IT : Assessing Officer received information from DGIT (Inv.), Kolkata that some companies were engaged in business of issuing penny stocks for which there were large number of beneficiaries claiming bogus long term capital gain - Assessing Officer, based on said information, found that assessee is one of beneficiaries of said racket and, thus long term capital gain from sale of shares of a company (Rutron) declared by assessee and claimed as exempt income under section 10(38) was treated by Assessing Officer as bogus and added said amount to total income of assessee under section 68

• The Tribunal noted that assessee had produced relevant record to show allotment of shares by company on payment of consideration by cheque, all entries are part of bank account of assessee and assessee dematerialized shares in D-mat account.

• The Tribunal held that Assessing Officer has not brought any material on record to show that assessee has paid over and above purchase consideration as claimed and evident from bank account and, thus, in absence of any evidence, it cannot be held that assessee has introduced his own unaccounted money by way of bogus long term capital gain.

[2018] 100 taxmann.com 172 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'D'

Ramprasad Agarwal

v.

Income Tax Officer 2(3)(2), Mumbai

MAHAVIR SINGH, JUDICIAL MEMBER
AND RAJESH KUMAR, ACCOUNTANT MEMBER
IT APPEAL NOS. 1228, 4843 (MUM.) OF 2018
[ASSESSMENT YEARS 2013-14 AND 2014-15]
NOVEMBER 30, 2018

Neel Khandelwal, A.R. *for the Assessee.* **Chaitanya Anjaria**, D.R. *for the Revenue.*

ORDER

Rajesh Kumar, Accountant Member - The above titled two appeals have been preferred by the assessee against the order dated 31.07.2018 & 15.12.2017 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment years 2013-14 & 2014-15 respectively.

ITA No.4843/M/2018

2. The grounds raised by the assessee are as under:

"1. The Income tax Officer - 2(3)(2), Mumbai (hereinafter referred to as the Assessing Officer) erred in issuing notice under section 148 of the Act.

The appellant contends that on the facts and in the circumstances of the case and in law, the issue of notice under section 148 is without jurisdiction, bad in law and hence, needs to be quashed.

2. The Commissioner of Income-tax (Appeals) - 6, Mumbai (hereinafter referred to as the CIT(A)) erred in upholding the action of the Assessing Officer in making an addition of a sum of Rs 83,45,689 under section 68 of the Act holding the capital gains on sale of long-term capital assets being, shares of Rutron International Ltd to be non-genuine and thereby not allowing exemption under section 10(38) of the Act.

The appellant contends that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in considering the capital gains on sale of long-term capital assets being, shares of Rutron International Ltd to be non-genuine inasmuch as the said shares have been purchased during an earlier year are investments; the same being sold shall necessarily give rise to capital gains and the impugned shares being long-term capital asset, the capital gains Rs 83,45,689 are long-term capital gains in respect of which the Assessing Officer ought to have allowed exemption of section 10(38) of the Act; accordingly, the impugned addition under section 68 of the Act is not justified.

The appellant further, contends that the CIT(A) ought not to have upheld the action of the Assessing Officer in making the impugned addition inasmuch as the assessment order has been framed in violation and utter disregard to the principles of natural justice inasmuch as, amongst others, the Assessing Officer has not given the documents/statements on oath to the appellant for rebuttal, which are in his possession and on which he has relied upon and has not given an opportunity to the appellant to cross examine the persons whose statement the Assessing Officer has relied upon.

The appellant further, contends that the CIT(A) ought not to have upheld the action of the Assessing Officer in making the impugned addition inasmuch as the Assessing Officer has not proved that the cash emanated from the coffers of the appellant."

3. At the time of hearing the Ld. A.R. did not press the ground No.1 which is against the issue of notice under section 148 of the Act and therefore same is dismissed as not being pressed.

4. The issue raised in 2nd ground of appeal is against the confirmation of addition of Rs.83,45,689/- by the Ld. CIT(A) as made by the AO by treating the capital gain on sale of long term shares of Rutron International Ltd. as non genuine and holding that exemption under section 10(38) of the Act was not allowable.

5. The facts in brief are that the assessee is director of M/s. Sudhir Switchgears P. Ltd. and earns income by way of salary from the said company, house property, other sources and long term capital gain. The assessee filed return of income on 27.03.2014 declaring income of Rs.21,22,111/- which was processed under section 143(1). Thereafter, the case of the assessee was reopened under section 147 of the Act by issuing notice under section 148 of the Act after the AO received information from DGIT (Inv.), Kolkata vide letter dated 08.09.2016 that some companies were engaged in the business of issuing penny stocks for which there were large number of beneficiaries claiming bogus long term capital gain/short term capital loss/business loss/speculation loss. The AO, based on the said information, found that assessee is one of the beneficiaries of the said racket and had earned profit on sale of investments in equity shares of Rutron International Ltd. to the tune of Rs.83,45,689/- and claimed the same as exempt under section 10(38) of the Act as per details below:

Scrip Name : Rutron International Ltd.

Sale date	No. of shares sold	Sale consideration	Purchase date	Purchase Cost	Capital gain
14.02.2013	5000	1100624.69	2.12.2011	50000	1050624.69
18.02.2013	4000	903408.68	2.12.2011	40000	863408.68
19.02.2013	5000	1132517.10	2.12.2011	50000	1082517.10

01.03.2013	14370	1070535.64	2.12.2011	43700	1026835.64
7.03.2013	630	158575.89	2.12.2011	6300	152275.89
08.03.2013	5000	1252520.78	2.12.2011	50000	1202520.78
12.03.2013	2000	515021.11	2.12.2011	20000	495021.11
13.03.2013	6000	1543173.2	2.12.2011	60000	1483173.20
18.03.2013	4000	1029311.86	2.12.2011	40000	989311.86

6. The AO came to the conclusion that the said capital gain of Rs. Rs.83,45,689/- on the sale of share of Rutron International Ltd. was earned by the assessee through connivance with the operator to avoid taxes. The AO also noted that the price of the shares of the said company which was less than Rs.1 in June 2012 rose to Rs.26 in March 2013 in less than 9 months. The price of the shares was so manipulated that the long term capital gain would be book profit on the sale of shares and thereafter the prices were manipulated to fluctuate so that interested beneficiary could book profit on market rate and can avail the benefit of long term/short term capital loss. Thereafter, again the share plunged to Rs.1. The whole modus operandi of this racket was unearthed upon a search and seizure operation under section 132 of the Act in the case of Shri Anil Agarwal. Shri Anil Agarwal is a director of M/s. Comfort Securities Ltd., a stock broker company registered with NSE, BSE, MCX, MCX-SX, NCDEX which is in the business of stock broking. Shri Anil Agarwal has been the operator and has been manipulating the prices of Rutron International Ltd. and he was also one of the directors of Rutron International Ltd also. In his statement recorded on 12.04.2015 under section 132(4) of the Act he said that M/s. Comfort Securities Ltd. a stock broking firm has helped various persons in obtaining accommodation entries in the form of LTCG and STCG. He stated that he has provided such entries in respect of shares of various companies namely Splash Media Infra Ltd., First Financial Services Ltd., D.B. (International) Stock Brokers Ltd., Unisys Softwares & Holdings Industries Ltd. for providing bogus LTCG or STCG. Thereafter, the AO issued a show cause notice to the assessee which was replied by the assessee vide letter dated 16.12.2017. Thereafter, the AO brushed aside the contentions of the assessee as not plausible and added the same under section 68 of the Act to the income of the assessee by framing assessment under section 143(3) of the Act read with section 147 vide order dated 19.12.17. The Ld. CIT(A) also affirmed the order of AO after considering the reply of the assessee and various contentions raised during the appellate proceedings.

7. The Ld. Counsel, at the outset, submitted that identical issue in the case of *Meghraj Singh Shekhawat* v. *DCIT* in ITA Nos.443 & 444/JP/2017 A.Y. 2013-14 and 2014-15 has been decided by the co-ordinate bench of the Tribunal involving the same company M/S Rutron International Ltd. and with all identical facts holding that the order of the AO treating the LTCG as bogus and consequential addition to total income of the assessee is not correct and deleted the same. The Ld. AR prayed that following the same order the addition made in the case of the assessee by treating long term capital gain as bogus has to be deleted.

8. When the issue was confronted to the Ld. D.R. whether the decision rendered by the co-ordinate Jaipur bench of the Tribunal was delivered on the identical facts involving the shares of sales of Rutron International Ltd. from which the assessee derived LTCG ,the Ld. D.R. candidly admitted that the said issue also arose out of the same racket in which the assessee made capital gain by selling the share of Rutron International Ltd., however, the Ld. D.R. relied heavily on the order of authorities below and submitted that all these transactions were thoroughly investigated by the investigation wing of the department and found that the present assessee was beneficiary of such bogus long term capital gain and therefore prayed before the Bench that the appeal of the assessee should be dismissed.

9. We have heard the rival submissions of both the parties and perused the material on record including the decision of the co-ordinate bench of the Tribunal in ITA Nos.443 & 444/JP/2017 A.Y. 2013-14 and 2014-15 in the case of *Meghraj Singh Shekhawat* v. *DCIT*. We find that the facts of the assessee's case are identical to the case as cited above. The relevant paras are reproduced as under:

2. Ground Nos. 1 to 5 are regarding the long term capital gain from sale of shares declared by the assessee and claimed as exempt income u/s 10(38) of the Act was treated by the AO as bogus and added the said amount to the total income of the assessee u/s 68 of the Act. The assessee is an individual and engaged in the business of retail sale of IMFL/Beer. A search u/s 132 of the Income Tax Act was conducted on 17.07.2013 in case of MRS Group of which the assessee belongs. In the Return of income filed in response to notice u/s 153A of the Act, the assessee declared total income Rs. 16,08,31,700/- including the income surrendered and declared by the assessee during the search and seizure action of Rs. 12,12,04,711/-as undisclosed income earned from business and profession. During the assessment proceeding the AO noted that the assessee has shown long term capital gain of Rs.1,32,56,113/- which is claimed as exempt u/s 10(38) of the Act on sale of shares of M/s Rutron International Ltd. The AO received information from Investigation Wing, Kolkata that during the search conducted u/s 132 of the Act on 12.04.2015 at the business premises of one Shri Anil Agarwal Group it was found that Shri Anil Agarwal is one of the promoters of M/s Rutron International Ltd. Further, it was unearth through search action that Shri Anil Agarwal through a number of private limited shell companies and other penny stock companies was involved in providing bogus long term capital gain to customers for commission. Accordingly, the Assessing Officer issued a show cause notice date 03.03.2016. In response to the show cause notice the assessee filed his reply dated 15.03.2016 which has been reproduced by the AO at page 3 & 4 of the assessment order. The assessee given the details of the purchase and sale of shares of M/s Rutron International Ltd. and clarified that the shares were allotted to the assessee by the company as preferential shares allotments on payment through cheque. The shares were sold by the assessee from his D-mat account through the broker M/s Anand Rathi Share and Stock Brokers Ltd. and therefore, the assessee denied any involvement of availing the bogus of long term capital gain. The AO did not accept and explanation of the assessee and referred to the statement of Shri Anil Agarwal recorded by Investigation Wing Kolkata u/s 132(4) of the Act and held that since, Shri Anil Agarwal was involved in providing bogus long term capital gain in respect of the shares of the companies including M/s Rutron International Ltd., therefore, the transaction of the assessee showing the long term capital gain from sale of shares of M/s Rutron International Ltd. is bogus and consequently the AO made an addition of Rs. 1,32,56,113/- to the total income of the assessee u/s 68 of the Act. Aggrieved by the action of the AO the assessee filed the appeal before the ld. CIT(A) however, the ld. CIT(A) has confirmed the treatment of long term capital gain as bogus transaction and consequential addition made by the AO.

3. Before us, ld. AR of the assessee has submitted that the Assessing Officer has made this addition solely on the basis of the statement of Shri Anil Agarwal recorded statement u/s 132(4) by the Investigation Wing, Kolkata without any corroborative evidence to show that the assessee has converted its unaccounted income in the long term capital gain. He has further contended that even in the said statement recorded u/s 132(4) Shri Anil Agarwal has not mentioned any fact about providing bogus long term capital gain entry to the assessee or even he was a promoter of M.s Rutron International Ltd. The ld. AR has further submitted that the assessee specifically demanded the cross examine of Shri Anil Agarwal on whose statement the AO has based his assessment order and made addition on account of bogus long term capital gain. Thus, in view of the decision of Hon'ble Supreme Court in case of CCE vs. Andaman timber Industries 127 DTR 241. The addition made by the AO is not sustainable. The ld. AR has submitted that the assessee was allotted 3,50,000/- equity shares by M/s Rutron International Ltd. on 01.03.2012 vide allotment letter dated 08.03.2012. The shares were allotted by the company at face value of Rs. 10/- each without charging any premium under preferential issue. He has referred to the bank statement of the assessee and submitted that the assessee paid the purchase consideration/share application money vide cheque on 29.02.2012 the payment made by the assessee is duly reflected in the back statement

of the assessee. Therefore, the assessee purchased shares in preferential allotment of the company and against the purchase consideration paid by the assessee through cheque. He has also referred to the D-mat account of the assessee and submitted that the shares were dematerialized on 18.06.2012 and thereafter the shares were sold from 13.03.2013 onwards on various dates through M/s Anand Rathi Shares & Stock Brokers Ltd. The shares were sold by the assessee are reflected in the D-mat account of the assessee and the sale consideration was directly credited to the bank account of the assessee. Therefore, the assessee has produced all the relevant evidence to show the allotment of shares, payment of consideration through cheque at the time of allotment of shares dematerialization of the shares and thereafter, sale of shares from the D-mat account. Hence, the transaction of purchase and sale of shares is genuine one as the assessee has proved the genuineness by producing the relevant record whereas the Assessing Officer has not produced any material or record to controvert the evidence produce by the assessee. Thus, ld. AR has submitted that the transaction of purchase and sale of shares is genuine and the long term capital gain arising from purchase and sale of shares cannot be treated as bogus transaction. Hence, ld. AR has pleaded that the addition made by the AO be deleted and the claim of the assessee accepted. In support of his contention he has relied upon the Hon'ble jurisdiction High Court dated 11-09-2017 in case of *CIT* v. *Smt. Pooja Agrawal* 385/2011 wherein the Hon'ble High Court has held that when the assessee furnished all supporting documents including the cheque, copy of contract note and D-mat account etc. then, the transaction entered into cannot be denied simply on the ground that in his statement the assessee denied made any transaction. Whereas in this case, the assessee never denied having these transactions but the AO has solely relied upon the statement of Shri Anil Agrawal which was recorded by the Investigation Wing, Kolkata without giving an opportunity of cross examine to the assessee. The ld. AR has relied upon the decision of Hon'ble Punjab and Haryana High Court dated 18.01.2018 in case of *CIT* v. *Prem Pal Gandhi* in ITA No. 95/2017. He has also relied upon the decision of the Coordinate Bench of this Tribunal dated 31.01.2018 in case of *Pramod Jain & others* v. *DCIT* in ITA No. 368/JP/2017 and submitted that in all these decisions when the assessee produced the supporting evidence to prove the genuineness of the transactions and the AO has failed to produce any counter evidence to disprove the evidence produce by the assessee it was held that the transactions cannot be treated as bogus merely on the basis of statement without any corroborating evidence brought by the Assessing Officer.

4. On the other hand, ld. DR has submitted that the assessee has shown a huge long term capital gain within a short period of one year from the sale of shares and therefore, as per the rule of preponderance of human probability the transaction of the assessee cannot be accepted as genuine and the onus is on the assessee to prove the same as how there is a spike in the price of the shares within such short duration. The surrounding circumstances clearly lead to only one possible conclusion that the assessee has manipulated the entire record and availed the bogus transaction of long term capital gain to convert his unaccounted income to avoid tax through long term capital gain. He has relied upon the decision of Hon'ble Bombay High Court in case of *Sanjay Bimalchand Jain* v. *Pr. CIT* 89 taxaman.com 196. The ld. DR has then referred to the finding of the AO as well as ld. CIT(A) and submitted that when Sh. Anil Agarwal has clearly admitted in the statement that through his company he is engaged in providing bogus long term capital gain to the clients and M/s Rutron International Ltd. is one of the company is whose share transferred by Shri Anil Agrawal. He has relied upon the orders of the authorities below.

5. We have considered the rival submissions as well as relevant material on record. The assessee has produced record of allotment of 3,50,000 equity shares of M/s Rutron International Ltd. under preferential issue at par of face value of Rs. 10/-each vide allotment letter dated 08.03.2012. The Assessing Officer has not disputed the genuineness of the letter of allotment issued by the company to the assessee wherein it has been communicated that the assessee has been allotted 3,50,000

equity shares vide allotment letter dated 08.03.2012 against the application of the assessee at par of face value of Rs. 10/- each without any premium. The assessee has also produced the bank statement showing the payment of consideration of the acquisition of shares on 29.02.2012. It appears that the said payment was made by the assessee at the time of applying for allotment of shares and subsequently the shares were allotted by the company on 01.03.2012. Thus, it is clear that the shares acquired by the assessee is not a trading transaction but these were allotted directly by the company under the preferential issue and hence, the role of intermediate is ruled out. Once, the shares were directly allotted by the company M/s Rutron International Ltd. against the consideration paid by the assessee through cheque. Then the role of any intermediately particular of Shri Anil Agarwal is said allotment does not appear from any of the record. Even as per the statement as reproduced by the Assessing Officer in the assessment order Shri Anil Agrawal has stated that he is having business nexus with the companies including M/s Rutron International Ltd. The department put a question about the association with as many as 13 companies and in response to that he has accepted that he is having business nexus with these companies including M/s Rutron International Ltd. The nature of service was also explained by Shri Anil Agrawal as the consultancy services. For ready reference we quote question No. 4 and 5 and answer, thereto in the statement of Shri Anil Agarwal as reproduced as under:-

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

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

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

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

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

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

companies or have ever had any business transactions with the promoters and directors of the above said companies.

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

Thus, it is clear from the relevant part of statement of Shri Anil Agrawal as reproduced by the AO that he has stated having business nexus with these companies and nature of business being consultancy services. Hence, he has not stated anything about providing bogus long term capital gain in respect of the equity shares of M/s Rutron International Ltd. A business nexus with any company will not automatically lead to the conclusion that the shares allotted by the other company is bogus transaction. As per question no. 5 and answer thereto it is clear that Shri Anil Agrawal was not the Director of M/s Rutron International Ltd. but he has stated to know some of the directors of these companies including M/s Rutron International Ltd. Hence, from this relevant part of the statement of Shri Anil Agrawal it cannot be inferred that he has provided the bogus long term capital gain from purchase and shares of equity shares of M/s Rutron International Ltd. much less the specific transaction of preferential issue allotment of shares by the company itself to the assessee. Further, though he has explained the modus oprendi of providing bogus long term capital gain entries in the equity shares however, when the transaction was not routed through Shri Anil Agrawal and the shares were allotted directly by the company to the assessee at par on face value then the same cannot be considered as a penny stock transactions. The assessee has produced the D-mat account and therefore, as on 18.06.2012 the assessee was holding 3,50,000 equity shares of M/s Rutron International Ltd. in D-mat account. This fact of holding the shares in the D-mat account as on 18.06.2012 cannot be disputed. Further, the Assessing Officer has not even disputed the existence of the D-mat account and shares credited in the D-mat account of the assessee. Therefore, once, the holding of shares is D-mat account cannot be disputed then the transaction cannot be held as bogus. The AO has not disputed the sale of shares from the D-mat account of the assessee and the sale consideration was directly credited to the bank account of the assessee, therefore, once the assessee produced all relevant evidence to substantiate the transaction of purchase, dematerialization and sale of shares then, in the absence of any contrary material brought on record the same cannot be held as bogus transaction merely on the basis of statement of one Shri Anil Agrawal recorded by the Investigation Wing, Kolkata wherein there is a general statement of providing bogus long term capital gain transaction to the clients without stating anything about the transaction of allotment of shares by the company to the assessee. Further, Shri Anil Agrawal was not a director of M/s Rutron International Ltd. as perceived by the AO and therefore, the entire finding of the AO is without any corroborative evidence or tangible material.

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

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

Thus, in view of the decision of Hon'ble Supreme Court in case of *CCE* v. *Andaman Timber Industries* (*supra*) the assessment based on statement without giving an opportunity is not sustainable in law. We further note that the assessee produced copy of affidavit of Shri Anil Agrawal who has retracted his statement before the Investigation Wing, Kolkata however, without

going into controversy of the retraction of the statement we find that the statement cannot be used by the AO without giving an opportunity to cross examination of Shri Anil Agrawal. The Coordinate Bench of this Tribunal in case of *Pramod Jain and Others* v. *DCIT* (*supra*) whole dealing with an identical issue as held in para 6 to 8 as under:-

"6. We have considered the rival submissions as well as relevant material on record. The assessee purchases 800 equity shares M/s Gravity Barter Ltd. for a consideration of Rs. 4 lacs the assessee has produced the purchase bill of the shares purchase from M/s Winall Vinimay Pvt. Ltd. which shows that the assessee purchase 800 equity shares having face value of Rs. 10/- each M/s Gravity Barter Pvt. Ltd. in allots of 400 each for a consideration of Rs. 2 lacs each total amount to Rs. 4 lacs @ Rs. 500 per shares. The purchase price of Rs. 500 per share itself shows that it was not a transaction of purchase of penny stock. These shares were duly reflected in the balance sheet as 31.03.2011. The payment of the purchase consideration was made by the assessee vide cheque on 17.05.2011 which is evident from the bank account of the assessee at page 40 of the paper book. In the mean time the said M/s Gravity Barter Pvt. Ltd. changed its status from private limited to a public limited and fresh certificate was issued by the Registrar of company on 05.02.2011 which is placed at page 43 of the paper book. Therefore, there is no reason to disbelief the fact of fresh certificate issued by the Registrar of companies on 05.02.2011 and hence, the date mentioned in the order of the Hon'ble Kolkata High Court as 18.04.2011 appears to be typographical mistake. Even otherwise these two dates do not have any effect on the genuineness of the transactions of purchase of equity shares by the assessee of M/s Gravity Barter Pvt. Ltd. The assessee though produced all the relevant records and evidences right from the purchase bills, certificate issued by the Registrar about the change of name, the communication between the assessee and the seller of the shares and thereafter, the amalgamation of M/s Gravity Barter Ltd. with M/s Oasis Cine Communication Ltd. which was duly approved by the Hon'ble High Court vide order dated 28.8.2011. The assessee in the mean time got the physical share certificate dematerialized into Demat account on 16.02.2012. There is no reason to doubt the allotment of the shares to the assessee after amalgamation took place between M/s Gravity Barter Ltd. and M/s Oasis Cine Communication Ltd. and subsequent to amalgamation the assessee was allotted shares of M/s Oasis Cine Communication Ltd. on 04.02.2012. Hence, the allotment of 35,200 equity shares of M/s Oasis Cine Communication Ltd. cannot be doubted or disputed as these shares were issued post amalgamation and by a listed company. It is also not in dispute that these shares of M/s Oasis Cine Communication Ltd. were issued in exchange of the shares held by the assessee of M/s Gravity Barter Ltd. Therefore, once the shares issued by M/s Oasis Cine Communication Ltd. cannot be doubted then the holding of the shares of the M/s Gravity Barter Ltd. by the assessee correspondingly cannot be doubted because of the reasons that the shares of M/s Oasis Cine Communication Ltd. could be allotted only in exchange of shares of M/s Gravity Barter Ltd. The holding the shares of M/s Gravity Barter Ltd. and the allotment of shares M/s Oasis Cine Communication Ltd. are directly interconnected. In the absence of holding of shares M/s Gravity Barter Ltd. the shares of the M/s Oasis Cine Communication Ltd. could not be issued or allotted to the assessee. Therefore, holding of the shares by the assessee at least at time of amalgamation took place and shares of the M/s Oasis Cine Communication Ltd. on 04.02.2012 cannot be doubted. Moreover, these shares were dematerialized by the assessee in the Demat account, therefore, on the date of allotment of share of M/s Oasis Cine Communication Ltd the assessee was holding these shares and prior to that the assessee was holding the shares of M/s Gravity Barter Ltd. on exchange of the same the shares of M/s Oasis Cine Communication Ltd. were issued to the assessee. The Assessing Officer has doubted the genuineness of the transactions however, once the holding of shares of the assessee at the time of the same were issued by M/s Oasis Cine Communication Ltd. is not in dispute then the holding of shares of M/s Gravity Barter Ltd. also cannot be dispute because of the fact that without holding of

the same the shares of M/s Oasis Cine Communication Ltd. could not be issued to the assessee. Once, the shares were held by the assessee then, the question of genuineness of the transaction does not arise however, the purchase consideration can be doubted by the AO if the shares were claimed to have been purchased against consideration paid in cash which is not in case of the assessee. The assessee has paid purchase consideration through cheque and therefore, even if the said consideration is found to be very less in comparison to the sale price at the time of sale of shares in the absence of any material or other facts detected or brought on record by the AO that the assessee has brought back his own unaccounted money in the shape of long term capital gain and has used the same as a device to avoid tax, the purchase consideration paid by the assessee cannot be doubted in the absence of any corroborating evidence. The Assessing Officer has not disputed that the fair market value of the shares of M/s Gravity Barter Ltd. was more than the purchase price claimed by the assessee. It may be a case that ensuring merger/amalgamation of the said company with M/s Oasis Cine Communication Ltd. the assessee might have anticipant the exceptional appreciation in the share price due to extraordinary event of merger/amalgamation. However, the same cannot be a reason for doubting genuineness of the transaction if the motive of purchase of the share is to earn an extraordinary gain because of some internal information available to the assessee.

7. In case of equity shares M/s Paridhi Properties Ltd. the assessee purchase 50,000 equity share on 26.03.2011 by paying share application money of Rs. 5 lacs which is duly reflected in the bank account of the assessee as paid on 28.03.2011. Therefore, the payment of share application money has been duly established by the assessee through his bank account for allotment of shares of 50,000 equity shares of M/s Paridhi Properties Ltd. The share allotted in private placement as per of Rs. 10/- cannot be termed as penny stock. The AO doubted that the entire process of application and allotment of shares as it have been completed within a short duration of 5 days, which in the opinion of the AO is not possible in ordinary course. However, when the assessee has produced the record including the share application, payment of share application money, allotment of share then merely because of a short period of time will not be a sufficient reason to hold that the transaction is bogus. The shares allotted to the assessee vide share certificate dated 31.03.2011 were dematerialized on 21.10.2011, therefore, on the date of dematerialization of the shares the holding of the shares of the assessee cannot be doubted and hence the acquisition of the shares of the assessee cannot be treated as a bogus transaction. Nobody can have the shares in his own name in demat account without acquiring or allotment through due process hence, except the purchase consideration paid by the assessee holding of shares cannot be doubted when the assessee has produced all the relevant record of issuing of allotment of shares, payment of share application money through bank, share certificate and demat account showing the shares credited in the demat account of the assessee on dematerialization. The said company M/s Paridhi Properties Ltd. was subsequently merged with M/s Luminaire Technologies Ltd. vide scheme approved by the Hon'ble Bombay High Court order dated 27.07.2012. Hence, the assessee got allotted the equity shares of M/s Luminaire Technologies Ltd. as per swap ratio approved in the scheme and consequently the assessee was allotted 5 lacs share of Rs. 1/- each on M/s Luminaire Technologies Ltd. The evidence produced by the assessee leave no scope of any doubt about the holding of the shares by the assessee.

8. As regards the purchase consideration when the assessee has shown the share application money paid through his bank account and the AO has not brought on record any material to show that apart from the share application money paid through bank account the assessee has brought his own unaccounted money back as long term capital gain. It is also pertinent to note that the shares of M/s Oasis Cine Communication Ltd. are still held by the assessee in its demat account to the extent of 17,200 shares and therefore, the holding of the shares by any parameter or stretch of imagination

cannot be doubted. The AO has passed the assessment year based on the statement of Shri Deepak Patwari recorded by the Investigation Wing of Kolkata however, the assessee has specifically demanded the cross examination of Shri Deepak Patwari vide letter dated 15.03.2016 specifically in paras 3 and 4 as reproduced by the AO at page No. 7 of the assessment order as under:-

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

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

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

"5. We have heard Mr. Kavin Gulati, learned senior counsel appearing for the assessee, and Mr. K. Radhakrishnan, learned senior counsel who appeared for the Revenue.

6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is

concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

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

8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice."

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

"46. In situations like this case, one may fall into realm of 'preponderance of probability' where there are many probable factors, some in favour of the assessee and some may go against the assessee. But the probable factors have to be weighed on material facts so collected. Here in this case the material facts strongly indicate a probability that the wholesale buyers had collected the premium money for spending it on advertisement and other expenses and it was their liability as per their mutual understanding with the assessee. Another very strong probable factor is that the entire scheme of 'twin branding' and collection of premium was so designed that assessee-company need not incur advertisement expenses and the responsibility for sales promotion and advertisement lies wholly upon wholesale buyers who will borne out these expenses from alleged collection of premium. The probable factors could have gone against the assessee only if there would have been some evidence found from several searches either conducted by DRI or by the department that Assessee-Company was beneficiary of any such accounts. At least something would have been unearthed from such global level investigation by two Central Government authorities. In case of certain donations given to a Church, originating through these benami bank accounts on the behest of one of the employees of the assessee company, does not implicate that GTC as a corporate entity was having the control of these bank accounts completely. Without going into the authenticity and veracity of the statements of the witnesses Smt. Nirmala Sundaram, we are of the opinion that this one incident of donation through bank accounts at the direction of one of the employee of the Company does not implicate that the entire premium collected all throughout the country and deposited in Benami bank accounts actually belongs to the assessee-company or the assessee-company had direct control on these bank accounts. Ultimately, the entire case of the revenue hinges upon the presumption that assessee is bound to have some large share in so-called

secret money in the form of premium and its circulation. However, this presumption or suspicion how strong it may appear to be true, but needs to be corroborated by some evidence to establish a link that GTC actually had some kind of a share in such secret money. It is quite a trite law that suspicion howsoever strong may be but cannot be the basis of addition except for some material evidence on record. The theory of 'preponderance of probability' is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee."

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

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

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

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

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

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

Thus, it is clear that the Tribunal in the said case has analyzed an identical issue wherein the shares allotted in the private placement @ Rs. 10 at par of face value which were dematerialized and thereafter sold by the assessee and accordingly the Tribunal after placing reliance on the decision of Hon'ble Supreme Court in case of *CCE* v. *Andaman Timber Industries* (*supra*) as well as the decision of Hon'ble jurisdiction High court in case of *CIT* v. *Smt. Pooja Agarwal* (*supra*) as held that when the Assessing Officer has not brought any material on record to show that the assessee has paid over and above purchase consideration as claimed and evident from the bank account then, in the absence of any evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. Similar in the case in hand the assessee has produced the relevant record to show the allotment of shares by the company on payment of consideration by cheque and therefore, it is not a case of payment of consideration by in cash. But the transaction is established from the evidence and record which cannot be manipulated as all the entries are part of the bank account of the assessee and the assessee dematerialized the shares in the D-mat account which is also an independent material and evidence cannot be manipulated. Therefore, the holding of the shares by the assessee cannot be doubted and the finding of the AO is based merely on the suspicion and surmises without any cogent material to show that the assessee has introduction his unaccounted income in the shape of long term capital gain. We find that the ld. CIT(A) has also referred to SEBI enquiry against the M/s Anand Rathi Share and Stock Brokers Ltd. However, we note that the said enquiry was regarding financial irregularities and use of fund belonging to the clients for the purpose other than, the purchase of shares on behalf of the clients. Therefore, the subject matter of the enquiry has no connection with the transaction of bogus long term capital gain. The decisions replied upon the ld. DR in case of *Sanjay Bimalchand Jain* v. *Pr. CIT* (*supra*) is not applicable in the facts of the present case as the said decision is in respect penny stock purchase by the assessee from a persons who was found to be indulged in providing bogus capital gain entries whereas in the case of the assessee the shares were allotted to the assessee by the company at par of face value. Hence, in view of the facts and circumstances when we hold that the order of the Assessing Officer treating the long term capital gain as bogus and consequential addition made to the total income of the assessee is not sustainable. Hence, we delete the addition made by the AO on this account."

10. It is clear from the above that the facts of the case of the assessee are identical with the facts in the above case wherein the co-ordinate bench of the Tribunal has deleted the addition. We, therefore, respectfully following the same set aside the order of Ld. CIT(A) and direct the AO to not to treat the long term capital as bogus and delete the consequential addition.

11. In the result, appeal of the assessee is allowed.

ITA No.1228/M/2018

12. The issue raised by the assessee in this appeal is identical to one as decided by us in ITA No 4843/Mum/2018 supra. Therefore our decision in ITA No. 4843/Mum/2018, would, mutatis mutandis, apply to this appeal as well. Accordingly the appeal of the assessee is allowed.

13. In result both the appeals of the assessee are allowed.

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