Conundrum of "Penny Stock" in Income Tax – Journey so far and way ahead

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1. Prologue

The sojourn of capital gains on sale of listed shares in the Income-tax Act,1961 (Act) has been full of turns and twist as were prior to introduction of Securities Transaction Tax (STT). Lot of issues were there on classification of capital gains vis a vis business income and period of holding etc. In the speech by Hon'ble Finance Minister regarding Direct Tax Cases (Union Budget - 2004-05), especially clause 111, the intention of Government for introducing the securities transaction tax and exempting the long term capital gain or from sale of share and levying 10% tax on short term capital gain or from sale of shares was given. The idea behind introduction of security transaction tax is to end the litigation on the issue, whether the profit earned from delivery based sale of shares is capital gains or business profit. So exempting long term capital gains and charging Securities transaction tax in place of income tax irrespective of profit etc being there or not was with a set legislative intent. Even in present scenario taxation of long term capital gains in section 112A in stated circumstances is prescribed @ 10% from AY 2019-2020. With this taxation landscape for long term capital gains exempted in normal circumstances in sec 10(38) till AY 2018-2019 we need to also factor into consideration opting of direct tax vivad se vishwas scheme 2020 (VSV) *pro tanto*. Since it differs from person to person and case to case and situation to situation as to whether VSV is to be opted in such cases of denial of exemption in section

10(38) etc so it is left for individual decision. Without prejudice to this open option for VSV, various live situations in which subject of denial of exemption in section 10(38) etc can be dilated and cogitated is divided into following categories:

i) Whether deeming fiction of section 68 or other provision dealing with deemed unexplained money/investment etc can be applied in first place to test genuineness of share sale transaction on stock exchange, If Yes, what kind of *explanation* within meaning of section 68 an assessee is supposed to tender to discharge initial onus and what kind of further *enquiry/examination* on assessee's explanation, Assessing officer is supposed to conduct to arrive *at objective and rational satisfaction/opinion* in section 68 etc ?

ii) Whether while approaching the given transaction of listed share sale can AO from inception on basis of so called inputs from investigation wing which is edifice of entire scrutiny , put *reverse burden* on assessee to establish negative fact that share sale is not falling in alleged domain of "penny stock" in light of section 106 of evidence law of 1872?

iii) How far theory of preponderance of probability, human probability and surrounding circumstances, general modus operandii etc be applied in very first place in perfunctory manner to dogmatize the entire case as if assessee's case from inception is falling in alleged "penny stock" tab?

iv) How far principle of natural justice enshrined in section 142(3) of the Act etc is applicable to cases of alleged penny stock where in many of cases even show cause notice is not at all there much less valid show cause notice containing complete back material (like inv.wing report, statements of third party etc) so as to comply to *audi altrem partem? What shall be impact of violation of natural justice in such cases , like can second innings at ITAT stage be provided to revenue to feel up the lacunaes left in assessment by AO and first appeal by CIT-A?*

v) Whether where assessment order is just based on mere investigation wing report and no independent application of mind is there in assessment order on part of AO to analyse and examine independently case set up by assessee on its facts, can that assessment order be said to be validly passed?

vi) Whether hon'ble delhi high court decision in case of Udit Kalra (for Kappac pharma script : ITA 220/2019 order dated March 8 ,2019) and hon'ble supreme court SLP dismissal in Suman Poddar case order dated 22.11.2019 in SLP (C) 26864/2019 (Script: Cressanda Solutions : ITAT order dated 25.07.2019 ; Hon'ble Delhi high court order in ITA 841/2019 dated 17.09.2019) constitute binding precedent for all cases and scripts where allegation of penny stock is there ?

vii) Whether it can be said that on law and facts aforesaid two orders regularly cited by revenue as *carte blanche* be distinguished or said to be inapplicable on a given fact situation ? What can be the possible fact situations/areas where these two orders can be said to be inapplicable?

viii) Whether where section 148 is applied in cases of various assessee relying in turn on Kolkata directorate income tax investigation wing information on alleged penny stock and certain statements of certain persons alleged to be entry provider/operator etc, to deny claimed section 10(38) exemption of assesssee for which scrutiny in section 143(2) could not be done, are these 148 /reopening proceedings valid in eyes of law where it is admitted fact that all such information now used for reopening was available at the time of section 143(2) and now section 148 is merely used to overcome missed out remedy of section 143(2)?

ix) Whether where in some cases AO originally accepted long term capital gains in regular assessment in section 143(3) after due enquiry and examination on section 10(38) issue, now in section 263 PCIT taking shelter of revision power wants to say AO has not done his task lawfully and has simply accepted assessee's claim, where PCIT relies on investigation wing material to say assessment order is erroneous and prejudicial to interest of revenue within section 263?

x) Whether in cases of alleged penny stock where assessee for some reasons has accepted addition made in quantum/merits, can concealment penalty in section 271(1)(c) sustain ipso facto on that basis only?

In succeeding paragraphs, a humble attempt has been made to address above posed *ten* issues in chronological sequence.

2. Applicability of section 68 to proceeds of sale of shares

Apropos aforesaid issues of applicability of section 68 to share sale simplictor and apropos **issues (i) to (vii)**, it may be apt to recall in hindsight views of Hon'ble Delhi high court in case of Jatin Investments (order date- 18.01.2017 & ITA no. 43/2016 approving Delhi ITAT order dated 27.05.2015 & ITA no. 4325/Del/2009) wherein succinctly it was laid down that "We have considered the submissions of both the parties and gone through the material available on the record. In the present case, it is noticed that the assessee purchased the shares in earlier years which were shown as investment in the books of accounts and reflected in the "Asset Side" of the "Balance Sheet", out of those investments (copy which is placed at page no. 23 and 24 of the assessee's paper book), the assessee sold certain investments and accounted for the profit / loss and offered the same for taxation. In the present case, the amount in question was neither a loan or the deposit , it was also not on account of share application money, the said amount was on account of sale of investment therefore the provisions of Section 68 of the Act were not applicable and the AO was not justified in making the addition. In our opinion, the Ld. CIT(A) rightly deleted the addition made by the AO13. On a similar issue the Hon'ble Jurisdictional High Court in the case of CIT vs. Vishal Holding and Capital Pvt. Ltd. vide order dated 9th August, 2010 upheld the order dated 30.7.2009 of the ITAT in ITA no. 1788/Del/2007…" (See also Delhi 'G ' Bench of the Tribunal in ITA NO.2264/Del/2013 in the case of ITO vs M/s Srishti Fincap Pvt. Ltd. Order dated 07.10.2015; Kolkata bench ITAT in case of Adbhut Vinimay Pvt. Ltd. ITA No.2404/Kol/2017 order dated 24.10.2018) Interestingly Delhi bench of ITAT in case of Maurice Udyog Ltd TA No. 6660/DEL/2016 order dated 29.11.2018 at para 20 has strikingly pointed out that:

"20. Before us, the ld. DR could not point out any factual error in the findings of the CIT(A). There is no dispute that the purchase of shares of the aforesaid companies has been accepted by the Assessing Officer. Assuming, yet not accepting that the sale consideration is bogus, then the question which has to be answered by the Assessing Officer is that where did the purchase money go since he has accepted the purchase of shares of two companies?." which is apposite here. (See also Delhi ITAT Reeta Singhal in ITA 4819/DEL/2018 order dated 17/01/2019).

Recently Kolkata bench of ITAT in Majestic Commercial Pvt Ltd case order dated 20.03.2020 in I.T. (SS)A.No. 83/Kol/2018 has lucidly held that

"…We thus find merit in the submissions of the ld. AR that the assessee had one-off transactions with the parties to whom shares were sold in FY 2010-11 and the assessee did not have any transaction thereafter. Since in exchange of the price received, the assessee had parted with asset of the equal value, there was no reason for the assessee to be concerned with the source of funds out of which the payments were made by the purchaser. Accordingly when there was no continuing relationship with the purchasers, then post the conclusion of sale transactions and applying the tests of human probabilities, the non-service of notices could not be viewed adversely by the AO. In the facts of the present case therefore such non-compliance was not decisive to justify the impugned addition in the hands of the assessee u/s 68 of the Act."

Quite appositely requisite approach of AO in matter of section 68 etc can be taken from recent Allahabad high court decision in case of

M/s Kesharwani Sheetalaya Sahsaon Allahabad in INCOME TAX APPEL No. - 17 of 2007 Order dated 24.04.2020 has held as under:

"14. The conditions for the applicability of Section 68 would therefore be as follows—

(i) the existence of books of accounts made by the assessee itself;

(ii) a credit entry in the books of account; and

(iii) the absence of a satisfactory explanation by the assessee about the nature and source of the amount credited.

15.The requirement under the Section is that the assesseeis to submit an expl anation about the nature and source ofthe sum which has been credited. The explanation furnishedby the assessee is to be satisfactory and the creditwort hiness or financial strength of the creditor is to be proved by showing that it had sufficient balance in its accounts toexplain the source and the credits in the books of accountsof the assessee. The assessee would be re quired to explainthe source of credit in the books of accounts but not thesour ce of the source i.e. source of the creditor. ***It is seen that although the requirement under Section 68 is that the Assessing Officer must be satisfied that the explanation offered by the assessee is genuine, but it is also provided that in the absence of a satisfactory explanation, the unexplained cash credit "may" be charged to income tax therefore, the uns atisfactoriness of the explanation wouldnot automatically result in deemin g the amount credited in the books as income of the assessee ..***

<u>27.</u> Section 68 requires the Assessing Officer to satisfy itself of the source of the credit and if during the course ofenquiry undertak , the entries are found to be not genuinethen the sum represented by such credit entry is to be addedas income of the assessee. The satisfaction of the Assessing Officer thus forms the basis for invocation of the provisions of Section 68. The satisfaction in this regard, however, mustnot be illusory or imaginary but is required to be based onthe facts and the evidence and on the basis of a properenquiry of the material before the Assessing Officer. The enquiry envisaged under the provision is to be reasonable and just.

28.Under Section 68, the onus is on the assessee to offerexplanation where a ny sum is found credited in the books ofaccountandwheretheassesseefailstop rovetothesatisfaction of the Assessing Officer, the source and natureof the a mount of cash credits an inference may be drawnthat the credit entries repre sent income taxable in the hands

of theassessee. Thisdoesnothoweverabsolvetheresponsibility of the Assessi ng Officer to prove that the cashcredits constitute the income of the assessee. <u>The onus onthe assessee has to be understood with reference to the factsof e ach case and if the prima facie inference on the basis offacts is that the asses see's explanation is probable, the onusshifts to the Revenue</u>. It has been consi stently held that oncethe assessee has proved the identityof its creditors, the genuineness of the transactions and the creditworthiness ofthe creditors visa vis the transactions which it had with thecreditors, the burden stands dischar ged and the burden thenshifts to the Revenue to show that the amount in qu estionactually belong to, or was owned by the assessee himself."

Further on approach of AO u/s 69 etc, Hon'ble P&H high court full bench verdict in case of Jawahar Lal Oswal 382 ITR 453 which succinctly lays down the rules of the game in matter concerning application of deemed provisions. "The Hon'ble Punjab & Haryana High Court in a recent judgement in the case of CIT vs Jawaharlal Oswal and Others (I.T.A. No. 49 of 1999, Judgment delivered on 29.01.2016) dismissed the Department's appeal by holding that suspicion and doubt may be the starting point of an investigation but cannot, at the final stage of assessment, take the place of relevant facts, particularly when deeming provision is sought to be invoked. The Hon'ble Court has observed ,*"...The principle that governs a deeming provision is that the initial onus lies upon the revenue to raise a prima facie doubt on the basis of credible material. The onus, thereafter, shifts to the assessee to prove that the gift is genuine and if the assessee is unable to proffer a credible explanation, the Assessing Officer may legitimately raise an inference against the assessee. If, however, the assessee furnishes all relevant facts within his knowledge and offers a credible explanation, the onus reverts to the revenue to prove that these facts are not correct. The revenue cannot draw an inference based upon suspicion or doubt or perceptions of culpability or on the quantum of the amount, involved particularly when the question is one of taxation, under a deeming provision. Thus, neither suspicion/doubt, nor the quantum shall determine the exercise of jurisdiction by the Assessing Officer….**Further a deeming provision requires the Assessing Officer to collect relevant facts and then confront the assessee, who is thereafter, required to explain incriminating facts and in case he fails to proffer a credible information, the Assessing Officer may validly raise an inference of deemed income under section 69-A.** As already held, if the assessee proffers an

explanation and discloses all relevant facts within his knowledge, the onus reverts to the revenue to adduce evidence and only thereafter, may an inference be raised, based upon relevant facts, by invoking the deeming provisions of Section 69-A of the Act. It is true that inferences and presumptions are integral to an adjudicatory process but cannot by themselves be raised to the status of substantial evidence or evidence sufficient to raise an inference. ***A deeming provision, thus, enables the revenue to raise an inference against an assessee on the basis of tangible material and not on mere suspicion, conjectures or perceptions."***

Further reference may be made to T & AP High Court decision in case of Pendurthi Chandrashekhar (order dated 23/02/2018)

> ***"…. Despite the availability of overwhelming and unimpeachable documentary evidence, the AO was not prepared to accept the same, as his approach appeared to be loaded with prejudice, suspicion and pre-determined mind and preconceived notions. The whole approach of the AO appears to be some how reject the every explanation of the assessee and the evidence produced in support of such explanation, by assigning reasons which are wholly imaginary and perverse. While the authorities are entitled to examine each transaction minutely, they cannot approach every transaction with undue suspicion by wearing coloured glasses. The approach of the AO reminds us of somebody describing a lamb as a dog and trying to make everyone to believe it to be so…." .***

Even Madras high Court in a recent case of Sri Balamurugan Textile Processing (Tax Case Appeal No. 344 of 2009 order dated 15.07.2019) in context of section 68 of the Act has highlighted that

> *"15. In our considered view, recording of satisfaction by the Assessing Officer to invoke Section 68 of the Act is primordial and the satisfaction to be recorded should be with the reasons to state as to why the assessee's explanation is not found to be satisfactory. In the absence of any such finding, invoking provision of Section 68 of the Act has to be held to be perverse".*

With above being the required approach on part of assessee and AO in matters falling in domain of deeming provisions of section 68,69,69A etc it is clear that yes assesse is supposed to establish that subject LTCG (Long term capital gains) is exempt in section 10(38) of the Act (being burden to prove *exemption* is on assessee) on basis of requisite stipulated conditions which say on basis of valid contract note from recognized stock broker , demat a/c , share sale/purchase documents and other impeccable documentary evidence etc is once lawfully discharged , then to put in ***reverse burden*** manner right from proceedings inception **infallible onus** on assessee to establish **negative fact** (refer sc 131 ITR 597 K.P.Varghese case) that stated online share sale transaction is not alleged penny stock is a **legal impossibility** and is contrary to section 106 of Indian evidence law which would require revenue to **first establish the fact/allegation that in given case subject share sale is bogus/sham.** In this connection revenue oft quoted reliance on **artificial/humongous price rise** and **charge of price rigging** and **subject shares of paper/shell companies** , charge of connivance with some

other persons to abuse stock market system, SEBI orders etc, which all takes to **test of preponderance of probability and surrounding circumstances** (refer SC in Sumati Dayal 214 ITR 801),a question which emerges here is whether amount received by assessee on online share sale with STT Payment etc can be called as assessee's unexplained income in deeming provisions of section 68,69 etc on charge that assessee's transaction does not meet stated test of genuineness of transaction as put on ground of preponderance of probability and surrounding circumstances ? To test this further, we may allude to illuminating discussion as contained in recent 5 Judge Constitution bench decision in Dilip Kumar case 9 SCC 1 (2018) where relevant extract is quoted below which is apposite here:

