessee from above cited parties are non-genuine and represents income of the assessee from undisclosed sources. When the unsecured loans itself are non-genuine, the interest expenses claimed cannot be allowed as deduction either u/s 57 or u/s 37(1) of the I.T. Act, 1961. This is because as per the provisions of section 57 of the Act, the expenses actually incurred for earning of income u/s 56 are allowed as deduction. However, in the instant case, it is clearly emerged that the amounts credit to the assessee's books represent undisclosed income of the assessee brought under the garb of loans. Since the interest expenses claimed to have been paid on these fictitious loans are no genuine, same cannot be allowed as deduction u/s 57 of the I.T. Act, 1961.

Furthermore, for claiming any deduction u/s 37(1) of the Act, the onus of proving the necessary facts in that connection, is on the assessee. Therefore, if the assessee fails to establish the facts necessary to support his claim of claiming deduction u/s .37(1) of the I.T. Act.

Hence, the interest claimed to have paid to the above parties as mentioned in the aforesaid table, during the F.Y. 2014-15 amounting to Rs. 62,81,903/- is hereby disallowed and added to the total income. Penalty proceedings u/s.271(1)(c) r.w.s. 274 of the I.T. Act, 1961 are also initiated on this issue for furnishing inaccurate particulars of income.

(Add: Rs. 62,81,903/-)"

26. Aggrieved assessee is in appeal before Ld. CIT(A) and filed detailed submissions. After considering the detailed submissions of the assessee, Ld. CIT(A) dismissed the ground raised by the assessee observing as under: -

"9.0 GROUND NO. 3: DISALLOWANCE OF INTEREST EXPENSES OF Rs.62,81,903/-:

9.1 During the course of assessment proceedings, while perusing the details furnished by the assessee, the AO observed that the assessee claimed to have paid interest of Rs.62,81,903/- to five parties identified as paper/shell companies indulged in providing accommodation entries in the guise of unsecured loans, which included the above mentioned three paper/shell companies. The details of the same are given below for ready reference.

Sr. No.	Name of the Party	Interest paid(In Rs.)
1	Blue Circle Services Ltd.	2,12,301/-
2	JMD Telefilms Industries Ltd.,	1,68,658/-
3	JMD Sounds Ltd.	87,377/-
4	Global Infratech & Finance Ltd.	9,33,827/-
5	Unisys Software Ltd.	48,79,740/-
	Total	62,81,903/-

9.2 In view of the above, the AO disallowed the assessee's claim of interest expenses to the extent of Rs.62,81,903/- on the ground that when the unsecured loans itself are not genuine and treated as income of the assessee, the question of allowing interest on such bogus loans doesn't arise. While doing so, the AO observed that, as per the provisions of section 57 of the Act, the assessee is eligible to claim expenses actually incurred for earning income subject to tax u/s.56 of the Act.

9.3 Also, the AO stated that, as per the provisions of section 37(1) of the Act, the onus is cast on the assessee to prove that expenses claimed as deduction have been wholly and exclusively incurred for the purpose of business of the assessee. Accordingly, since the assessee has failed to prove nexus between interest income and interest expenses and, also, the onus of proof u/s.37(1) of the Act, coupled with the fact that unsecured loans were treated as bogus in nature, the entire amount of interest expenses of Rs.62,81,903/- was disallowed.

9.4 During the course of appellate proceedings, the assessee submitted that the AO is not justified in disallowing the interest expenses of Rs.62,81,903/- on the ground that he had fulfilled all the requisite conditions to prove the genuineness of unsecured loans received from the above mentioned five parties

DECISION-III:

9.5 I have given my thoughtful consideration to the issue under dispute and examined the same in the light of the factual matrix of the case and relevant provisions of the statute.

9.6 At the outset, it is an admitted fact that the assessee claimed to have paid interest of Rs.62,81,903/- to five parties in respect of unsecured loans received from them, which were proved to be bogus in nature as explained in the impugned assessment order. Further, I have already held that the assessee's claim of unsecured loans obtained from the above mentioned three parties i.e., Rs.1,25,00,000/-, was not genuine and bogus in nature. While doing so, a finding of fact has been recorded that the assessee had obtained accommodation entries from various parties in the guise of unsecured loans.

9.7. As far as two more parties i.e., Global Infratech & Finance Ltd. and Unisys Software Ltd., I have perused the impugned assessment order and the findings of Investigation Wing and I am satisfied that these two parties, being paper/shell companies, are also indulged in providing accommodation entries in the guise of unsecured loans, share capital, share application money, etc.

9.8 Accordingly, I am of the considered opinion that the unsecured loan transactions claimed to have received by the assessee from the above mentioned two companies on which interest expenditure was claimed to the extent of Rs.58,13,567/- (9,33,827 + 48,79,740) are also bogus in nature. As a natural corollary, the assessee is not entitled to claim interest on such bogus unsecured loans as allowable deduction either u/s.57 or u/s.37(1) of the Act. Accordingly, the entire amount of interest expenses claimed by the assessee of Rs.62,81,903/- cannot be allowed as deduction as per the provisions of the Act. Thus, the ground of appeal raised by the assessee on this issue is dismissed.

10.0 In the result, the appeal filed by the assessee against the order u/s.143(3) of the Act for the AY 2015-16 is dismissed."

27. At the time of hearing, Ld.AR of the assessee brought to our notice relevant facts of the ground and submitted as under: -

"Why the Ld. A.O. made disallowances

The Ld. A.O., considered the parties from whom loan was taken as alleged group companies of Shri Jagdish Purohit Group on whose premises a search action was conducted by the Investigation wing and that the loan was bogus loan and he treated the loan as unexplained cash credit u/s 68 and accordingly added to the total income of the appellant. As the original cash credits were bogus, the Ld AO treated interest paid during the year under reference and during the earlier AY's on such unexplained cash credit as bogus and disallowed the same.

Why the disallowances is not sustainable

1. *During the course of assessment proceedings, the assessee has filed the required documents which very well proves the identity, creditworthiness and source of the parties from whom genuine loan was taken for business.*
2. *As the cash credits taken were genuine, the claim of interest on cash credits are actual expenditure incurred for business and to be allowed. Furthermore, the interest expenditure claimed by the assessee has also been offered as income by the lenders in their return of income. The disallowances made are bad in law and liable to be deleted.*
3. *A copy of ledger summary of all the parties depicting loan taken and repayment of loan along with interest is a part of paper book (page 114-143)*

In terms of the above, we would request Your Honour to delete the disallowance made on account of interest expenses by Ld. A.O."

28. On the other hand, Ld. DR relied on the order of the lower authorities.

29. Considered the rival submissions and material placed on record, this ground is relating to addition made under section 68 of the Act. As we have adjudicated Ground No.2 in favour of the assessee and the issue involved is disallowance of interest on the same loan. This ground

being interest paid i.e., consequential to Ground No. 2, is also allowed in favour of the assessee.

30. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 07th February, 2024.

Sd/-
(ABY T VARKEY)
JUDICIAL MEMBER

Mumbai / Dated 07.02.2024
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum