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"CONUNDRUM" ON ISSUE OF PENNY STOCK UNDER 1961 ACT - POST SWATI BAJAJ – HON'BLE CALCUTTA HIGH COURT REVENUE FAVORING DECISION 446 ITR 56

1. Important SC decision to be brought /pleaded that there can be NO GUILT BY MERE ASSOCIATION

Hon'ble apex court in case of CHINTALAPATI SRINIVASA RAJU VS SEBI (2018) 7 SCC 443 (satyam scam case: insider trading charge: relevant para:

"We have already demonstrated that the minority judgment is much more detailed and correct than the majority judgment of the Appellant Tribunal. We accept Shri Singh's submission that in cases like the present, a reasonable expectation to be in the know of things can only be based on reasonable inferences drawn from foundational facts. This Court in SEBI v. Kishore R. Ajmera, (2016) 6 SCC 368 at 383, stated:

""26. It is a fundamental principle of law that proof of an allegation leveled 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 leveled. While direct evidence is a more certain basis to come to a conclusion, yet, in the absence thereof the Courts cannot be helpless. 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."

21.We are of the view that from the mere fact that the appellant promoted two joint venture companies, one of which ultimately merged with SCSL, and the fact that he was a co-brother of B. Ramalinga Raju, without more, cannot be stated to be foundational facts from which an inference of reasonably being expected to be in the knowledge of confidential information can be formed. The fact that the appellant was to be continued as a director till replacement again does not take us anywhere. Shri Viswanathan has shown us that two other independent non-executive directors were appointed in his place on and from 23.1.2003. What is clear is that the appellant devoted all his energies to the businesses he was running, on and after resigning as an executive director of SCSL, as a result of which the salary he was being paid by SCSL was discontinued."

2. **On how to cull out ratio /principle to be treated as binding precedent** : refer Hon'ble supreme court recent decision in case of Secundrabad club 457 ITR 263: *""74. The doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and enables an organic development of the law besides providing assurance to individuals as to the consequences of transactions forming part of daily affairs. Thus, what is binding in terms of Article 141 of the Constitution is the ratio of the judgment and as already noted, the ratio decidendi of a judgment is the reason assigned in support of the conclusion. The reasoning of a judgment can be discerned only upon reading of a judgment in its entirety and the same has to be culled out thereafter. The ratio of the case has to be deduced from the facts involved in the case and the*

particular provision(s) of law which the court has applied or interpreted and the decision has to be read in the context of the particular statutory provisions involved in the matter. Thus, an order made merely to dispose of the case cannot have the value or effect of a binding precedent. ***75.*** *What is binding, therefore, is the principle underlying a decision which must be discerned in the context of the question(s) involved in that case from which the decision takes its colour. In a subsequent case, a decision cannot be relied upon in support of a proposition that it did not decide. Therefore, the context or the question, while considering which, a judgment has been rendered assumes significance.* ***76.*** *As against the ratio decidendi of a judgment, an obiter dictum is an observation by a court on a legal question which may not be necessary for the decision pronounced by the court. However, the obiter dictum of the Supreme Court is binding under Article 141 to the extent of the observations on points raised and decided by the Court in a case. Although the obiter dictum of the Supreme Court is binding on all courts, it has only persuasive authority as far as the Supreme Court itself is concerned.* ***77.*** *In the context of understanding a judgment, it is well settled that the words used in a judgment are not to be interpreted as those of a statute. This is because the words used in a judgment should be rendered and understood contextually and are not intended to be taken literally. Further, a decision is not an authority for what can be read into it by implication or by assigning an assumed intention of the judges and inferring from it a proposition of law which the judges have not specifically or expressly laid down in the pronouncement. In other words, the decision is an authority for what is specifically decides and not what can logically be deduced therefrom.* ***78.*** *Further, the precedential value of an order of the Supreme Court which is not preceded by a detailed judgment would be lacking inasmuch as an issue would not have been categorically dealt with. What is of essence in a decision is its ratio and not every observation found therein, nor what logically follows from the various observations made therein.****79.*** *Another important principle to be borne in mind is that declaration of the law by the Supreme Court can be said to have been made only when it is contained in a speaking order, either expressly or by necessary implication and not by dismissal in limine. In the words of Mukherji, CJ, in DTC v. DTC Mazdoor Congress Union, 1991 Supp (1) SCC 600 : AIR 1991 SC 101, the expression 'declared' is wider than the words 'found or made'. The latter expression involves the process, while the former expresses the result."*

Also ***Career Institute Educational Society vs Om Shree Thakurji Educational Society Petition for Special Leave to Appeal (C) Nos. 7455-7456/2023 Date 24.04.2023 (how to cull out binding ratio of any precedent)*** **2023 SCC OnLine SC 586:** *"The distinction between obiter dicta and ratio decidendi in a judgment, as a proposition of law, has been examined by several judgments of this Court, but we would like to refer to two, namely, State of Gujarat & Ors. vs. Utility Users'*

Welfare Association & Ors.3 and Jayant Verma & Ors. vs. Union of India & Ors.4. The first judgment in State of Gujarat (supra) applies, what is called, "the inversion test" to identify what is ratio decidendi in a judgment. To test whether a particular proposition of law is to be treated as the ratio decidendi of the case, the proposition is to be inversed, i.e. to remove from the text of the judgment as if it did not exist. If the conclusion of the case would still have been the same even without examining the proposition, then it cannot be regarded as the ratio decidendi of the case. In Jayant Verma (supra), this Court has referred to an earlier decision of this Court in Dalbir Singh & Ors. vs. State of Punjab5 to state that it is not the findings of material facts, direct and inferential, but the statements of the principles of law applicable to the legal problems disclosed by the facts, which is the vital element in the decision and operates as a precedent. Even the conclusion does not operate as a precedent, albeit operates as res judicata. Thus, it is not everything said by a Judge when giving judgment that constitutes a precedent. The only thing in a Judge's decision binding as a legal precedent is the principle upon which the case is decided and, for this reason, it is important to analyse a decision and isolate from it the obiter dicta."

Also refer hon'ble apex court in case of

The state of Himachal Pradesh vs Yogendra Mohan Sengupta (Civil appeal 5348- 5349 OF 2019)order dated 011.01.2024 (2024 SCConline SC 36)

"**89.** As to what could be a binding precedent has been succinctly observed by this Court in the case of *Union of India* v. *Dhanwanti Devi*[26], which reads as under:

"**9.** ……It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the *ratio decidendi*. According to the well-settled theory of precedents, every decision contains three basic postulates—(*i*) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (*ii*) statements of the principles of law applicable to the legal problems disclosed by the facts; and (*iii*) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts

proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. The concrete decision alone is binding between the parties to it, but it is the abstract *ratio decidendi*, ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for what reason, and the precedent by long recognition may mature into rule of *stare decisis*. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its *ratio decidendi*." **90.** This Court, in the case of *Dhanwanti Devi* (supra) in paragraph 9, has held that it is not profitable to extract a sentence here and there from the judgment and to build upon it. It has been held that the essence of the decision is its ratio and not every observation found therein. It has been held that a deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue would constitute a precedent."

Following decisions of hon'ble apex court deal with how to cull out ratio /principle from a binding precedent: besides *Hon'ble Bombay high court in Mohd Farhan A shaikh 434 ITR 1 (360degree view of how to read "precedent");*

S.no	Case Title	Citation /remarks
1.	Dalbir Singh vs State of Punjab	1979 3 SCC 745 "According to the well settled, theory of precedents every decision contains three basic ingredients: (i) findings of material

		facts, direct and inferential. An inferential finding, of facts is the inference which the Judge draws from the direct, or perceptible facts, (ii) statements of the principles of law applicable to the legal problems disclosed by the facts, (iii) Judgment based on the combined effect of (i) and (ii). For the purposes of the parties themselves and their privies, ingredient No. (iii) is the material element in the decision for it determines finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops the parties from reopening the dispute. ***However for the purposes of the doctrine of precedents, ingredient No. (ii) is the vital element in the decision.*** This indeed is the ratio decidendi. It is not everything said by a judge when giving judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the radio decidendi" The ratio decidendi may be *defined as a statement of law applied to the legal problems raised by the facts as found, upon which the decision is based. The other elements in the decision are not precedents.* *Also refer*

		i) *CIT vs Sun engineering Works Pvt Ltd 1992 4 SCC 363* ii) *Sanjay Singh and another vs U.P.Public Service Commission 2007 3 SCC 720* iii) *Ambica quarry Works & others vs State of Gujarat 1987 1 SCC 213* iv) *Prakash Amichand Shah vs State of Gujara & others 1986 1 SCC 581* v) *Delhi Administration in the NCTof delhi vs Manohar Lal 2002 7 SCC 222* vi) *UOI vs Amrit Lal Manchanda 2004 3 SCC 75* vii) *Divisional Controller KSRTC vs Mahadeva Shetty 2003 7 SCC 197* viii) *Indian Drug & Pharmaceuticals Ltd vs Workmen India Drugs & Pharmaceuticals Ltd 2007 1 SCC 408* ix) *Ashwani Kumar Singh vs U.P.Public Service Commission & Others 2003 11 SCC 584*

		x) *Director of settlement AP & others vs M.R.Apparao & another 2002 4 SCC 638*
2.	Jayant verma vs UOI	2018 4 SCC 743 the ratio decidendi of a judgment is the principle of law adopted having regard to the line of reasoning of the Judge which alone binds in future cases;
3.	Krishena Kumar vs UOI	1990 4 SCC 207 "The doctrine of precedent, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. It does not mean that this Court is bound by the various reasons given in support of it, especially when they contain "propositions wider than the case itself required." This was what Lord Selborne said in Caledonian Railway Co. v. Walker's Trustees and Lord Halsbury in Quinn v. Leathem, [1981] A.C. 495, (502). Sir Frederick Pollock has also said: "Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision." In other words, the

		enunciation of the reason or principle upon which a question before a court has been decided is along binding as a precedent. The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration."
4.	State of Orissa & Others vs Md Illiyas	2006 1 SCC 275 "Reliance on the decision without looking into the factual background of the case before it is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is

		important to analyse a decision and isolate from it the ratio decidendi"
5.	Three judge bench in case of Regional manager and anr vs Pawan kumar Dubey	1976 3 SCC 334 "It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts." **SAME IN Delhi Airport Metro Express Pvt Ltd vs Delhi metro rail corporation 2022 9 SCC 286**
6.	Islamic Academy Education & Another vs State of Karnataka & others (5 judge constitution bench)	2003 6 SCC 697 The ratio decidendi of a Judgment has to be found out only on reading the entire Judgment. In fact the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from, the judgment, one

		cannot find out the entire ratio decidendi of the judgment. 118. A judgment, it is trite, is not to be read as a statute. The ratio decidendi of a judgment is its reasoning which can be deciphered only upon reading the same in its entirety. The ratio decidendi of a case or the principles and reasons on which it is based is distinct from the relief finally granted or the manner adopted for its disposal
7.	Natural resources allocation in Re Special reference no.1/2012 5 judge constitution bench	2012 10 SCC 1 The 'law declared' has to be construed as a principle of law that emanates from a judgment, or an interpretation of a law or judgment by the Supreme Court, upon which, the case is decided. [See: Fida Hussain & Ors. Vs. Moradabad Development Authority & Anr.19]. Hence, it flows from the above that the 'law declared' is the principle culled out on the reading of a judgment as a whole in light of the questions raised, upon which the case is decided. [Also see: Ambica Quarry Works Vs. State of Gujarat & Ors.20 and Commissioner of Income Tax Vs. Sun Engineering Works (P) Ltd.21]. In other words, the 'law declared' in a judgment, which s binding upon courts, is the ratio decidendi of the judgment. It is the essence of a decision

		and the principle upon which, the case is decided, which has to be ascertained in relation to the subject-matter of the decision "70. It is also important to read a judgment as a whole keeping in mind that it is not an abstract academic discourse with universal applicability, but heavily grounded in the facts and circumstances of the case"
8.	State of Gujarat vs Utility Users Welfare Association & others	2018 6 SCC 21 "Inversion test" to identify ratio Also in Nevada Properties Pvt Ltd vs state of Maharashtra 2019 20 SCC 119; Also in Career Institute Educational society vs OM Shree Thakirji Educational society 2023 SCConline SC 586
9.	Constitution bench in case of Dr Shah Faesal & others vs UOI	2020 4 SCC 1 The ratio is the basic essence of the judgement and the same must be understood in the context of the relevant facts of the case
10	THE MAVILAYI SERVICE COOPERATIVE BANK LTD. & ORS. … Appellants Versus COMMISSIONER OF INCOME TAX, CALICUT & ANR. … Respondents	431 ITR 1 "23. It is settled law that it is only the ratio decidendi of a judgment that is binding as a precedent. Thus, in B.

		Shama Rao v. Union Territory, Pondicherry (1967) 2 SCR 650, the majority judgment of Shelat J., speaking for himself and other two learned Judges held: "It is trite to say that a decision is binding not because of its conclusion but in regard to its ratio and the principle laid down therein." (at page 657)

3. **Hon'ble SC SLP dismissal in case of PCIT vs Renu Aggarwal 153 TAxmann.com 579 (SC) (03.07.2023) 456 ITR 249 (SC); approving underlying hon'ble Allahabad high court in case of PCIT vs Renu Agarwal ITA 44/2022 order dated 06.07.2022 and underlying lucknow ITAT order in case of ITA 205/Lkw/2020 (17.10.2022) on merits of alleged bogus LTCG /penny stock addition**
4. Hon'ble SC recent ruling on issue of cross examination ***Hon'ble apex court recent ruling in case of Civil Appeal No.7425 of 2019 (Commissioner of Income Tax Vs. M/s Reliance Industries Ltd.) held on issue of cross examination etc*** (2024) **460 ITR 162**

"DELETION OF ADDITION MADE BY THE ASSESSING OFFICER ON ACCOUNT OF PAYMENT MADE BY THE ASSESSEE TO SHRI S.K. GUPTA AND HIS GROUP OF COMPANIES. 46. This brings us to the second of the additional issues which is the deletion of the addition of Rs. 3,39,95,000.00 made by the assessing officer on account of payment made by the assessee to Shri SK Gupta and his group of companies. This issue has been raised by the revenue in Civil Appeal No. 7425/2019 (CIT Vs. M/s Reliance Industries Ltd.). 47. Respondent assessee in this case is M/s Reliance Industries Ltd. and the assessment year under consideration is 2006-2007. Assessee claimed allowance of expenditure of about Rs. 3.39 crores on account of payments made to one Shri SK Gupta and his group of companies. The assessing officer vide the assessment order dated 19.03.2008 passed under Section 143 (3) of the Act, referred to the statement of Shri S.K. Gupta recorded during the search operations and held that the said person had not rendered any service to the assessee so as to receive such payments. Therefore, the assessing officer disallowed such claim of expenditure of the assessee and added the same to the income of the assessee. 48. On an appeal by the assessee, CIT(A) vide the order dated 27.01.2009 confirmed the disallowance of professional fee paid by the assessee to Shri S.K. Gupta and his group of companies. 49. On further appeal by the revenue, Tribunal vide the order dated 29.05.2015 set aside the view taken by CIT (A). Tribunal on perusal of the materials on record, noted that Shri S.K. Gupta had retracted his statement within a short time by filing an affidavit. He thereafter got his further statement recorded where he reiterated his stand taken in the affidavit. In view of the above, Tribunal set aside the order of the assessing officer as affirmed by the CIT (A) and allowed the claim of the assessee. 50. Revenue preferred appeal before the High Court of Bombay under Section 260A of the Act raising the above issue along with another issue. The High Court vide the order dated 30.01.2019 answered the above issue in favour of the assessee and against the revenue

by holding that no substantial question of law arose from the decision of the Tribunal. 51. From the materials on record, we find that the assessing officer had solely relied upon the statements made by Shri S.K. Gupta on 12.12.2006 and 23.12.2006 during the course of the search. However, the assessing officer overlooked the fact that within a short span of time, Shri S.K. Gupta had retracted from the said statements by filing an affidavit on 05.02.2007. Thereafter, he reiterated the statements made by him in the affidavit dated 05.02.2007 in a statement recorded on 08.02.2007. We find that in the later statements, Shri S.K. Gupta had categorically stated that he had rendered services to the assessee. He also mentioned that the name of the assessee was not referred to as one of the beneficiaries of the accommodation bills in his earlier statement. He had categorically stated that he had rendered service to the assessee and that the assessee had not obtained any bogus accommodation bills from him. Assessing officer had dis-believed the affidavit as well as the subsequent statement of Shri S.K. Gupta without any justifiable and cogent reason. That apart when the revenue had relied upon the retracted statement of Shri S.K. Gupta, it ought to have provided an opportunity to the assessee to cross-examine Shri S.K. Gupta which was however denied. Thus, revenue was not justified in disallowing the claim of professional expenses of the assessee on account of payment to Shri S.K. Gupta and his group of companies. 52. Therefore, we agree with the view taken by the High Court. As noted by the High Court, the entire issue is based on appreciation of the materials on record. Tribunal had scrutinized the materials on record and thereafter had recorded a finding of fact that there were sufficient evidence to justify payment made by the assessee to Shri SK Gupta, a consultant of the assessee, and that the assessing officer had wholly relied upon the statement of Shri Gupta recorded during the search operation which was retracted by him within a reasonable period. In these circumstances, we are of the view that there is no admissible material to deny the claim of expenditure made by the assessee. Accordingly, this issue is answered in favour of the assessee and against the revenue"

Hon'ble madras high court in case of naresh sangeeta vs ITO (penny stock matter)
W.P.No.20694 of 2023 and W.M.P.No.20053 of 2023 Dated : 27.11.2023
"10. No doubt, if the oral statement of a person is not utilized in a case, it is not necessary to cross-examine the said person."
Hon'ble rajasthan high court in case of PCIT vs Sanjay Chhabra 2023 453 ITR 516 (on issue of alleged bogus LTCG):
"The Tribunal by impugned order has categorically held that the material information received by the Assessing Officer from the investigation wing alongwith certain statements recorded by DBIT Investigation, Calcutta could not be taken into consideration as that material was not disclosed nor an opportunity was accorded for cross-examination of the Assessee. This finding recorded by the Tribunal cannot be said to be perverse or suffering from any patent illegality. Learned counsel for the Revenue could not satisfy us with reference to any judgment on this aspect that even without disclosing any material to the Assessee and without allowing him proper cross-examination, such undisclosed and unverified material could be taken into consideration for the purposes of addition"

5. **Interestingly Mumbai bench ITAT in case of NARESH MANEKCHAND JAIN VS ACIT (ITA 1945 & 1946/Mum/2023) order dated 31.08.2023 has observed /directed**

"017. Therefore, looking at the magnitude of the operation of money laundering carried on by the assessee along with the several other persons and the number of beneficiaries who have availed the services of the assessee in converting that unaccounted income in long-term exempt capital gain, short term capital gain or business losses, [the learned assessing officer has mentioned that there are 32,855 persons who have been identified in several scripts of those listed entities] we are duty-bound to direct the learned assessing officer to pass on this information to various other authorities and regulators. Here we find that assessee is merely an accommodation entry provider as held by the lower authorities. Therefore, the real beneficiaries are the persons who have obtained the exempt long-term capital gain by converting their unaccounted income. It is also categorically held by the lower authorities that assessee has arranged synchronized trade of buy and sale of shares of those companies. Assessee in his statement also mentioned names of some of the directors of those companies who are also engaged and involved in this operation. In view of this, we direct the learned assessing officer to complete below directions within 90 days of the date of receipt of this order :- i. Share information of all those persons who are involved in the above racket of money laundering with the concerned Assessing officer to take action in their hands in accordance with the law. ii. Cases of all the assessee who are named as beneficiaries such as Ranka Jwellers and its entities, individuals also may be reopened and dealt with according to the decision of Honourable Supreme court in case of Pr. CIT v. Abhisar Buildwell (P.) Ltd. [2023] 149 taxmann.com 399 (SC) and instructions of CBDT. Ld AO may treat it as directions u/s 150 of the Income tax Act. It applies in case of all the beneficiaries and other persons named in assessment order or as per information available with the AO referred to in assessment order. iii. Intimate securities and exchange board of India the names of those directors who are involved in these operations. iv. Intimate the list of beneficiaries to the securities and Exchange board of India who has earned unaccounted income by way of a synchronized trade through the cartel of these accommodation entry providers. v. Intimate to SEBI all the share brokers, Depositories through whom buy and sale transaction of these securities are carried out and did not report to such suspicious transactions to SEBI and RBI. vi. To intimate to the board of stock exchanges where these transactions are carried out to show that synchronized trades have happened in all these companies by all these persons and to take actions against clients, brokers, Demat agencies etc. vii. To intimate the above money-laundering activities carried out by all those persons along with the names of the persons, companies and the beneficiaries to the respective authorities for examination of applicability of The Prevention Of Money-Laundering Act, 2002 as per paragraph 11 of schedule of that Act. viii. Intimate the name of companies involved whose share prices are rigged on stock exchange supported by fictitious turnover and shell structure to MCA/ Registrar of companies to take necessary action/ inquiry in accordance with the law."

On assessee's writ petition before Hon'ble Bombay high court in WRIT PETITION (L) NO.27193 OF 2023 7th October 2023

"5. We have considered the impugned order with the assistance of Mr. Gandhi and Mr. Sharma and we find that very strong observations have been made against Petitioner. Apart from these observations, directions have been passed to the Assessing Officer to complete the directions given therein, within 90 days of the receipt of the order. Those directions are contained in paragraph 17(i) to (viii). 6. In our view, these directions could not and in any case should not have been passed because this was an appeal that was filed by sessee and not an appeal that was filed by the Revenue. 7. Having considered the impugned order and the averments made in the Petition, in our opinion, the order passed in the absence of Petitioner has to be quashed and set aside and the matter should be remanded for de-novo consideration. Ordered accordingly. 8. It will be apposite to re-produce the following paragraph from the judgment of this Court in Indira Balakrishna, Manager of Estate of Balakrishna Purshottam Purani v. CIT 1 . It reads as under: "Now, it is never desirable for any Judge to express an opinion which is not necessary for the decision of a case; even so judges, and some of them very eminent judges, have indulged from time to time in obiters. But the only result of their doing so is possibly to encumber law reports and the giving expression to these obiters has not resulted in any prejudice to any party. But in the case of the Tribunal the position is entirely different. Every expression of opinion by them is likely seriously to prejudice the assessee. In this very case because they took the view that the Appellate Assistant Commissioner was in error in considering that the income from property fell under section 9(3), the Income-tax Officer has, as pointed out by Mr. Palkhivala, issued a notice against the assessees under section 34(1)(b). The Tribunal being the highest authority under

the Income-tax Act, the Income-tax Officer is bound to respect any opinion expressed by it, and if it says that an assessee has been under-assessed or there has been a failure to assess properly, the Income-tax Officer is bound to take action under section 34, and that is exactly what has happened in this case. Therefore, in our opinion, with respect to the Tribunal, it should be very careful in giving findings and in expressing opinions. It must try and confine itself to the question that really arises in the appeal before it and not travel outside the ambit of its jurisdiction and express opinions prejudicial to the assessee which may help the Department in taking proceedings against the assessee. It may be said that if the Income-tax Officer is in error in issuing the notice under section 34 or that the view expressed by the Tribunal was not correct, the assessee would always have his remedy. But that is not the point. The assessee is harassed by a notice issued against him under section 34 and he has got to run the gamut of several income tax authorities before ultimately he gets justice, and all this arises because the Tribunal overlooks its own responsible position and the serious consequences of expressing opinions which do not really arise for the decision of the appeal before it." (emphasis supplied) 9. The Tribunal that would hear the matter afresh shall be uninfluenced by the impugned order in this Petition. "

6. Important high court rulings

6.1 <u>Hon'ble delhi high court in case of Shashi Mohan Garg vs ITO</u> <u>W.P.(C) 7619/2019 (05.10.2023)</u>

Reopening founded on basis "4.1 The AO arrived at this conclusion based on the information received on 16.03.2016 from the Kolkata Investigation Directorate. The information that the AO had received was, broadly, to the effect that certain persons, who were based in Kolkata, had incorporated shell companies. These shell companies were being operated by one Ashish Kumar Agarwal. Furthermore, the information claimed that two persons i.e, Ashok Kumar Kayan and Sushil Kumar Kayan, sharebrokers at the Calcutta Stock Exchange (CSE) and Bombay Stock Exchange (BSE), were providing bogus long-term capital gains (LTCG) through trading in shares of shell companies. The information also revealed that a survey was conducted on the premises of Ashok Kumar Kayan, which disclosed that Ashok Kumar was providing accommodation entries in the form of LTCG, in cahoots with entry providers and promoters of scrips at CSE." Quashed /interdicted by hon'ble delhi high court holding

"13. Therefore, the AO being unable to tie up the information received by him, with the alleged failure on the part of the petitioner to „fully and truly" disclose all material facts, attains criticality in the instant case. There is a non-application of mind by the AO. The AO appears to have solely proceeded based on the general information received by him. The AO, in a sense, has taken recourse to „borrowed" satisfaction. It is on account of this reason that, although, the AO notes that LTCG said to have been earned by the petitioner amounted to Rs. 94,85,883/-, he continued to hold the position that income chargeable to tax which had escaped assessment [which he had tied to LTCG from sale of shares in Blue Print Securities] was Rs. 1,04,38,000/-. 14. There is nothing in the „reason to believe" that would show how the AO has reached a figure of Rs. 1,04,38,000/-. The only clue concerning that figure is in the information that he had received from the Kolkata Division of the Investigation Directorate. 15. Furthermore, as noted above, the AO verily believed, for some strange reason, that the petitioner"s/assessee"s case was the one which fell within four (4) years,

which is why he had adverted to Section 151(2) rather than Section 151(1) of the Act. 16. Thus, for the foregoing reasons, we are of the view that the reassessment proceedings were triggered against the petitioner/assessee without due application of mind by the AO about the information received by him from the Kolkata Division of the Investigation Directorate. 17. We are, thus, inclined to allow the prayer made in the writ petition. Consequently, the impugned notice dated 28.03.2019 issued under Section 148 of the Act is quashed."

6.2 <u>Hon'ble Gujarat high court in case of PCITvs Divyaben Prafulchandra Parmar (tax appeal 812/2023 order dated 02.01.2024)</u>

"[8] The Departmental Representative appearing for the appellant submitted before the Tribunal that the assessee did not prove the genuineness of the transaction and the transaction done through the banking channel, is not sufficient. It was submitted that the debit note, ledger account and other evidence such as STT paid by the assessee do not show that the transaction is genuine. Reliance was placed on the decision of the Calcutta High Court in the case of PCIT vs. Swati Bajaj reported in (2022) 139 taxmann.com 352 (Calcutta), to submit that the assessee has not proved the genuineness of transaction and therefore, the addition made by the Assessing Officer should be sustained.

[9] The Tribunal, after considering the findings of the Assessing Officer, CIT(A) as well as the material placed on record, has come to the conclusion and arrived at a finding of fact that the assessee has proved the genuineness of transaction of sale of 10,000 shares of Sunrise Asian Ltd. The Tribunal also relied upon the decision of this Court in the case of Jagat Pravinbhai Sarabhai reported in [2022] 142 taxmann.com, wherein it is held that the Assessing Officer has failed to substantiate that addition under Section 68 of the Act could be sustained in absence of genuineness of investment in shares of the assessee by producing copy of the transaction statement and shares were retained for a long time and sold aftersome time and the investment could not be held to be bogus. It was, therefore, held by the Tribunal that in the facts of the case also, when the assessee has held the shares from 2011-2014 for almost two and half years, the same cannot be said to be bogus.

[12] As the Tribunal deleted the addition charging of income tax at the rate of 30% under Section 115BBE of the Act, was held to be not applicable.

[13] Feeling aggrieved by the order passed by the Tribunal, the appellant – Revenue has preferred this Tax Appeal on the proposed substantial questions of law narrated hereinabove.

