आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'B' अहमदाबाद।

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD

BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER

ITA No.1121/Ahd/2018
[Asst.Year : 2014-15]
AND
ITA No.961/Ahd/2019
[Asst.Year : 2015-16]

Hemil Subhashbhai Shah "Samarpan", B/h. Anand Shopping Centre Bhatta, Paldi Ahmedabad. PAN : BEOPS 2822 D		DCIT, Ward-5(3)(1) Ahmedabad.

(Applicant)		**(Responent)**

Assessee by :	Shri S.N. Soparkar, Sr.Advocate Shri Parin Shah, AR & Ms.Urvarshi Sodhan, AR
Revenue by :	Shri Purushottam Kumar, Sr.DR

सुनवाई की तारीख/Date of Hearing : 14/03/2023
घोषणा की तारीख /Date of Pronouncement: 12/06/2023

आदेश/O R D E R

PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER

Present two appeals have been filed by the assessee against order passed by the ld. Commissioner of Income Tax (Appeals)-5, Ahmedabad[hereinafter referred to as "Ld.CIT"] dated 9.3.2018 and 26.03.2019pertaining to the Asst.Year 2014-15 and 2015-2016 under section 250(6) of the Income Tax Act, 1961 (hereinafter referred to as the "Act' for short).

It was common ground that the issues involved in both the appeals was similar involving identical facts. Therefore both the appeals were taken up together for hearing and are being disposed of by this common order.

2. The grounds raised in both the appeals are as under:

ITA No.1121/Ahd/2018 (Asst.Year 2014-15)

1. That Hon. CIT(Appeal) has erred in confirming addition of Rs.10,40,265 u/s 68 of the act.

2. That Hon.CIT(Appeal) has erred in confirming that long term capital gain earned by the appellant is not genuine. On the facts of the case, no addition should be made u/s. 68 of the Act and long term capital gain should be treated as exempt as claimed by the appellant.

ITA No.961/Ahd/2019 (Asst.Year 2015-16)

1. That Hon. CIT(Appeal) has erred in confirming addition of Rs.58,10,231 u/s 68 of the act.

2. That Hon.CIT(Appeal) has erred in confirming that long term capital gain earned by the appellant is not genuine. On the facts of the case, no addition should be made u/s. 68 of the Act and long term capital gain should be treated as exempt as claimed by the appellant.

3. The assessee, as is evident from the above,is aggrieved by the long term capital gains returned by it to tax on sale of shares, being held to be bogus and mere accommodation entries by the Revenue authorities. The shares sold in both years were of the same company i.e. "KAPPAC PHARMA LTD" and basis with the AO/CIT(A) for holding it to be bogus was that the shares were found by the Investigation Directorate, Kolkatta to be penny stock whose prices were artificially manipulated and rigged to provide gains or loss to entities as per their requirement, in return for cash; that it was scam unearthed by the Investigation Wing, Kolkatta revealing that by collusive involvement of entry operators, brokers and beneficiaries, accommodation entry has been provided to

beneficiaries by artificially rigging prices of the shares. The AO found the shares dealt with by the assessee i.e. KAPPAC PHARMA LTD to be such share identified as penny stock by the Investigation Wing, Kolkatta and as per the AO, the Investigation Wing revealed the assessee as one of the beneficiaries. Based on these facts thelong term capital gain returned by the assessee was treated as bogus and all documentary evidences filed by the assessee to prove genuineness of its claim were rejected, as not sufficient to discharge onus cast on the assessee.

The primary contention of the ld.counsel for the assessee before us was that the finding of the authorities below of the transaction of sale of shares being bogus was flawed since the assessee had discharged its onus of proving the genuineness of the transactions. The list of dates, events and documents filed proving genuineness of the transaction was filed before us as under:

Sr. No.	Date	Event	P/B Pages
1	11.02.2013 17.02.2013	Purchase of 15000 shares of Kappac Pharma -Debit Note, Receipt and Ledger of Vendor	{P/B – I} 18 – 20
2	27.02.2013	Shares transferred in name of assessee -Share Certificates & Share Transfer Form	 22 – 26
3	25.03.2013	Bank Statement showing payment made to vendor for purchase of shares	21
4	17.06.2013	Request made for dematerialization of shares	27
5	25.03.2014	Sale of 1500 shares -Sale bill -Ledger A/c of ASE Capital Market -Ledger A/c of Kappac Pharma -Statements ASEL showing list of shares held by assessee -Bank Statement of Assessee showing receipt	 12 13 – 15 29 30 – 31 32
5	30.05.2014 03.06.2014 12.09.2014 08.10.2014	Sale of 13500 shares -Sale bills -Ledger A/c of ASE Capital Market -Ledger A/c of Kappac Pharma -Bank Statement showing receipt	{PB – II} 36 – 39 34 32 40 & 42

4. That as per the above, entire transaction of sale and purchase was claimed to be proven by the assessee and to be in order; that the AO/CIT(A) had not brought any evidence against the assessee; that nothing adverse was confronted to the assessee, this despite the assessee asking for cross-examination and for all material evidence against it ;that the assessee was denied opportunity for cross-examination. Reliance was placed on the decision of the Hon'ble Apex Court in the caseof Andaman Timber Industries Vs. Comm. Of Central Excise, Kolkata (2015) 62 taxmann.com 3 (SC).

5. The ld.DR, on the other hand contended that the issue was squarely covered against the assessee by the judgment of the Hon'ble Calcutta High Court in the case of Pr.CIT Vs. Swati Bajaj, (2022) 446 ITR 56 (Cal) where based on the similar investigation report of the Investigation Wing, Kolkatta and in identical set of

facts, the Hon'ble Court had held that mere filing documentary evidences did not discharge onus cast on the assessee to prove genuineness of the transaction, more particularly, since the huge price rise in the shares sold was not shown to be supported by financials of the company, and there was no justification for the same, and considering large scale scam unearthed by the department, where entry operators and brokers involved had admitted to providing accommodation entries through bogus long term capital gain on sale of shares.

6. We have heard both the parties , gone through the orders of the authorities below and the case laws cited before us. The facts, which are not disputed is that the assessee has earned long term capital gain on sale of 1500 shares of KAPPAC PHARM LTD. in Asst.Year 2014-15 soldfor a consideration of Rs.10,42,425/- and in Asst.Year 2015-16 13500 shares of the same company were soldfor a consideration of Rs.58,10,231/-. The AO has relied on the report of Investigation Wing, Kolkatta, which found these shares to be penny stock i.e. of no value as such, but manipulated by accommodation entry operators in collusion with the brokers to artificially rig their prices resulting in long term capital gains to the beneficiaries. He specifically mentions the shares sold by the assessee as found to be penny stock in the report of the Investigation Wing of the Department at Kolkatta, and also the assessee being indicated in the report as one of the beneficiaries.

7. The assessee, on the other hand, states to have discharged its onus of proving the genuineness of the transaction by filing documentary evidences and at the same time, contending that no specific evidences against the assessee was found, and also that, the

assessee was not confronted with the adverse report and allowed opportunity for cross-examination.

8. We have gone through the judgment of the Hon'ble Calcutta High Court in the case of Swati Bajaj (supra) and find that the issue before us is clearly covered by the said decision. The facts stated in the said case are identical to that in the case before us, as also, pleading of the assessee before the Hon'ble High Court being identical. Parity of facts is discerned from the Hon'ble High Court's order where it notes that the AO relied on the investigation report to find long term capital gain returned by the assessee on sale of shares of M/s Surabhi Chemicals as relating to penny stock and to be in the nature of mere accommodation entries. The facts are noted at para 3 of the judgment. The pleadings of the assessee before the Hon'ble Court were also identical as that made before us i.e.

i) Investigation report relied upon by the AO was a general report;
ii) Adverse report was not confronted to the assessee;
iii) No opportunity of cross-examination provided to the assessee, and
iv) Assessee's onus of proving genuineness of the transaction stood discharged.

9. The Hon'ble High Court dealt with each and every contention raised by the ld.counsel for the assessee before it.

10. Regarding the contention of the assessee that investigation report was a general report and could not form the basis for holding the impugned transaction as bogus, it was discarded by the Hon'ble court holding that the report was prepared by an authority of the

Department, i.e DDIT on the basis of Investigation conducted when matter of large scale scam of providing accommodation entries in the guise of long term capital gains came to their notice. That therefore it was an internal report and needed to be given due weightage to commence proceedings under the Act against assesses who fall within the ring of suspicion. The findings in this regard by the Hon'ble Highcourt areat para-43 to 51 of the order as under:

> *"43. From the assessment order passed in the case of the assessee Smt. Swati Bajaj, we find that the genesis of the issue commenced from an investigation report submitted by the Directorate of Income Tax, Investigation, Kolkata (DIT). The investigation report has been prepared by the Deputy Director of Income Tax, Investigation Unit -II and III, Kolkata. Before we examine the report, we shall deal with the objection raised by Mr. Surana, learned senior advocate as regards the effect of such report, whether at all it is a "report" and can the assessing officer or the CIT (A) can proceed on the basis of such "report". The above submission is sought to be buttressed by placing reliance on the decision in Sesa Sterlite Ltd. and Odeon Builders (supra).*
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> *44. In Sesa Sterilite Ltd. (supra), all the assessees were traders and exporters of iron ore and some of them were also miners and processors of the ore. Allegations of large-scale illegal mining and trading necessitated the Government of India to appoint a Commission of Inquiry under section 3 of the Commission of Inquiry Act, 1952. The Commission so appointed by the Union of India submitted three reports wherein finding was rendered with regard to the violation of various statutes and other infirmities and that there were illegal exports particularly by means of under-invoicing on the part of the mining lessees and exporters. In the said case this report was the basis for the Income-tax Officer to issue notice under section 148 of the Act proposing to re-open the assessments under section 147 of the Act for the assessment year 2008-2009.The reason for re-opening were:*
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> *(a) Under-invoicing of exports by the assessee, (b) Illegal mining activity and income arising from it to be assessed as income from other sources and (c) Escapement of income from assessment on account of failure on the part of the assessee to disclose wholly and truly part all material fact necessary for the assessment.*
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> *45. In support of the first reason, the third report of the Commission of Inquiry was relied on. The assessee challenged the re-opening as being bad in law as it was solely on the basis of the report of the Commission of Inquiry and such report itself was vitiated on account of serious violation of principles of natural justice by reason of breach of Section 8B and 8C of the Commission of Inquiry Act. That the lessees including the assessee therein were not given any opportunity to explain the material used by the Commission of Inquiry in its report. Further it was contended that the report of the Commission is in the nature of expression of an opinion by the Commission and has no efficacy either as a legal findings or admissible*

evidence. The Division Bench of the Bombay High Court while testing the correctness of the said submissions observed that in so far as the allegations of under-invoicing by the exporters is concerned, it is nothing but a matter of expression of opinion by the Commission of Inquiry. Further the Court noted that the report of the Commission of Inquiry was a subject matter of challenge in a writ petition by the mining lessees and exporters including the assessee Sesa Sterlite Ltd. (supra). The Court further held that the report of the Commission neither constitutes a binding judgment nor a definitive pronouncement. Further by referring to the decision of the Hon'ble Supreme Court in State of Karnataka v. Union of India [1977] 4 SCC 608, it was held that the report submitted by the Commission of Inquiry may or may not be accepted by the authority appointing the Commission of Inquiry. In the background of these findings, the Court held that the re-opening of the assessment could not have been done exclusively based on the report of the Commission of Inquiry.

46. Mr. Surana, learned senior counsel relied on the decision of the Allahabad High Court in Smt. Kavita Gupta and submitted that the report of the Deputy Director of Income Tax, Investigation (DDIT) cannot be the basis of the assessment more so when the report was not furnished to the assessee, there is no finding as against the asessee in the report which was produced for the first time before this Court during the course of the arguments of these appeals. It is submitted in Smt. Kavita Gupta, it was held that a mere report of the DDIT suggesting that some of the gifts received by the assessee therein may be non-genuine and that to when not confronted to the assessee was not sufficient to conclude that the gifts obtained by the assessee were not genuine. It was further argued that the report of the DDIT is a third-party information which has not been independently subjected to further verification by the assessing officer who has not provided the copy of the statements to the appellants. Thus, the appellant thereby denying opportunity of cross examination to the assessee therein who had in the said case discharged the initial burden of substantiating the purchases through various documents is in violation of principle of natural justice. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in Odeon Builders (supra).

47. We are required to test the correctness of the objection raised by Mr. Surana the learned senior counsel with the aid of the aforementioned three decisions. The decision in Sesa Sterilite Ltd. (supra) as noted, arises out of a report submitted by the Commission of Inquiry constituted by the Union of India to enquire into the allegations of illegal mining and trading of ore in various states including the state of Goa. The court after noting the provisions of the Commission of Inquiry Act more particularly as to the effect of such report on the authority appointing the Commission of Inquiry and also on the ground that the report was vitiated on account of breach of sections 8B and 8C of the Commission of Inquiry Act, has rendered a finding in favour of the assessee therein. That apart, the Court also found that the very report of the Commission of Inquiry was subject matter of challenge in a writ petition before the Bombay High Court by the mining lessees and exporters. Therefore, the Court taking note of the facts and also the decision in State of Karnataka (supra) which has held that the report of the Commission of Inquiry may or may not be binding on the authority

appointing the Commission, held that the re-opening of the assessments under section 147 of the Act could not have been solely based upon such report. Firstly, we need to note that the report of the DDIT is by an authority of the investigation wing of the Income-tax department. Therefore, at the threshold it cannot be treated to be a third-party report. That apart the effect of a report submitted in terms of the provisions of the Commission of Inquiry Act is quite different and distinct from a report submitted in-house by the Income Tax department. Therefore, in our view the decision in Sesa Sterlite Ltd. (supra) is distinguishable. In so far as the decision in Kavita Gupta (supra) the challenge was whether the assumption of jurisdiction by the Commissioner of Income-tax under section 263 of the Act was justified in the eye of law. In the said case, the Court noted the legal position that when an inquiry is launched under section 143(3) of the Act, the findings will not depend only upon the presumption, the onus of proof could not be cast entirely upon the revenue and such onus would shift on the revenue only if the assessee produced some material to show that what she states may be correct. On facts the Court, in the said case, found that the onus had shifted to the revenue as the assessment was completed by the assessing officer after inquiry and in such factual position, the Court held that a mere report of the Deputy Director (Intelligence) suggesting that some of the gifts obtained by the assessee therein were not genuine and such report having been not confronted to the assessee therein was not sufficient to conclude the gifts were not genuine. The said decision is distinguishable for several reasons. Firstly, the Court considered as to whether the assumption of jurisdiction under section 263 of the Act by the CIT (A) was justified and on facts the Court was satisfied that when the scrutiny assessment was completed under section 143(3) the assessing officer had conducted a proper inquiry. Therefore, the Court found that there was no cause for invoking power under section 263 of the Act by merely relying upon the report of the Deputy Director (Investigation) which was not furnished to the assessee therein. These distinguishing factors will clearly show that the decision is inapplicable to the facts and circumstances of the cases on hand. In Odeon Builders (supra) the appeal filed by the revenue was dismissed by the Hon'ble Supreme Court as no substantial questions of law arise from the order passed by the tribunal. The CIT (A) and the learned Tribunal concurrently held in favour of the assessee therein on facts holding that the information gathered by the investigation wing of the department which was not independently subjected to further verification could not have been relied upon by the assessing officer more particularly that the department did not furnish the report to the assessee therein and the Hon'ble Supreme Court was satisfied that the assessee therein had prima facie discharged the initial burden of substantiating the purchases through various documents. In our humble view the decision is wholly distinguishable on facts.

48. In the background of the aforementioned discussions, we have no hesitation to hold that the plea raised on behalf of the assesses that the report should be discarded cannot be accepted. The report has to be read as a whole along with the annexures/chapters. We shall go into the finer details of the report, the effect of such report in the later part of this judgment.

49. An investigation is commenced when allegations crops up regarding tax evasion. The Income-tax department was nowhere in the picture when the assessees effected purchase of the shares and subsequently sold the shares well after the period of 12 months. It is only when the assessees, substantially in large numbers, made fanciful claims of LTCG, time had come to examine its genuinity of such claims. While on this issue, it would be relevant to take note of the decision of the Hon'ble Supreme Court in Ram Jethmalani (supra). The matter before the Hon'ble Supreme Court was in respect to transfer of monies and accumulation of monies which were unaccounted for by many individuals and legal entities in the country in foreign banks. The degree of control on such transactions by the states was explained by the Hon'ble Supreme Court in the following terms:

If the State is soft to a large extent, especially in terms of the unholy nexus between the law makers, the law keepers, and the law breakers, the moral authority, and also the moral incentives, to exercise suitable control over the economy and the society would vanish. Large unaccounted for monies are generally an indication of that.

These matters before us relate to issues of large sums of unaccounted for monies, allegedly held by certain named individuals, and loose associations of them; consequently we have to express our serious concerns from a constitutional perspective. The amount of unaccounted for monies, as alleged by the Government of India itself is massive. The show-cause notices were issued a substantial length of time ago. The named individuals were very much present in the country. Yet, for unknown, and possible unknowable, though easily surmisable, reasons the investigations into the matter proceeded at a laggardly pace. Even the named individuals had not yet been questioned with any degree of seriousness. These are serious lapses, especially when viewed from the perspective of larger issues of security, both internal and external, of the country.

50. The Hon'ble Supreme Court proceeded to frame two issues the first of which was the appointment of a Special Investigation Team (SIT) and the justification for appointing a Special Investigation Team was made by the Hon'ble Supreme Court in the following terms:

In the light of the fact that the issues are complex, requiring expertise and knowledge of different departments, and the necessity of coordination of efforts across various agencies and departments, it was submitted to us that the Union of India has recently formed a High Level Committee, under the aegis of the Department of Revenue in the Ministry of Finance, which is the nodal agency responsible for all economic offences. The composition of the High Level Committee (HCL) is said to be as follows: (i) Secretary, Department of Revenue as the Chairman; (ii) Deputy Governor Reserve Bank of India; (iii) Director (IB); (iv) Director, Enforcement; (v) Director, CBI; (vi) Chairman, CBDT; (vii) DG, Narcotics Control Bureau; (viii) DG, Revenue Intelligence; (ix) Director, Financial Intelligence Unit; and (x) JS (FT & TR-I), CBDT. It was also submitted that the HLC may co-opt, as necessary, representation not below the rank of Joint Secretary from the Home Secretary, Foreign Secretary, Defence Secretary and the Secretary, Cabinet Secretariat. The Union of India claims that such a multi-disciplinary group and committee would now enable the conducting of an efficient and a

systematic investigation into the matters concerning allegations against Hassan Ali Khan and the Tapurias; and further that such a committee would also enable the taking of appropriate steps to bring back the monies stashed in foreign banks, for which purposes a need may arise to register further cases. The Union of India also claims that the formation of such a committee indicates the seriousness with which it is viewing the entire matter.

51. The above decision would render support to cause an investigation by the Income-tax department when matters come to their notice showing abnormally high and inflated claims of LTCG especially when the share market in the country during the relevant time was not progressive. Therefore, no fault can be attributed to the Income-tax department for causing an investigation and any finding rendered pursuant to such investigation could very well be a material to commence further proceedings under the Act against the assessees who fall within the ring of suspicion. Mr. Surana, learned Senior Counsel would contend that unlike in the cases relied upon by him, there is nothing to show that the Government of India or the CBDT had directed conduct of an investigation by the DDIT who is the lowest in the rung of officers in the investigation wing of the Income-tax department. To examine, this we had perused the preamble portion of the report. The report has been prepared by the DDIT and it has been forwarded to the DGIT (Investigation) in all the states in the country as well as the Director General of International Tax, Mumbai. The report prepared by the DDIT is on behalf of the Directorate of Investigation, Kolkata, and this is evident from the report dated 27-4-2015. Therefore, to discredit the report as if to be initiated by the DDIT on his own accord is in an incorrect submission. The learned senior counsel referred to the penultimate paragraph of the report and submitted that the officer who prepared the report himself mentions it to be a "write" up and therefore it is not a "report" in the strict sense. We are unable to agree with the said submission as substance over form has to be looked into and preferred. Therefore, to pick up the words "write up" and to brand the report to be a personal opinion of the DDIT is not tenable. Therefore, on the grounds raised by the learned senior counsel, we are not persuaded to hold that the report has to be discarded in its entirety and accordingly this objection raised on behalf of the assessee is decided against them.

11. Regarding the aspect of the adverse investigation report not being confronted to the assessee and opportunity of cross examination not being afforded to the assessee, the Hon'ble High Court held that infraction of the principles of natural justice would invalidate orders passed only when such infraction is shown to have caused prejudice to the assessee; that the investigation by the department commencing from those who dealt with the penny stocks, the brokers and the entry providers and being for the purpose of unravelling their modus operandi, the

assessee/beneficiaries have not been directly indicted in the report. The assesses otherwise have been provided with the details of the contents of the report by the AO. In such circumstances with the assessees failing to show how they were prejudiced by not providing the report, the same cannot be held to be infraction of principle of natural justice to invalidate the order of the AO. This issue has been dealt with at para-55 to 69 of the order as under:

> *"55. The first argument on behalf of the assessee is that the copy of the investigation report was not furnished to them despite specific written request made on behalf of the assesses to furnish the copy of the report, the statements recorded and provide those persons from whom statements were recorded to be cross examined on behalf of the assessee. There is no dispute to the fact that the copy of the statement said to have been recorded during the course of investigation has not been furnished to the assessees and the request made by some of them for cross examining of those persons was not considered. The question would be as to whether the non-compliance of the above would render the assessments bad in law. The argument of the revenue is that the assessments cannot be held to be illegal merely on the grounds that the copy of the report was not furnished as the respective assessing officers have clearly mentioned as to the nature of investigation done by the department and as the report itself states that the investigation commenced not from the assessees end but the individuals who dealt with these penny stocks who were targeted. It is equally true invariably in all cases, the statement of the stock brokers, the entry operators or the Directors of the various penny stock companies does not directly implicate the assessee. If such being the situation, the assessee cannot be heard to say that the copy of the entire report should have been furnished to him, the person from whom the statements were recorded should have been produced for cross examination as admittedly there is nothing to implicate the assessee Smt. Swati Bajaj of insider trading or rigging of share prices. But the allegation against the assessee is that the claim for LTCG/LTCL is bogus. As pointed out by Mr. Rai, learned senior standing counsel, the investigation report is general in nature not assessee specific. Therefore, we are required to see as to whether non-furnishing of the report which according to the revenue is available in the public domain would vitiate the proceedings on the ground that the assessee was put to prejudice.*
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> *56. In State Bank of Patiala v. S.K. Sharma AIR 1996 SC 1669, the Hon'ble Supreme Court pointed out that violation of any and every procedural provision cannot be said to automatically vitiate the domestic enquiry held against the delinquent employee or the order passed by the disciplinary authority except in cases falling under no notice, no opportunity and no hearing categories. Further it was held that if no prejudice is established to have resulted from such violation of procedural provisions no interference is called for, against the ultimate orders. The test laid down was whether the person has received a fair hearing considering all things as the ultimate test*

is always the test of prejudice or the test of fair hearing as. Further the Hon'ble Supreme Court pointed out a distinction between a case of no opportunity and a case of no adequate opportunity and while examining the latter case, it was held that the violation has to be examined from the stand point of prejudice, in other words the Court or the tribunal has to see whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answers to the said query. Further it was held that there may be a situation where interest of the state or public interest may call for curtailing of rule of audi alteram partem and in such a situation the Court may have to balance public/state interest with the requirements of natural justice and arrive at an appropriate decision.

57. In a very recent decision of the Hon'ble Supreme Court in M.J. James (supra) after referring to a catena of decisions on the point the Hon'ble Supreme Court pointed out that natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the audi alteram partem rule cannot by itself, without more lead to the conclusion that prejudice is thereby caused. Where procedural and/or substantive provisions of law embodied the principles of natural justice, their infraction per-se does not lead to invalidity of the order passed. The prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest but also in public interest. Further by referring to the decision in State of Uttar Pradesh v. Sudhir Kumar Singh [2020] SCC Online SC 847, it was held that the "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant, it should exist as a matter of fact or to be cast upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice.

58. Therefore, the assesseeshave to specifically point out as to how they were prejudiced on account of non-furnishing of the investigation report in its entirety, failure to produce the persons from whom the statements were recorded for being cross examined would cause prejudice to the assessee as nowhere in the report the names of the assessees feature. The investigation report states that the investigation has not commenced from the individuals but it has commenced who had dealt with the penny stocks, concept of working backwards. This is a very significant factor to be remembered. Therefore, there has been absolute anonymity of the assessee in the process of investigation. The endeavour of the department is to examine the "modus operandi" adopted and in that process now seek to identify the assessees who have benefited on account of such "modus operandi". Therefore, considering the factual scenario no prejudice has been established to the assessee by not furnishing the investigation report in its entirety nor making the persons available for cross examination as admitted by the department in substantial number of cases the assessees have not been specifically indicted by those persons from whom statements have been recorded.

59. We are conscious of the fact that there may be exceptions however nothing has been brought before us to show that there was an exception in any of these appeals heard by us. In a few cases the assessee has been made known of the statement of the Director of the penny stock company or the stock broker, entry operator despite which those assessees could not

make any headway. While on this issue, we need to consider as to whether and under what circumstances the right of cross examination can be demanded as a vested right. In KishanlalAgarwalla (supra), the Hon'ble Division Bench of this Court pointed out that no natural justice requires that there should be a kind of formal cross examination as it is a procedural justice, governed by the rules and regulations. Further it was held that so long as the party charged has a fair and reasonable opportunity would receive, comment and criticize the evidence, statements or records on which the charges is being against him, the demand and tests of natural justice are satisfied.

60. In Bakshi Ghulam Mohammad (supra) the Hon'ble Supreme Court held that the right of hearing cannot include the right of cross examination and the right must depend upon the circumstances of each case and must also depend on the statute under which the allegations are being enquired into.

61. Having noted the above legal position, it goes without saying there is no vested right for the assessee to cross examine the persons who have not deposed anything against the assessee. The investigation report proceeds on a different perspective commencing from a different point and this has led to the enquiry being conducted by the assessing officer calling upon the assessee to prove the genuineness of the claim of LTCG.

62. In the light of the above conclusion we hold that the decision in Gorkha Security Services (supra) does not lend any support to the case of the assessees and is distinguishable.

63. The copy of the recommendations of SIT on black money as contained in the third SIT report as published by the Press Information Bureau, Government of India, Ministry of Finance, dated 24-7-2015 was placed before us with reference to the misuse of exemption on LTCG for money laundering and the recommendations are as hereunder:

A company with very poor financial fundaments in terms of past income or terms of past income or turnover is able t raise huge capital allotment of Preferential allotment of shares is made to various entities.

There is a shop rise in price of scrip once the preferential allotment is done. This is normally achieved through circuading shares of shares among a select group of companies. These groups of companies often have common promoters/directors. The scrips with thus artificially inflated price rise are offloaded through companies whose funding is provided by the same set people who want to convert black money into while.

There is an urgent need for having an effective preventive and punitive action is such matters to prevent recurrence of such instances.

We recommend the following measures in this regard:

SEBI needs to have an effective monitoring mechanism to study unusual rise of stocks prices of Companies while such a rise is taking place. We understand that SEBI has a strong IT infrastructure which can generate red flag for such instances. Such red flags could be built upon trading volumes,

entities which contribute to trading volume financial background of firms through their annual returns and any other indicators SEBI may develop. We believe that with effective and timely monitoring by SEBI a significant number of such instances can be checked in time. Once such instances are detected, SEBI should invariably share this information with CBDT and FIU.

Barring such entities from securities market would not be of strong deterrence in itself. In case it is established, the stock platforms have been misused for taking LTCG benefits, prosecution should invariably be launched and relevant sections of SEBI Act. Section 12A read with section 24 of the Securities Exchange Board of India Act 1992 are predicate offences.

Enforcement Directorate should then be informed to take action under Prevention of Money Laundering Act for the predicate offences.

64. From the above it is seen that there is a discussion about the "modus operandi" adopted and the SIT opines that there is an urgent need for having an effective, preventive and punitive action in such matters to prevent recurrence of such instances. This is a relevant aspect to be borne in mind.

65. Thus, the report submitted by the investigation department cannot be thrown out on the grounds urged on behalf of the assessees. The assesses have not been shown to be prejudiced on account of non- furnishing of the investigation report or non-production of the persons for cross examination as the assessee has not specifically indicated as to how he was prejudiced, coupled with the fact as admitted by the revenue, the statements do not indict the assessee. That apart, we have noted that the investigation has commenced targeting the individuals who dealt with the penny stocks and after examining the modus seeing the cash trail the report has been submitted recommending the same to be placed before the DGIT (investigation) of all the states of the country. It is thereafter the concerned assessing officers have been informed to consider as to the bonafideness and genuineness of the claims of LTCG/LTCL of the respective assessees qua the findings which emanated during the investigation conducted on the individuals who dealt with the penny stocks. Therefore, the assessments have commenced by the assessing officers calling upon the assessee to explain the genuineness of the claim of LTCG/LTCL made by them. In all the assessment orders, substantial portion of the investigation report has been noted in full. A careful reading of the some would show that the assessee has not been named in the report. If such be the case, unless and until the assessee shows and proves that she/he was prejudiced on account of such report/statement mere mentioning that non-furnishing of the report or non-availability of the person for cross examination cannot vitiate the proceedings. The assessees have miserably failed to prove the test of prejudice or that the test of fair hearing has not been satisfied in their individual cases. In all the cases, the assessees have been issued notices under sections 143(2) and 142(1) of the Act they have been directed to furnish the documents, the assessee have complied with the directions, appeared before the assessing officer and in many cases represented by Advocates/Chartered Accountants, elaborate legal submissions have been made both oral and in writing and thereafter the assessments have been

completed. Nothing prevented the assessee from mentioning that unless and until the report is furnished and the statements are provided, they would not in a position to take part in the inquiry which is being conducted by the assessing officer in scrutiny assessment under section 143(3) of the Act. The assesseewere conscious of the fact that they have not been named in the report, therefore made a vague and bold statement that the non-furnishing of report would vitiate the proceedings. Therefore, merely by mentioning that statements have not been furnished can in no manner advance the case of the assessee. If the report was available in the public domain as has been downloaded and produced before us by the learned standing counsel for the revenue, nothing prevented the assesses who are ably defended by Chartered Accountants and Advocates to download such reports and examine the same and thereafter put up their defence. Therefore, the based on such general statements of violation of principles of natural justice the assessees have not made out any case.

66. While on this issue, it is important to take note of the decision in T. Takano (supra). In the said case, the SEBI took a stand that the investigation report under Regulation 9 of the SEBI regulations could also include sensitive information about the business affairs of various entities and persons concerned and if disclosed it would affect their privacy and the competitive position of other entities. While considering the correctness of the submissions made on behalf of the SEBI, the Hon'ble Supreme Court held that if the disclosure of the report would affect third party rights the onus then shifts to the appellant to prove that the information is necessary to defend the case appropriately. On facts it was found that the appellant therein did not sufficiently discharge his burden by proving that the non-disclosure of the information would affect his ability to defend himself.

67. In the cases on hand, undoubtedly the report contains information about various penny stocks companies about the directors of the companies and also the stock brokers, entry operators and others who have been named in the report. It is an admitted case that the names of the assessees do not figure in the report. Therefore, non-furnishing of the report has in no manner prejudiced the rights of the assessees to discharge the onus cast upon them in terms of section 68 of the Act.

68. It is equally not in dispute that whatever information which was required to be made known to the assessee has been informed to the assessee by the assessing officer by issuance of a notice to each of the assesses to which they have responded by submitting their replies. Therefore, in the absence of any prejudice caused to the assessee on account of non-furnishing of the entire report, the assessees cannot be a heard to say that there has been violation of principles of natural justice and their right to defend themselves was in any manner affected. At this juncture, it would be of much relevance to refer to the decision in K. R. Ajmera (supra). The question of law which arose for consideration before the Hon'ble Supreme Court was as to what is the degree of proof required to hold brokers/sub-brokers liable for fraudulent/manipulative practices under the SEBI Regulations and for violating the code of conduct of the SEBI (Stocks brokers and Sub-brokers) Regulations. It was pointed out that the code of conduct for stock brokers lays down that they shall maintain high standard of integrity, promptitude and fairness in the conduct of all

investment business and shall act with due skill and care and diligence in the conduct of all investment business. The Code also enumerates different shades of duties of stock brokers towards the investor and those duties pertain to high standard of integrity that the stock broker is required to maintain in the conduct of his business. It was further pointed out that it is a fundamental principle of law that prove of an allegation levelled against a person may be in the form of direct substantive evidence or as in many cases such proof may have to be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and levelled. It was further held that direct evidence is a more certain basis to come to a conclusion yet in the absence thereof the courts cannot be helpless. It was further pointed out that it is the judicial duty to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded and to reach what would appear to the Court to be a reasonable conclusion therefrom. The test would always be that what inferential process that a reasonable/prudent man would adopt to arrive at a conclusion. The above tests laid down by the Hon'ble Supreme Court were applied to the facts of the case in K.R. Ajmera (supra) and it was noted that the scrips in which trading had been done wherefore illiquid scrips meaning thereby that such scrips though listed in the BSE were not a matter of every day buy and sell transactions. Further it was held that trading in such illiquid scrips is not impermissible yet voluminous trading over a period of time in such scrips is a fact that should attract the attention of a vigilant trader engaged in such trades. It was further pointed out that though proximity of time between the buy and sell orders may not be conclusive in an isolated case such an event in a situation where there is a huge volume and trading can reasonable point to some kind of a fraudulent/manipulative exercise with prior meeting of minds. Such meeting of minds so as to attract the liability of the brokers / sub-broker and may be between the brokers/sub-broker and the client or it could be between two brokers/sub-brokers engaged in the buy and sell transactions. Further it was pointed out that when over a period of time such transactions have been made between the same set of brokers or a group of brokers a conclusion can be a reasonable reached that there is a concerted effort on the part of the brokers concerned to indulge in synchronized trade the consequences of which is large volumes of fictitious trading resulting in unnatural rise in hiking the price/value of the scrips. In the said case, it was argued that on a screen-based trading the identity of the second party to be a client or the broker is not known to the first party/client or broker. This argument was rejected as being irrelevant. It was pointed out that the screen-based identity system keeps the identity of the parties anonymous and it will be too naïve to rests the final conclusions on said basis which overlooks a meeting of minds elsewhere. Further it was held that direct proof of such meeting of mind elsewhere would rarely be forth coming and therefore the test is one of the preponderance of probabilities so far as the adjudication of a civil liability arising out of violation of the Act or to the Regulations. Further it was held that the conclusion has to be gathered from various circumstances like that volume of trade effected; the period of persistence in trading in particular scrips; the particulars of the buy and sell orders, namely, the volume thereof; the proximity of time between the two and such other relevant factors.

69. Thus, the legal principle which can be culled out from the above decision is that to prove the allegations, against the assessee, can be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and levelled and when direct evidence is not available, it is the duty of the Court to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded so as to reach a reasonable conclusion and the test would be what inferential process that a reasonable/prudent man would apply to arrive at a conclusion. Further proximity and time and prior meeting of minds is also a very important factor especially when the income tax department has been able to point out that there has been a unnatural rise in the price of the scrips of very little known companies. Furthermore, in all the cases, there were minimum of two brokers who have been involved in the transaction. It would be very difficult to gather direct proof of the meeting of minds of those brokers or sub-brokers or middlemen or entry operators and therefore, the test to be applied is the test of preponderance of probabilities to ascertain as to whether there has been violation of the provisions of the Income-tax Act. In such a circumstance, the conclusion has to be gathered from various circumstances like the volume from trade, period of persistence in trading in the particular scrips, particulars of buy and sell orders and the volume thereof and proximity of time between the two which are relevant factors. Therefore, in our considered view the methodology adopted by the department cannot be faulted.

12. The aspect of discharge of onus of the assessee by filing documentary evidences, is dealt with at para 75 to 88 of the order , holding that the burden in the said cases where the facts showed phenomenal and fanciful rise in shares in a short span of time and thereafter steep fall, all unsupported by the financials of the companies , was heavy and could not be said to be discharged by filing mere documentary evidences of sale and purchase of shares. The- relevant portion of the order isas under:

"75. While it may be true that M/s. Swati Bajaj, Mr. Girish Tigwani or other assessees who are before us could have been regular investors, investors could or could not have been privy to the information or modus adopted. In our considered view, what is important is that it is the assessee who has to prove the claim to be genuine in terms of section 68 of the Act. Therefore, the assessee cannot escape from the burden cast upon him and unfortunately in these cases the burden is heavy as the facts establish that the shares which were traded by the assessees had phenomenal and fanciful rise in price in a short span of time and more importantly after a period of 17 to 22 months, thereafter has been a steep fall which has led to huge claims of STCL. Therefore, unless and until the assessee discharges such burden of proof, the addition made by the assessing officer cannot be faulted.

76. It was argued that unless there are foundational facts, circumstantial evidence cannot be relied on. This argument does not merit acceptance as wealth of information and facts were on record which is the outcome of the investigation on the companies, stock brokers, entry operators etc. Based on those foundational facts the department has adopted the concept of "working backward" leading to the assessees. While at that relevant stage the sounding circumstances, the normal human conduct of a prudent investor, the probabilities that may spill over, were all taken into consideration to negative the claim for exception made by the assessee. Therefore, the department was fully justified in taking note of the prevailing circumstances to decide against the assessees.

77. While on the issue regarding the onus of proof, it would be beneficial to refer to the decisions which were relied on. In Durga Prasad More (supra), the Hon'ble Supreme Court pointed out that on the question of onus that law does not prescribe any quantitative test to find out whether the onus in a particular case has been discharged or not and it depends on the facts and circumstances of each case. It was further held that in some cases, the onus may be heavy whereas in others, it may be nominal. In the said case the assessee was receiving some income which he stated that it is not his income but that of his wife. On facts, it was found that the assessee's wife is supposed to have had Rs. 2 lakhs neither deposited in bank, nor advanced to others but safely kept in a safe. The assessee was unable to show from what source she built up the amount and Rs. 2 lakhs before the year 1940 which was a big sum during the relevant time. The Tribunal disbelieved the story of the assessee and held it to prima facie be a fantastic story, a story that does not accord with human probabilities. It was further held that the Courts and Tribunals have to judge the evidence before it by applying the test of human probabilities, human minds may differ as to the reliability of a piece of evidence but in that sphere, the decision of the final fact finding authority is made conclusive by law.

78. In SumatiDayal (supra), the appeals were filed by the assessee against the order passed by the Income-tax Settlement Commission. On the aspect of burden of proof, it was pointed out that in all cases in which a receipt is sought to be taxed as income, the burden lies on the department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act, lies upon the assessee. With regard to the effect of Section 68 of the Act, it was held that where any sum is found credited in the books of the assessee in previous year, the sum may be charged to Income-tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. It was further held that in such a case, the prima facie evidence against the assessee namely, the receipt of money and if he fails to rebut, the said evidence being unrebuted, can be used against him by holding that it was a receipt of an income nature. The Hon'ble Supreme Court proceeds to discuss the facts of the case where the dispute was whether the winnings of the assessee therein were from horse races. Pointing out as to how this matter has to be examined, it was held that the matter has to be considered in the light of human probabilities and by applying the said test it was held that the

assessee's claim therein about the amount being her winnings from horse races was not genuine.

79. It was argued on behalf of the assessees that the decision in Durga Prasad More (supra) and SumatiDayal (supra) cannot be relied upon by referring to the factual scenario in those cases. The question would be as to whether the interpretation sought to be given by the learned Advocates for the assessees as regards the principle laid down by the Hon'ble Supreme Court in the aforementioned decisions is justified or not. In Salmond On Jurisprudence, 12th Edition, the concept of ratio decidendi was explained by stating that what it decides generally, is the ratio decidendi or rule of law for which it is authority; what it decides between the parties includes far more than just this. The principles that have to be borne in mind, is to determine the ratio of any particular case which was explained. Further, a ratio is the rule the Judge acted on and it would be always said for certain what the rule was as in some cases an order or judgment is unsupported by reasons and the others there are lengthy judgment in which may be embodied several different propositions of all which support the decision. Therefore, the principle laid down in the decision has to be looked into by culling out the ratio laid therein. Therefore, the revenue is fully justified and cannot be precluded from referring to the above decisions.

80. The decisions in Durga Prasad More (supra) and SumatiDayal (supra) have been consistently referred in subsequent decisions of the Hon'ble Supreme Court and in this regard, it will be beneficial to refer to the decision in P. Mohanakala (supra). The questions of law which were framed for consideration are more or less identical as the substantial questions of law raised before use with regard to the burden of proof cast on the assessee under section 68 of the Act. It was held that the expression "the assessee offers no explanation" means where the assessee offers no proper, reasonable and acceptable explanation as regard the sums found credited in the books maintained by the assessee. Further it was pointed out that in cases where the explanation offered by the assessee about the nature and source of sums found credited in the books is not satisfactory shows, prima facie evidence against the assessee namely, the receipt of money, the burden is on the assessee to rebut the sum and if he fails to rebut, it can be held against the assessee that it was a receipt of an income nature. Further, it was held that in the absence of satisfactory explanation of the assessee, the Income-tax Officer may assume that cash credit entries in the books represented income from undisclosed sources. In the said case also the Court took note of the fact that the Assessing Officer considered various surrounding circumstances before rejecting the explanation offered by the assessee which finding was approved by the Hon'ble Supreme Court as it was based on the material available on record and not on any conjectures and surmises.

81. In Roshan Di Hatti (supra), it was held that the onus of proving the source of money found to have been received by an assessee is on him, if he disputes, it is not liable to tax, it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation and in the absence of such proof the revenue is entitled to treat it as taxable income. Further, it was held that where the nature of and source of a receipt whether it be of money or of the property, cannot be satisfactorily explained

by the assessee, it is open to the revenue to hold that it is the income of the assessee and no further burden lies on the revenue to show that the income is from any particular source.

82. In Kale Khan Mohammad Hanif (supra), one of the questions referred was whether the burden of proof, source of cash credit is on the assessee. It was held that the answer to question must be in the affirmative and that is how it was answered by the High Court therein. It was held that the onus of proving the source of the sum of money found to have been received by the assessee is on him, if he disputes liability for tax, it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation under the provision of the Act.

83. In Smt. Tharakumari (supra), the appeal by the assessee was questioning the correctness of the finding as to whether LTCG claimed by the assessee, which was brought to tax by the Assessing Officer as unexplained income under section 68 of the Act was justified. The said case also arose out of a penny stock where the assessee had purchased shares in M/s. Luminaries Technologies Ltd. The Division Bench of the Madras High Court took note of the findings recorded by the Tribunal which also referred to the report of the DITI, Kolkata and held that the nature of transactions of sale of shares of a shell company was rightly held to be sham transactions and the same are to be taxed as undisclosed income under section 68 of the Act.

84. In N.R. Portfolio Pvt. Ltd., the substantial question of law framed for consideration was whether the Tribunal was right in deleting the additions under section 68 of the Act and whether the decision of the Tribunal is perverse. While answering the said question, it was pointed out that the Assessing Officer is both an investor and an adjudicator. The Assessing Officer can also refer to incriminating material or evidence available with him and call upon the assessee to file their response and a general and universal procedure or method to be adopted by the Assessing Officer while verification of facts cannot be laid down. Further, the manner and mode of conducting assessment proceedings has to be left to the discretion of the Assessing Officer and the same should be just, fair and should not cause any harassment to the assessee. Further, it was held that the provisions of the Evidence Act are not applicable but the Assessing Officer being a quasi-judicial authority, must take care and caution to ensure that the decision is reasonable and satisfies the balance of equity, fairness of justice and the principle of preponderance of probabilities apply. The assessee argued that the revenue must have evidence to show circulation of money from the assessee to the third party which contention was rejected by the Court holding it to be fallacious and after referring to the decision in A. GovindarajuluMudaliar v. CIT [1958] 34 ITR 802 (SC) wherein the Hon'ble Supreme Court observed that it is not the duty of the revenue to adduce evidence to show from what source income was derived and why it should be treated as concealed income and the assessee must prove satisfactorily the source and the nature of cash received during the accounting year and it is not necessary for the revenue to locate the exact source. Further, it was observed that the Court was conscious of the doctrine of "source of source" or "origin of origin" and pointed out as follows:

"We are conscious of the doctrine of 'source of source' or 'origin of origin' and also possible difficulty which an assessee may unimpeachable creditworthiness of the share subscribers. But this aspect has to be decided on factual matrix of each case and strict or stringent test may not be applied to arms length angel investors or normal public issues. Doctrine of 'source of source' or 'origin of origin' cannot be applied universally, without reference to the factual matrix and facts of each case. The said test in case of normal business transactions may be light and not vigorous. The said doctrine is applied when there is evidence to show that assessee may riot be aware, could not have knowledge or was unconcerned as to the source of money paid or belonging to the third party. This may be due to the nature and character of the commercial/business transaction relationship between the parties, statutory postulates etc. However, when there is surrounding evidence and material manifesting and revealing involvement of the assessee in the "transaction" and that it was not entirely an arm's length transaction, resort or reliance to the said doctrine may be counterproductive and contrary to equity and justice. The doctrine is not an eldritch or a camouflage to circulate ill-gotten and unrecorded money. Without being oblivious to the constraints of the assessee, an objective and fair approach/determination is required."

85. The Court then proceeded to refer to the decision of the Full Bench in CIT v. Sophia Finance Ltd . [1993] 70 Taxman 69/[1994] 205 ITR 98 (Delhi) wherein it was held as follows:

"In this analysis, a distillation of the precedents yields the following propositions of law in the context of s. 68 of the IT Act. The assessee has to prima facie prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/subscriber; (4) if relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the shareholders register, share application forms, share transfer register etc., it would constitute acceptable proof or acceptable explanation by the assessee; (5) the Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices; (6) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessee nor should the AO take such repudiation at face value and construe it, without more, against the assessee; (7) the AO is duty bound to investigate the creditworthiness of the creditor/subscriber the genuineness of the transaction and the veracity of the repudiation."

86. The Court referred to the decision in CIT v. Nova Promoters Finlease (P.) Ltd. [2012] 18 taxmann.com 217/206 Taxman 207/342 ITR 169 (Delhi) wherein it was held that in view of the link between the entry providers and incriminating evidence, mere filing of PAN, acknowledgement of IT Returns of the entry providers, bank account statements etc. where not sufficient to discharge the onus under section 68 of the Act. Further it was held that credit worthiness cannot be proved by mere issue of a cheque or by furnishing a copy of the bank account and circumstances might require that there may be some evidence of positive nature to show that the said

subscribers had made a genuine, investment as well as angel investor after due diligence or for personal reasons and the findings or a conclusion must be practicable, pragmatic and might in a given case take into account that the assessee might find it difficult to unequigibly established credit worthiness of the shareholders. After noting the several decisions, it was held that the Court or the Tribunal should be convinced about the identity, credit worthiness and the genuineness of the transactions and the onus to prove the three factoms is on the assessee as the facts are within the assessee's acknowledge. Mere production of incorporation details, PANs or the fact that the third persons or the companies had filed income tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up. Further it was held that the facts in the case reflect proper paper work or the documentation but genuineness and credit worthiness, identity are deeper and obtrusive. It was held that it would be incorrect to state that the onus to prove the genuineness of the transactions and credit worthiness of the creditors stands discharged in all cases if payment is made through banking channels. Whether or not onus is discharged depends upon the facts of each case, it depends on whether the two parties are related or known to each other, the manner or mode by which the parties approached each other, whether the transaction was entered into through written documentation to protect the investor, whether the investor professes an angel investor, the quantum of money, credit worthiness of the recipient and the object and purpose for which payments/investment was made etc. It was held that these facts are basically and primarily in the knowledge of the assessee and it is difficult for revenue to prove and establish the negative. Certification of incorporation of company payment by bank channels etc. cannot be in all cases tantamount to satisfactory discharge of onus.

87. Mr. Agarwal sought to distinguish the decision in Manish D. Jain by pointing out the facts of the case and the modus operandi of the assessee. As pointed out earlier, what we are required to examine in a judgment is the ratio and if we bear the said concept in mind, we would be guided in a proper manner. In the said decision, the judgment in SumatiDayal was referred to which decision was followed in Sanjay Kaul (supra) wherein it was held that where the assessee was not a regular investor in shares and had only invested in high risk stocks of obscure companies with no business activities or assets, which were identified as the penny stocks, the assessing officer had correctly concluded that the assessee entered into a pre-arranged sham transaction so as to convert unaccounted money into accounted money in guise of capital loss and therefore, the alleged Short Term Capital Loss (STCL) was rightly disallowed. Similar view was taken in Sanjay Bimalchand Jain (supra), in the said case the assessee had purchased shares from the penny stocks companies for a lower amount and within a year, sold such shares at higher amount and the assessee had not tendered cogent evidence to explain as to why the shares in unknown company had jumped to such a higher amount in no time and also failed to provide details of persons, who purchased the said shares and the transaction was held to be an attempt to hedge the undisclosed income as LTCG. In Suman Poddar (supra) it was held that the share transactions were bogus because the company whose shares were allegedly purchased was a penny stock and this decision was affirmed by the Hon'ble Supreme Court in Suman Poddar (supra). In CIT v. Oasis Hospitality (P.) Ltd. [2011] 9

taxmann.com 179/148 Taxman 247/333 ITR 119 (Delhi) it was held that the initial onus is upon the assessee to establish three things necessary to obviate the mischief of section 68 and those are: (i) identity of the investors; (ii) their credit worthiness/investments and (iii) genuineness of the transactions and only when these three ingredients are established prima facie, the department is required to undertake further exercise. The Court after noting the legal position had examined the facts of the case, the modus operandi and allowed the appeal filed by the revenue. This decision was followed in Prabha Jain (supra).

88. The facts in NDR Promoters Private Limited are more or less similar to that of the cases on hand, identical objection was raised by the assessee with regard to the non-production of directors for cross examination etc. and the Court noted the facts in particular that the assessee did not have any business income in the year ending March 31st, 2007 and had a marginal income from other sources in the year ending 31st March 2008 and did not incur any expenditure in the year ending 31st March, 2007 and the shares of face value of Rs. 10/- each were issued at a premium of Rs. 40/-, the total Rs. 50/-. Thus, taking note of the factual position, the Court held that the transaction in question were clearly sham and make believe with an excellent paper work to camouflage their bogus nature."

Thus, we have noted that the decision of the Hon'ble Kolkatta High court in the case of Swati Bajaj (supra) having dealt with an identical issue of alleged bogus long term capital gain from transaction in penny stocks, dealing with all arguments as raised in the present case before us, is squarely applicable in the present cases before us. Applying the same therefore, the order of the Ld.CIT(A) confirming the addition made on account of bogus long term capital gains claimed by the assessee is upheld. Grounds raised by the assessee are dismissed.

13. In effect both the appeals of the assessee are dismissed.

Order pronounced in the Court on 12th June, 2023 at Ahmedabad.

Sd/-	*Sd/-*
(T.R. SENTHIL KUMAR)	**(ANNAPURNA GUPTA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad, dated 12/06/2023