[14] Learned Senior Standing Counsel Mr. Karan Sanghani for the appellant reiterated the submissions made before the Tribunal and submitted that the Assessing Officer, after analyzing the data made available from the Bombay Stock Exchange, came to the conclusion that the price of script, which the assessee sold, was fluctuating by 24 times and after sale of shares made by the assessee, the price has reduced to Rs.0.49. It was, therefore, submitted that the Assessing Officer, taking into consideration the volatility of the share price of the

script sold by the asssessee, was justified in relying upon the report of the Investigation Wing of Kolkata as well as the fact that the SEBI has suspended the transaction of the said script for some time and accordingly, the Assessing Officer was justified in making addition of unaccounted income of the assessee on the ground of accommodation entries availed by the assessee.

[15] It was further submitted that the CIT(A), after considering the documents available on record, has upheld the view taken by the Assessing Officer. It was submitted that the Tribunal, after considering the submissions made by the assessee and the Departmental Representative, allowed the appeal. It was submitted that the Tribunal, therefore, contrary to the facts and evidence on record, has allowed the appeal without considering the findings of the Assessing Officer and the CIT(A) in its true perspective.

[16] Considering the contentions raised on behalf of the Revenue, the Tribunal has arrived at a finding of fact that shares of Sunrise Asian Ltd. sold by the assessee cannot be doubted as bogus and exemption under Section 10(38) of the Act was rightly availed by the assessee. The Tribunal has also concluded that the presumption drawn by the Assessing Officer was not corroborated by any evidence to establish the alleged non-genuine transaction by the assessee. It was, therefore, rightly held by the Tribunal that the claim of the assessee for exemption of Long Term Capital Gains under Section 10(38) of the Act cannot be held to be bogus on the basis of presumption in absence of any evidence brought on record by the assessee with regard to shares of Sunrise Asian Ltd, which is not even found to be rigged by the SEBI also. The Tribunal has also considered that the assessee held the shares for two and half years and after holding the shares for a long period, the same were sold by the assessee and therefore, reliance was placed on the decision of this Court in the case of Jagat Pravinbhai Sarabhai (supra), wherein this Court has held as under:

17] In view of the above, we are of the opinion that no question of law much less any substantial question of law arises from the impugned order passed by the Tribunal. The appeal, being devoid of any merit, is, accordingly, dismissed"

Jagat Pravinbhai Sarabhai (supra): "5. The genuineness of investment in the shares by the assessee was substantiated by him by producing copy of transaction statement for the period from 1.6.2001 to 1.10.2010. The

investment was made in the year 2000-01. The shares were retained for more than ten years and were sold after such long time. These circumstances suggested that the investment was not bogus or investment made in penny stock. The shares were purchased in order to invest and not for the purpose of earning exempted income by frequent trading in short span. 6. The finding recorded by the appellate authority and confirmed by the appellate tribunal is based on material before them. They are in the realm of findings of fact. No error could be noticed in the findings and conclusion that the investment was longstanding and genuine and was not penny stock on the basis of which the capital gain was wrongly claimed. 6.1 On the facts of case, no question of law much less substantial

question of law arises."

Also refer hon'ble Gujarat high court in cases of THE PRINCIPAL COMMISSIONER OF INCOME TAX 1, AHMEDABAD Versus CHAMPALAL GOPIRAM AGARWAL R/TAX APPEAL NO. 366 of 2023 (25.07.2023)

"6. We have considered the submissions of the learned advocate for the appellant as well as gone through the decisions rendered by the learned tribunal.
7. It is observed by the learned tribunal that the controversy arose whether the assessee genuinely purchased and sold the shares of the above referred two companies through stock exchange. The learned tribunal has further observed that the AO has simply proceeded on the basis of financials of the company in arriving at the conclusion that the transactions were accommodation entries and hence they were fictitious. However, the conclusion drawn by the AO was on the assumption that there was an agreement to convert unaccounted money by taking fictitious LTCG. On appreciation of facts, earned tribunal held that the decision of the AO was unsupported by any material on record and the finding was purely on assumption basis.
8. The learned tribunal has also observed that the respondent had successfully discharged the initial burden cast upon it under the provisions of Section 68 of the Act. It is not in dispute that the shares of the aforesaid two companies were purchased online and the payments were made through banking channel and the shares were dematerialized and the shares have been routed from demat account and the consideration was also received through bank channels. The AO does not have any independent source or evidence to show that there was an agreement between the assessee and any other party. The learned tribunal has also observed that in absence of any specific finding against the assessee, the assessee cannot be held to be linked to the wrong acts merely on the basis of surmises and assumptions"

Hon'ble Gujarat high court in case of PRINCIPAL COMMISSIONER OF INCOME-TAX-1, AHMEDABAD Versus MAMTA RAJIVKUMAR AGARWAL R/TAX APPEAL NO. 408 of 2023 (11.09.2023)

"4 Hence, the Tribunal held, and in our opinion rightly so that there was no evidence available on record suggesting that the assessee or his broker was involved in rigging up of the price of the script of M/s Shree Nath Commercial & Finance Ltd. The assessee had acted in good faith. The Tribunal, therefore, correctly held that the Assessing Officer had acted only on assumption which was misconceived. The CIT(A) order dismissing the revenue's appeal was confirmed.
5 Looking to the concurrent findings, we see no reason to entertain this appeal as no substantial question of law, much less a question of law is involved in the appeal. The appeal accordingly stands dismissed with no orders as to costs."

6.3 Hon'ble Orissa high court in case of *Principal Commissioner of Income Tax I, Ayakar Bhawan, Bhubaneswar …. Appellant -versus- Dipansu Mohapatra …. Respondent*

ITA Nos. 11, 12, 13, 14, 15, 16, 17, 18, 19, 21 and 22 of 2022

08.02.2023

"4. The question sought to be urged by the Revenue Department in these appeals is "whether after making certain statements in the survey the Assessee not claiming exemption under Section 10(38) of the Income Tax Act, 1961 at the stage of the assessment proceedings, could be the Assessee turned around and make such claim of wanting to cross-examine persons make adverse statements against the Assessee at the stage of the appeal before the ITAT" ? 5. The impugned order of the ITAT has sufficiently dealt with the factual details concerning the Respondent-Assessees. The question was regarding the claim of long-term capital gains on shares in terms of Section 10(38) of the Act. During the course of scrutiny assessment, a revised return was filed by the Assessee claiming the above exemption. After the AO rejected the plea, the Assessee went before the CIT(A). The CIT(A) was satisfied that the purchase of liquid shares have been made through Account Payee Cheques andthe shares themselves were held in Demat Account for more than 12 months and then sold through the recognized stock exchange after payment of security transaction tax. A reference was made to the CBDT circular which debarred the Revenue from obtaining admissions/ statements during the course of a survey. The ITAT also noted the settled position in law that if an Assessee has wrongly offered an item of income or omitted to make a claim of deduction in the return, he was entitled to correct such a mistake by making a request to the AO to that effect. 6. Another ground on which the ITAT found fault with the additions made by the AO was that reliance was placed on statement of 'so called entry operator' to justify the additions under Sections 68 and 69 of the IT Act. These statements were recorded on various dates in some other proceedings not connected with the Assessee. Further, the statements were recorded much before the date of the survey conducted on the Assessee. It was unable to be disputed by the Department that the Assessee did not have an opportunity to challenge such statements and further, no opportunity to crossexamine the so-called entry providers was given to the Assessees.

7. Having heard learned Senior Standing Counsel for the Department (Appellant) and having perused the impugned orders of the AO, CIT(A) and the ITAT, the Court finds that both the grounds viz., the claim for benefit of Section 10(38) of the Act and denial of an opportunity to cross examine the entry providers, turned on facts. The ITAT was justified in accepting the plea of the Assessee that the failure to adhere the principles of natural justice went to the root of the matter. Also, the CBDT circular that permitted to the Assessee to file revised returns if he omitted to make a claim was also not noticed by the AO.

8. In the considered view of the Court, the ITAT committed no error in concurring with the view of the CIT(A) and in dismissing the Revenue's appeals."

6.4 <u>Hon'ble Orissa high court in case of PCIT vsSmt Bimala Devi Singhania ITA 84 & 85/2022 order dated 10.10.2023</u>

<u>Revenue case before hon'ble high court:</u>

"4. Mr. T.K. Satapathy, learned Senior Standing Counsel appearing for the Income Tax Department vehemently contended that the respondent-assessee is one of the beneficiary of the modus operandi to create bogus profit in the garb of tax exemption under Long Term Capital Gain by well-organized network of entry providers with the sole motive to provide such accommodation entries to enable the beneficiary to convert her undisclosed income to tax free income. Therefore, the CIT (A) and Income Tax Appellate Tribunal are not justified by nullifying the order passed by the Assessing Officer and accepting the claim of the respondent-assessee regarding exemption under Section 10 (38) of the Income Tax Act with regard to the income under the heading Long Terms Capital Gain on sale of shares of penny stocks by ignoring the admission by their group before the income tax authority. It is further contended that in view of the CBDT Circular No.23 of 2019 dated 06.09.2019, as the matter related to bogus Long Term Capital Gain of penny stock, the finding arrived at by the CIT (A) and Income Tax Appellate Tribunal, cannot be sustained in the eye of law"

"6. On the basis of the pleadings available on record and also the arguments advanced by learned counsel appearing for the respective parties, this Court, vide order dated 13.09.2023, framed the substantial questions of law to the following effect:- "I) Whether the learned Tribunal has rightly accepted the claim of the assessee as per law regarding exemption under Section 10 (38) with respect to alleged income under the head "Long Term Capital Gain" on sale of shares of penny stock by ignoring the admission by their group before the Income Tax Authority that complete tax would be paid on the bogus LTCG claimed by the group subsequent to survey operation under Section 133A? II) Whether the learned Tribunal has rightly dismissed the appeal of the revenue with the observation that as the sale of shares were effected through recognized stock exchange and STT had been paid at the time of transfer, therefore it cannot be held as bogus?"

On sec 10(38) Held "8. On bare perusal of the aforementioned provisions, it is made clear that for claiming the benefit of exemption under Section 10(38) of the Income Tax Act, 1961 three requirements need to be fulfilled. Firstly, the share should be held for more than one year, secondly, it should be listed and sold on recognized stock exchange and, thirdly, on the said sale necessary Security Transaction Tax (STT) has to be chargeable. If all these requirements are satisfied, then the benefit of exemption under Section 10 (38) of the Income Tax Act, 1961 is admissible.

9. In Bhoruka Engineering Industries Ltd. (supra), the Karnataka High Court has also laid down the above mentioned principles. Therefore, applying the provisions contained under Section 10 (38) of the Income Tax Act, 1961 and also the law laid down by the High Court of Karnataka mentioned supra, all the above noted three elements are existing in the present case and, thereby, the respondent-assessee is entitled to get the benefit under Section 10 (38) of the Income Tax Act, 1961. As such, a survey under Section 133A of the Income Tax Act, 1961 was conducted on 20.08.2015 and, without detecting any incriminating documents or evidence against the respondent-assessee, recorded the statement that tax will be paid on the claim made under Section 10 (38) of the Income Tax Act, 1961 in filing the IT return for the Assessment Year 2013-14 and to be disclosed as income from other source. But the said statement, being without any incriminating evidence against the respondent-assessee, cannot be ipso facto decided against the respondent-assessee. The present income tax appeal filed at the instance of the revenue involved no substantial question of law, as both the appellate authorities have decided on the basis of evidence and documents produced by the respondent-assessee and the revenue and, as such, on the basis of the facts, both the authorities have come to a conclusion that the respondent-assessee is entitled to the benefit under Section 10 (38) of the Income Tax Act, 1961 and held that he appellant-revenue had failed to bring any evidence in rebuttal nor was it proved that the documents produced were false, fabricated or fictitious, hence, the findings, as recorded by the appellate authorities, that the transaction of purchase and sale of shares could not be treated as non-genuine,

were essentially in the realm of appreciation of evidence and, as such, no substantial question of law is involved.

12. It is worthwhile to mention here that, the Security Transaction Tax (STT) under Chapter-VII of Finance (No.2) Act, 2004 is a direct tax levied by Government of India on every purchase and sale of securities that are listed on the recognized stock exchanges in India. The STT was implemented to curb the tax avoidance on capital gains, which is similar to Tax Collected at Source (TCS) to be collected by a recognized stock exchange and both the buyer and seller will pay the said tax, as prescribed rate for carrying out the transaction of securities for financial gains, are liable to pay STT. All gains from such transactions are called capital gains and are classified as LTCG or STCG, depending on the holding period. Therefore, the alleged substantial questions of law as proposed by the Revenue cannot be sustained in the eye of law, as the same is contrary to clauses (a) and (b) of Section 10 (38) of the Income Tax Act, 1961 (Circular No.5/2005 dated 15.07.2005).

. As such, CIT (A) and Income Tax Appellate Tribunal, being the fact finding courts, relying upon the evidences available on record, having passed the orders impugned, there is no necessity of answering the substantial questions of law framed for adjudication. 15. Thus, both the appeals, being devoid of merits, are hereby dismissed. However, there shall be no order as to costs"

6.5 **Hon'ble Bombay high court in case of PCIT vs Indravadan Jain, HUF INCOME TAX APPEAL NO. 454 OF 2018 12th JULY 2023** [2023] 156 taxmann.com 605 (Bombay)

" Respondent had shown sale proceeds of shares in scrip Ramkrishna Fincap Ltd. (RFL) as long term capital gain and claimed exemption under the Act. Respondent had claimed to have purchased this scrip at Rs.3.12/- per share in the year 2003 and sold the same in the year 2005 for Rs.155.04/- per share. It was A.O.'s case that investigation has revealed that the scrip was a penny stock and the capital gain declared was held to be accommodation entries. A broker Basant Periwal & Co. (the said broker) through whom these transactions have been effected had appeared and it was evident that the broker had indulged in price manipulation through synchronized and cross deal in scrip of RFL. SEBI had also passed an order regarding irregularities and synchronized trades carried out in the scrip of RFL by the said broker. In view thereof, respondent's case was reopened under Section 148 of the Act. While allowing the appeal filed by respondent, the CIT[A] deleted the addition made under Section 68 of the Act. The CIT[A] has observed that the A.O. himself has stated that SEBI had conducted independent enquiry in the case of the said broker and in the scrip of RFL through whom respondent had made the said transaction and it was conclusively proved that it was the said broker who had inflated the price of the said scrip in RFL. The CIT[A] also did not find anything wrong in respondent doing only one transaction with the said broker in the scrip of RFL. The CIT[A] came to the conclusion that respondent brought 3000 shares of RFL, on the floor of Kolkata Stock Exchange through registered share broker. In pursuance of purchase of shares the said broker had raised invoice and purchase price was paid by cheque and respondent's bank account has been debited. The shares were also transferred into respondent's Demat account where it remained for more than one year. After a period of one year the shares were sold by the said broker on various dates in the Kolkata Stock Exchange. Pursuant to sale of shares the said broker had also issued contract notes cum bill for sale and these contract notes and bills were made available during the course of appellate proceedings. On the sale of shares respondent effected delivery of shares by way of Demat instructions slip and also received payment from Kolkata Stock Exchange. The cheque received was

deposited in respondent's bank account. In view thereof, the CIT[A] found there was no reason to add the capital gains as unexplained cash credit under Section 68 of the Act. The tribunal while dismissing the appeals filed by the Revenue also observed on facts that these shares were purchased by respondent on the floor of Stock Exchange and not from the said broker, deliveries were taken, contract notes were issued and shares were also sold on the floor of Stock Exchange. The ITAT therefore, in our view, rightly concluded that there was no merit in the appeal."

Also refer:

Hon"ble Bombay High Court in the recent case of PCIT vs Ziauddin A Siddique in Income Tax Appeal No. 2012 of 2017 dated 04.03.2022 had held as under:- *"2. We have considered the impugned order with the assistance of the learned Counsels and we have no reason to interfere. There is a finding of fact by the Tribunal that the transaction of purchase and sale of the shares of the alleged penny stock of shares of Ramakrishna Fincap Ltd ("RFL") is done through stock exchange and through the registered Stock Brokers. The payments have been made through banking channels and even Security Transaction Tax ("STT") has also been paid. The Assessing Officer also has not criticized the documentation involving the sale and purchase of shares. The Tribunal has also come to a finding that there is no allegation against assessee that it has participated in any price rigging in the market on the shares of RFL. 3. Therefore we find nothing perverse in the order of the Tribunal. 4. Mr. Walve placed reliance on a judgement of the Apex Court in Principal Commissioner of Income Tax (Central)- 1 vs. NRA Iron & Steel (P) Ltd (2019) 103 taxmann.com 48 (SC) but that does not help the revenue in as much as the facts in that case were entirely different. 5. In our view, the Tribunal has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raises any substantial question of law. 6. The appeal is devoid of merits and it is dismissed with no order as to costs."*

6.6 Hon'ble Bombay high court in case of Ankur V Bandka vs ACIT (WP 2734/2022) order dated 08.08.2023: (reopening u/s 148 quashed)

Relevant excerpt "3 The reasons to believe that Petitioner's income has escaped assessment for relevant Assessment Year reads as under:- " Information has been received that enquiries were conducted in the case of M/s. INDIRA SECURITIES PVT. LTD. shares and it was found that the said scrip is penny stock scrip and had been used to provide accommodation entries in the form of long term capital gains and short term capital loss to the interested beneficiaries. The financial of the company do not support the sharp movement in the price of the shares. The entry operators and exit providers have used this scrip to provide accommodation entries in the form of long term capital gain and STCL to the interested beneficiaries. The assessee has been identified as one of the beneficiaries who have taken advantage of this racket. Scrip movement of INDIRA SECURITIES PVT has been analyzed. Perusal of volume of trade data w.r.t. scrip movement

clearly reveals that during front running of the scrip i.e. when the scrip price is artificially inflated due to circular trading the trade volume is too low. The trade volume increases suddenly when the lock-in period of the preferential shares has come to an end. This is when the beneficiaries of bogus LTCG take an exit (The financial of the company is attached).

3. It has been noticed that the whole process of preferential allotment was staged event in which the beneficiaries of bogus LTCG plan with the operators and subscribe to the shares of penny stock for availing entry of bogus LTCG. The company INDIRA SECURITIES PVT. LTD. has no financials and no future potential and the whole process of preferential allotment is a managed event. The director was not able to substantiate and provide any logical explanation to support the astronomical rise in price of scrip. Further the director was not able to provide any documentary evidence to prove that a meeting between directors of the company and prospective allottees of equity shares was in fact conducted. Also the director was asked to provide details of content of the presentation which was presented to theprospective allottees which convinced them to invest in their company. To this question as well the director was not able to give a satisfactory explanation.

3.3 From the above facts and analysis it is appears that the scrip M/s INDIRA SECURITIES PVT. LTD. has been used to provide bogus Long Term Capital Gains to various beneficiaries. No satisfying logical explanation has been given by either the exit providers or the directors to justify that the transactions were genuine without malicious intent. Assessee is one of the beneficiary.

7. In view of the above facts, it is clear that the assessee has failed to disclose fully and truly all material facts about his true and correct income in his return of income filed for the AY 2013- 14. Therefore, I have reason to believe that income chargeable to tax of Rs. 1,59,06,184/- has escaped assessment in the hands of the assessee and the same needs to be assessed u/s. 147.SHASHIKANT SINGH CIRCLE 24(1), MUMBAI""

Held quashing above reasons: "The reasons indicate that the penny stock/scrip in which the alleged racket seems to have taken place is M/s. Indira Securities Private Limited. No stock of any Private Limited can be traded in the stock market. That shows total non-application of mind by the Assessing Officer while recording reasons. It is on these reasons recorded, approval under Section 151 has been sought. The proposal is made by one Prabhakar Ranjan Pathak, recommended by one Vinod Kumar, Range 24 (1), Mumbai and approved by one Narasamma Salagala PCIT, Mumbai. If any of these persons had even bothered to read the reasons to believe, they would have certainly red flagged the reasons because there can never be scrip movement in M/s. Indira Securities Private Limited. Even in the annexure enclosed to the approval, in paragraph 2 it says " scrip movement of Indira Securities Private Limited has been analyzed. Perusal of volume of trade data w.r.t. scrip movement clearly reveals that during front running of the scrip i.e. when the scrip is artificially inflated due to circular trading, the trade volume is too low. The trade volume is increased suddenly when the lock-in-period of the preferential shares has came to an end. This is when the beneficiaries of bogus LTCG taken an exit (the Financial of the company attached)." This itself should have alarmed the recommending authority as well as approving authority who should have either returned the file or raised a query as to how there can be movement of scrip in Private Limited Company in the stock market.

Moreover, in the reasons recorded for re-opening, there are no details as to what was the information received against assessee, how many shares he had brought, how many shares he had sold and how the Assessing Officer come to a conclusion that income chargeable to tax of Rs.1,59,06,184/- has escaped assessment"

Also refer Hon'ble Bombay high court in case of Mrs. Rashmi Vinay Bhatt …Petitioner Versus The Income – tax Officer Ward – 6(3)(1), Mumbai and Ors. …Respondents WRIT PETITION NO. 3292 of 2022 13TH MARCH 2023.

"3. We have examined the reasons for initiation of proceedings u/s 147 of the Act annexed to the Petition that are evidently premised on 'information received from credible sources'. The Assessment Officer (AO) records that the assessee had claimed exemption on the income from Long Term Capital Gain of .3,38,79,160/- and based on the ₹ information concluded that the assessee had obtained accommodation entries of the said amount on Penny Stock Transactions and consequently income had escaped assessment. We find nothing to indicate failure to disclose any material fact. HELD 8. The present case is also vitiated because the initiation of proceedings is based on borrowed satisfaction without independent application of mind which proposition is supported by various judgments of the Supreme Court as well as our Court in

the case of PCIT v Shodiman Investments (P) Ltd. (2020) 422 ITR 337 (Bom)"

6.7 Hon'ble delhi high court in cases of ***Krishna Devi 431 ITR 361 (further applied in two cases of : BINDU GARG (ITA 519/2022 order dated 08.12.2022) ; KARUNA GARG (ITA 477/2022 order dated 23.11.2022); (assessee favoring decisions)***

6.8 Kolkata bench ITAT in case of RAIGARH JUTE & TEXTILE MILLS LTD VS ACIT (ITA 2286/Kol/2019) order dated 27.06.2023

"12. We find force in the contentions raised by the ld. counsel for the assessee. Firstly, in this case, the assessee has not claimed long-term capital gains on account of unrealistic steep rise in the share prices of these scrips traded in as was in the case of PCIT vs. Swati Bajaj &Ors (supra). The Hon'ble High Court had held, under the circumstances, that the burden was upon the assessee to explain the business prudence of investment in these scrips of the companies having negligible financial worth and thereafter of steep rise in their share price resulting into huge capital gains within a short span of time. The case before us is of business loss in share trading."

Kolkata bench ITAT in case of M/s. Gateway Financial Services Ltd.....Appellant [PAN: AABCG 1634 L] Vs. ACIT, CC-3(1), Kolkata.....Respondent
July 14th, 2023
I.T.A. No.: 982/KOL/2018
Assessment Year: 2014-2015

"We thus, find that at the time of making the impugned additions, there were only third party statements and report of the investigation wing referring to some entry operators and share brokers but there was no direct evidence doubting the genuineness of the said transactions and the additions are made only on the basis of preponderance of probabilities theory. Similar type of additions were also made in the case of Swati Bajaj (supra) and Hon'ble Jurisdictional High Court decided in favour of the revenue. However, in the case of assessee(s) in appeal before us, facts are distinguishable because specific enquiry has been conducted by the SEBI regarding the facts of the case i.e., all the transactions carried out by the assessee(s) in appeal before us for the purchase and sale of equity shares of Radford Global Ltd.. These have been examined by an Authority which provides the platform for carrying out the share trading/purchase andsale of transactions and after extensive enquiry, assessee(s) in appeal before us have been exonerated from the alleged charges. It has been held that there is no direct evidence which could indicate that buyers and sellers had pre-planned the said transactions and in other words, the complete theory of preponderance of probabilities adopted by assessing officer has attained oblivion. Therefore, under these given facts, the judgment of the Hon'ble Jurisdictional High Court in the case of Swati Bajaj (supra), are not applicable, as the facts of the case are distinguishable so far as the assesse(s) in appeal before us are concerned."

Kolkata bench ITAT in case of Samrat Finvestors Private Limited vs ITO
I.T.A. No. 840/Kol/2023 Assessment Year: 2014-15
Date of Pronouncement: 11/01/2024

"The facts qua the first issue raised by the assessee are that the assessee, during the year, has incurred loss of Rs.3,98,50,208/- which comprised of share trading loss amounting to Rs.2,87,07,277/- and Rs.1,11,42,931/- in respect of loss on trading in F&O segment…

11. We have also perused carefully the facts of the decisions passed by the Coordinate Benches in the case of Gateway Financial Services Ltd. (supra) and Raigarh Jute & Textile Mills Pvt. Ltd. (supra) and find that the facts of the assessee's case are substantially similar to that in the above cases as decided by the Coordinate Benches. We also note that the decision of the Hon'ble Jurisdictional High Court in the case Swati Bajaj & Ors. (supra), relied upon by the ld. D/R, has been distinguished by the Coordinate Bench and held to be not applicable to the facts of those cases. .."

Kolkata bench ITAT in case of Nalanda Builders Pvt. Ltd vs DCIT in ITA 763/Kol/2022 (11.01.2024) (On same lines)

6.9 Delhi bench ITAT in case of SARIKA BINDAL vs ITO ITA No.1999/Del/2020 (13.12.2023);

"8. We have carefully considered the rival submissions and perused the material available on record. The case law cited have also been taken into account. As pointed out on behalf of the assessee, the transaction of existence of purchase and sale of CCL Ltd. giving rise to LTCG claimed to be exempt under section 10(38) of the Act is fully corroborated by the documentary evidences. The shares have been credited in the demat account and transferred out of demat account at the time of sale. Both purchase and sale transactions are carried out through banking channel and by transfer of shares. The prima facie bonafides of existence of transaction executed cannot thus be doubted. It is not the case of the revenue that the capital gain arising to Assessee in not in the nature of LTCG. The case of revenue is that such transactions is an accommodation entry and thus sham. The abnormal increase in prices of share has led to suspicion on bonafides of transaction and was treated as accommodation entry of sham nature. 8.1 The Hon'ble Delhi High Court in the case of Karuna Garg as well as Krishna Devi has held that an astronomical increase in the share price of a company in itself is not a justifiable ground for holding the LTCG to be an accommodation entry.

8.5 In such backdrop, we are of the view that the addition is not justified based on conjecture and surmise and the assessee is discharged primary onus which lay upon it. The Revenue, on the other hand, could not dislodge the perception that apparent is not real. 8.6 In the light of factual matrix and case laws available on record, we see potency in the plea of the assessee that such capital gains arising on sale of shares cannot be regarded as sham profit and consequently, additions under s. 69A of the Act is not justified. The Assessing Officer has not provided anything on record to justify additions under section 69C of the Act either. The modus operandi spelt by itself is not a adequate ground to impeach the transactions"

Reference made to hon'ble delhi high court in case of PCIT vs. Karuna Garg [ITA no. 477/2022 judgment dated 23.11.2022]; P CIT vs. Prem Lal Gandhi 401 ITR 253 (P&H) Hon'ble Punjab and Haryana High Court ; ; Trivikram Singh Toor vs. PCIT 142 taxmann.com 493 (Chandigarh) (2023); Hon'ble Delhi High Court in the case of PCIT vs. Reeshu Goel judgment dated 7/10/2019;revenue relied on SWATI BAJAJ case (supra);

Also refer Delhi SMC bench ITAT detailed decision in case of NAZ SHAZIA VS ITO (ITA 1831/DEL/2023) order dated 18.01.2024

Held

"26. Considering the totality of the facts and circumstances of the instant case and respectfully following the judicial precedents relied upon hereinabove, I hold that the reopening of assessment had been initiated by mere surmise and conjecture without having any cogent material to form a

reasonable belief that income of the assessee had escaped assessment within the meaning of section 147 of the Act. Hence I hold that the assumption of Jurisdiction u/s 147 of the Act is void abinitio in the instant case. Even on merits, I find that there is no case for making any addition u/s 69A of the Act in the hands of the assessee. Hence I hold that assessee would be entitled for relief by way of exemption for long term capital gains u/s 10(38) of the Act in the facts and circumstances of the instant case. Accordingly, the grounds raised by the assessee are allowed."

"25. I find that the ld. DR before me vehemently relied on the recent decision of Hon"ble Calcutta High Court in the case of PCIT vs Swati Bajaj reported in 139 taxmann.com 352 (Cal) which is an elaborate decision rendered after considering various decisions of various High Courts on the subject. In the said decision, it was held that assessee had to establish the genuineness of rise of price of shares within a short period of time that too when general market trend was recessive. But I find that when there are several decisions of Hon"ble Jurisdictional High Court as stated supra which are already in favour of the assessee, the same would prevail over this tribunal and this tribunal need not take cognizance of the Hon"ble Non-Jurisdictional High Court. The law is very well settled by the Hon"ble Supreme Court in the case of Union of India vs Kamalakshi Finance Corporation Ltd reported in 55 ELT 43 (1991) that the decision of Hon"ble Jurisdictional High Court would have higher precedence value than the decision of Hon"ble NonJurisdictional High Court on the Tribunal. The Hon"ble Supreme Court emphasized therein that the orders of the Tribunal should be followed by the authorities falling within its jurisdiction so that judicial discipline would be maintained in order to give effect to orders of the higher appellate authorities. The Hon"ble Apex Court has observed that utmost regard must be had by the adjudicating authorities and the appellate authorities to the requirement of judicial discipline. Hence I deem it fit and appropriate to follow the decisions of Hon"ble Jurisdictional High Court referred supra wherein the impugned issue is decided in favour of the assessee. Moreover, when there are two conflicting decisions of various High Courts, the Hon"ble Supreme Court in the case of Vegetable Products reported in 88 ITR 192 (SC) had held that Construction that is favourable to the assessee should be adopted. Hence by following this principle, the decision of Hon"ble Calcutta High Court and other decisions that are rendered against the assessee, need not be followed by this Court in the peculiar facts and circumstances of the instant case."

6.10 Ahmedabad bench ITAT in case of DCIT vs Shri Rajnikant Prabhudas Mandavia I.T.A. Nos. 401&402/Ahd/2019 25.09.2023

"13. In the case before us, the Assessing Officer has not doubted the purchase of shares were through banking channels. The assessee has placed on record copies of contract memos in connection with purchase and sale of shares. Besides the above shares, the assessee has also held shares of 84 other companies as well. In the present case, no material has been brought on record to suggest that assessee was involved in any price rigging and not has the case of assessee mentioned in the list of beneficiaries, by the persons whose statements were recorded. In the statements recorded, the name of the assessee as a beneficiary was not specifically mentioned this fact was also specifically taken noted by Hon'ble Supreme Court in the case of Renu Aggarwal (supra). The Ld. Assessing Officer has not brought any material to support his finding that there has been collusion or connivance between the broker and the assessee for the introduction of his own unaccounted money. In the present case, despite the assessee's specific request, no opportunity of cross examination was provided to the assessee on the basis of whose statements reliance has been placed to hold that the sale of shares was sham / bogus. Further, the ITAT Kolkata and ITAT Mumbai with respect to the very same stock i.e. M/s Global Infratech and Finance Ltd. In three separate judgments (Mukesh Sharma in ITA Number 6249/Mum/2018, Kaushalya Agarwal 194/Kol/2018 and Mangilal Jain 729/Kol/2018) have decided the issue in favour of the assessee by holding that the assessee was not engaged in bogus purchase and sale of shares. 14. Accordingly, looking into the facts of the instant case, and respectfully following the decisions in the case of Mukesh Sharma in ITA Number 6249/Mum/2018, Kaushalya Agarwal 194/Kol/2018 and Mangilal Jain 729/Kol/2018, which were rendered with respect to the same stock i.e. Global Infratech and Finance Ltd. which the assessee had sold during the impugned assessment year, and

the recent decision of Hon'ble Supreme Court in the case of Renu Aggarwal (supra) we are of the considered view the Ld. CIT(Appeals) has not erred in facts and in law in allowing the appeal of the assessee."

6.11 Jaipur bench ITAT in case of DCIT vs Vigyan Lodha ITA No. 169/JP/2022 (20.12.2022)

"During the course of hearing before us, ld. DR relied upon the decisions of Hon'ble Calcutta High Court in the case of Swati Bajaj and submitted that such case under identical legal position was decided against the assessee. Controverting the submissions, in this regard, Ld.AR before us placed on record a distinguishing note to distinguish legal and factual position of the present case with that of Swati Bajaj before on Hon'ble Calcutta High Court (supra). In the present case, the entire addition has been made by the AO on the basis of report of investigation wing and report of certain persons. No opportunity of cross verification was provided to the assessee. Under such circumstances, no addition can be made to the income of assessee, specifically when entire basis of addition Is investigation report, which was never confronted to assessee, and statement of persons, who were neither examined by the AO nor opportunity of cross examination provided to assessee. It is a settled proposition laid down by different High Courts and by the Hon'ble Apex Court, as set out in the distinguishing note placed on record by the Ld.AR of assessee, as also set out hereinbefore. Hon'ble Calcutta High Court, in case of Swati Bajaj, served that the assessee did not mention regarding report to be furnished or statement to be provided during assessment proceeding before AO. However, in the present case, specified request was made for the copy of report as well as copies of statements of different persons stated by the assessee. Accordingly, we feel that the decision of Hon'ble Calcutta High Court in case of Swati Bajaj is not applicable in the present case of assessee in view of submission made by ld. AR, hereinabove. Thus, in view of the above discussion and taking into consideration various documentary evidences producedby the assessee in support of his claim and further relying upon various decisions of this Tribunal as well as the decision of Hon'ble Jurisdictional High Court including the decision in case of CIT vs. Pooja Agarwal (supra) as well as in case of PCIT vs. Pramod Jain & Others (supra), we allow the claim of exemption under section 10(38) of the Act and accordingly delete the addition made by the AO.

Hence, the order of ld. CIT (A) is upheld."

6.12 *Mumbai bench ITAT in case of* ***YOGESH P THAKKAR ITA 1605/Mum/2021 order dated 03.02.2023***

"5.14. We find that the ld. DR had relied on the decision of Hon"ble Calcutta High Court in the case of PCIT vs Swati Bajaj reported in 139 taxmann.com 352 which is an elaborate decision rendered after considering various decisions of various High Courts on the subject. In the said decision, it was held that assessee had to establish the genuineness of rise of price of shares within a short period of time that too when general market trend was recessive. But we find that when there are several decisions of Hon"ble Jurisdictional High Court as stated supra are already in favour of the assessee, the same would prevail over this tribunal and this tribunal need not take cognizance of the Hon"ble Non-Jurisdictional High Court. The law is very well

settled by the Hon‟ble Supreme Court in the case of Union of India vs Kamalakshi Finance Corporation Ltd reported in 55 ELT 43 (1991) that the decision of Hon‟ble Jurisdictional High Court would have higher precedence value than the decision of Hon‟ble Non-Jurisdictional High Court on the Tribunal. The Hon‟ble Supreme Court emphasised therein that the orders of the Tribunal should be followed by the authorities falling within its jurisdiction so that judicial discipline would be maintained in order to give effect to orders of the higher appellate authorities. The Hon‟ble Apex Court has observed that utmost regard must be had by the adjudicating authorities and the appellate authorities to the requirement of judicial discipline. Hence we deem it fit and appropriate to follow the decisions of Hon‟ble Jurisdictional High Court referred supra wherein the impugned issue is decided in favour of the assessee. Moreover, when there are two conflicting decisions of various High Courts, the Hon‟ble Supreme Court in the case of Vegetable Products reported in 88 ITR 192 (SC) had held that Construction that is favourable to the assessee should be adopted. Hence by following this principle, the decision of Hon‟ble Calcutta High Court and other decisions that are rendered against the assessee, need not be followed by this Court in the peculiar facts and circumstances of the instant case.” Same in case of ***Pankaj Kantilal Shah ITA 576/Mum/2022 order dated 16.06.2023***

Calcutta high court sec. 68 leading penny stock decision fav revenue in SWATI BAJAJ CASE reported at 446 ITR 56 (important take away :

A) *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.*

B) *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.*

C) *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. The report has been signed by the Principal Director of Income Tax (Investigation), Kolkata. The report has been communicated to the DGIT (Investigation) of all the states.*

D) *Thus, we find that the methodology of the investigation by the department is quite different from the normal method of investigation which commences from the investor or the assessee as the case may be. The report states that on account of huge sums of money being claimed as LTCG/LTCL, a different approach/methodology was adopted by the department, by commencing the investigation not from the individuals who traded with the penny stocks but investigation has started targeting the individuals who dealt with those penny stocks. This concept can be mentioned to be one of "working backwards". This is one of the modes of causing an investigation, considering its magnitude. The approach of the department cannot therefore be faulted. Therefore, a different approach is required to be taken on the effect and efficacy of the report according to the department is in the nature of a project. The Court sit in judgment over the methodology adopted by the department as no taxpayer is entitled to any benefit which shall not accrue to him under the provisions of the Act. If any dubious methodology has been adopted for the purpose of availing certain benefits not admissible under law, the same will not come within the ambit of tax planning but shall be a case of tax avoidance by adopting illegal methods. Therefore, we are of the view that the department was justified in proceeding to take up the cases, not only within the jurisdiction of the state of West Bengal but other states as well.*

E) *Thus, the moot question would be if the report is the starting point for considering as to how the claim of LTCG/LTCL by the respective assessees were genuine, we should consider as to whether the assessing officers have committed any error of law, error of jurisdiction or error on facts, leading to the assessments being held to be not sustainable.*

F) *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.*

G) *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*

he 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.

H) 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. herefore, the assessees have 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.

I) 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 nonfurnishing 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. 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.

J) 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.

K) 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.

L) The assesses have lost sight of an important fact that when a claim is made for LTCG or STCL, the onus is on the assessee to prove that credit worthiness of the companies whose shares the assessee has dealt with, the genuineness of the price rise which is undoubtedly alarming that to within a short span of time.

M) During the course of argument, it was submitted on behalf of the revenue that if the Court is satisfied that the order of the tribunal is perfunctory, the matter may be remanded to the tribunal for fresh consideration. The question would be as to whether remand of the matter to the tribunal is warranted and justified considering the submissions on either side. Unless and until, it is a case of absolutely no material, a remand was not called for. If the tribunal had failed to exercise its jurisdiction and test the correctness of the findings of the CIT (A) and the assessing officer, this Court can very well ignore the decision of the tribunal and consider the findings rendered by the assessing officer and the CIT(A) for its legality.

N) 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

O) 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.

P) HC heavily relied on SEBI Versus Kishore R. Ajmera (2016) 6 SCC 368 in support of its vires to reverse ITAT orders.

Q) In the result, these appeals are allowed and the substantial questions of law framed/suggested are answered in favour of the revenue and against the assessee restoring the orders passed by the respective Assessing Orders as affirmed by the CIT(A) as well as the orders passed by the CIT under Section 263 of the Act.

Authors Humble Comments on the above high court decision:

i) That till end with due respect humbly put in such a detailed order there is no clue as to when the substantial question of laws were mandatorily and appropriately framed u/s 260A , prior to final adjudication and interference in factual findings of ITAT which as per ***three judge SC decision in Shiv Raj Gupta 425 ITR 420*** is must , sans which there is apparent jurisdictional flaw in high court order; ***As***

evident from last para of high court decision the phrase "question of law framed/<u>suggested</u>" is used;

ii) That at one side the high court holds the subject investigation done by investigation wing into modus operandii is having evidentiary value against tax payers across country who are allegedly benefited by penny stock (though high court also confirms/holds no assessee /beneficiary is named in it) but on the other side high court holds that assessee themselves could have downloaded the report on their own to give their defenses is assessment proceedings and then high court holds no prejudice is caused to assessee by not giving of said investigation report to assessee is plainly against mandate of sec 142(3) which is completely overlooked by high court;

That high court when gives its imprimatur to stated modus operandii as detected in the said investigation report is rightly used against the assessee in asst/first appeal/high court, proceedings is essentially /effectively making investigation at par with assessment and adjudication and thus rendering salutary process of assessments made by assessing officers as empty ritual and idle formality and upholding that *pre existing- investigation wing findings* are almost binding on *assessing officers which are not supposed to make independent examination/adjudication (concept of independent quasi judicial functioning of AO is completely jeopardized)- Contrary ruling of Delhi high court in AGSON GLOBAL CASE is worth comparing 441 ITR 550 (Justice Rajiv Shakdher order)* (***<u>also reference to be made to : Surinder Singh Brar vs UOI in 2013 1 SCC 403</u>*** *:* "The reason why the LAO did not apply his mind to the objections filed by the appellants and other landowners is obvious. He was a minion in the hierarchy of the administration of the Union Territory of Chandigarh and could not have even thought of making recommendations contrary to what was contained in the letter sent by the Administrator to Surinder Singh Brar. If he had shown the courage of acting independently and made recommendation against the acquisition of land, he would have surely been shifted from that post and his career would have been jeopardized. In the system of governance which we have today, junior officers in the administration cannot even think of, what to say of, acting against the wishes/dictates of their superiors. One who violates this unwritten code of conduct does so at his own peril and is described as a foolhardy. Even those constituting higher strata of services follow the path of least resistance and find it most convenient to tow the line of their superiors. Therefore, the LAO cannot be blamed for having acted as an obedient subordinate of the superior authorities, including the Administrator. However, that cannot be a legitimate ground to approve the reports prepared by him without even a semblance of consideration of the objections filed by the appellants and other landowners and we have no hesitation to hold that the LAO failed to discharge the statutory duty cast upon him to prepare a report after objectively considering the objections filed under Section 5A(1) and submissions made by the objectors during the course of personal hearing") & SC **<u>in case of UOI vs Tara Chand Gupta 1971 1 SCC 486</u>** ("The words "a decision or order passed by an officer of Customs under this Act" used in S. 188 of the Sea Customs Act must mean a real and not a purported determination. A determination, which takes into consideration factors which the officer has no right to take into account, is no determination. This is also the view taken by courts in England. In such cases the provision excluding jurisdiction of civil courts cannot operate so as to exclude an inquiry by them.. In Anisminic Ltd. v. The Foreign Compensation Commission(1) Lord Reid at pages 213 and 214 of the Report stated as follows :"It has sometimes been said that

it is only where a tribunal acts without jurisdiction that its decision 'is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith . It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to art, so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled ,to decide that question wrongly as it is to decide it rightly." (1) [1969]1 All E.R. 208.To the same effect are also the observations of Lord Pearce at page 233. R, v. Fulham, Hammersmith and Kensington Rent Tribunal(1) is yet another decision of a tribunal properly embarking on an enquiry, that is, within its jurisdiction, but at the end of it making an order in excess of its jurisdiction which was held to be anullity though it was an order of the kind which it was entitled to make in a proper case.The principle thus is that exclusion of the jurisdiction of the civil courts is not to be readily inferred. Such exclusion, however, is inferred where the statute gives finality to the order of the tribunal on which it confers jurisdiction and provides for adequate remedy to do what the courts would normally do in such a proceeding before it. Even where a statute gives finality, such a provision does not exclude cases where the provisions of the particular statute have not been complied with or the tribunal has not acted in conformity with the fundamental principles of judicial procedure *The word "jurisdiction" has both a narrow and a wider meaning. In the sense of the former, it means the authority to embark upon an enquiry; in the sense of the latter it is used in several aspects, one of such aspects being that the decision of the tribunal is in non-compliance with the provisions of the Act. Accordingly, a determination by a tribunal of a question other than the one which the statute directs it to decide would be a decision not under the provisions of the Act, and therefore, in excess of its jurisdiction.") &* ***SC in case of : Ayaaubkhan Noorkhan Pathan vs State of Maharashtra 2013 4 SCC 465****/ ("30. The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice.") & SC in case of Nawab Shaqafath Khan & Others vs Nawab Imdad Jah Bahadur 2009 5 SCC 162 (on what are various facets of jurisdictional errors:* "…jurisdictional question may arise not only when a court acts wholly without jurisdiction but also in a case where jurisdictional errors are committed while exercising jurisdiction. There are various facets of `jurisdictional errors'. Taking into consideration any irrelevant fact or non-consideration of a relevant fact would involve jurisdictional issue…")

iii) That no effort is made at high court stage when such large scale reversal of ITAT orders is made so as to evaluate the individual fact position (may be in some cases there could be impeecable online purchase and online sales; no SEBI adverse order against assessee/his broker ; independent inquiry u/s 133/131 etc

if any made in asst by AO before drawing adverse inference u/s 68; short term capital gains in any case if already offered to tax in ITR etc; staggered sales in different years as against sales made in one lot; cash versus banking channel purchase ; particular case wise – scn issued to assessee if any as per binding CBDT instruction ; particular profile of assessee as regular investor etc; particular company/script name not in list of investigation wing report ;etc)

iv) *That most important angle of alleged cash circulation if any as revenue from inception alleged in the modus operandii is no where adequately dealt/dilated in the order;*

v) *That applicability of sec. 68 perse to sale of shares admitted and accepted to be purchased in earlier years is not adequately dealt – refer Guj HC leading decision in case of Ramnivas Ramjivan Kasat 248 Taxman 484/410 itr 540*

vi) *That various decisions of high courts favoring assessee are noted below:*

a) *Delhi high court Reeshu Goel ITA 173/2021 order dated 14.12.2021 by Justice Manmohan*

b) *Gujarat high court in Parasben Kochar Tax Appeal 204/2020 order dated 17.09.2020 by Justice JB pardiwala SC Dismissed revenue SLP in SLP (C) 6782/2021 approving Gujarat high court order*

c) *Gujarat high court decision in case of Muktaben Nishantbhai Patel in Tax Appeal 294 & 295/2021 order dated 12.04.2022 by Justice JB Pardiwala*

d) *Rajasthan high court decision in case of Sanjay CHabra DB ITA 22/2021 Order dated 06.04.2022*

e) *Bombay high court decision in case of Ziauddin Siddique in ITA 2012/2017 order dated 04.03.2022*

f) *Allahabad high court decision in case of Renu Agarwal ITA 44/2022 order dated 06.07.2022*

(For No concealment penalty in such reversal -refer Madras high court detailed order in case of Banlaji Jacob 430 ITR 259 by same judge Justice T.S.Sivagnanam)