> "12.We may, here itself notice that the distinction in interpreting a taxing provision (charging provision) and in the matter of interpretation of exemption notification is too obvious to require any elaboration. Nonetheless, in a nutshell, we may mention that, as observed in ***Surendra Cotton Oil Mills Case*** (supra), in the matter of interpretation of charging section of a taxation statute, strict rule of interpretation is mandatory and if there are two views possible in the matter of interpretation of a charging section, the one favourable to the assessee need to be applied. There is, however, confusion in the matter of interpretation of exemption notification published under taxation statutes and inthis area also, the decisions **are galore1** In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. Thepenal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocent might become victims of discretionary decision making. Insofar as taxation statutes are concerned, Article 265 of the Constitution3

prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because State cannot at their whims and fancies burden the citizens without authority of law. In other words, when competent Legislature mandates taxing certain persons / certain objects in certain circumstances, it cannot be expanded / interpreted to include those, which were not intended by the Legislature.

After thoroughly examining the various precedents some of which were cited before us and after giving our anxious consideration, we would be more than justified to conclude and also compelled to hold that every taxing statue including, charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity in a charging provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State. There is abundant jurisprudential justification for this. In the governance of rule of law by a written Constitution, there is no implied power of taxation. The tax power must be specifically conferred and it should be strictly in accordance with the power so endowed by the Constitution itself. It is for this reason that the Courts insist upon strict compliance before a State demands and extracts money from its citizens towards various taxes. Any ambiguity in a taxation provision, therefore, is interpreted in favour of the subject/assessee. The statement of law that ambiguity in a taxation statute should be interpreted strictly and in the event of ambiguity the benefit should go to the subject/assessee may warrant visualizing different situations. For instance, if there is ambiguity in the subject of tax, that is

to say, who are the persons or things liable to pay tax, and whether the revenue has established conditions before raising and justifying a demand. Similar is the case in roping all persons within the tax net, in which event the State is to prove the liability of the persons, as may arise within the strict language of the law. There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation. Thus, we may emphatically reiterate that if in the event of ambiguity in a taxation liability statute, the benefit should go to the subject/assessee. But, in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the revenue, the aforesaid conclusions are expounded only as a prelude to better understand jurisprudential basis for our conclusion. We may now consider the decisions which support our view."

If aforesaid observations are tested against facts of case in hand in authors humble view same should go to benefit the tax payer as there is not only ambiguity in law in disallowing stated LTCG but also principle of strictest interpretation would support case set up by assessee as held in aforesaid order in following instructive words ***"In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocent might become victims of discretionary***

decision making. Insofar as taxation statutes are concerned, Article 265 of the Constitution3 prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because State cannot at their whims and fancies burden the citizens without authority of law. In other words, when competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the Legislature." , these observations in our view are clincher to present issue. Like wise one may refer to:

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 137 OF 2009

ASSISTANT COMMISSIONER,COMMERCIAL TAXES & ORS. ...APPELLANT(S)

VERSUS

LIS (REGISTERED) .. .RESPONDENT(S)

06-12-2017

14. ***Time and again, it has been emphasized that a taxing statute cannot be made applicable to a citizen by unnatural or unreasonable extensions thereof. A recent view of this Court in this regard is available in 'Shabina Abraham vs. Collector of Central Excise and Customs'1 wherein a judgment of the Bombay High Court which is of considerable vintage i.e. 'Commissioner of Income Tax, Bombay v. Ellis C.Reid2, has been referred to and, in fact, relied upon to observe that reasons of morality and fairness can have no application to bring a citizen***

who is not within the four corners of the taxing statute with its fold so as to make him liable to payment of tax.

Then reference is further made to Mumbai ITAT Special bench decision in (on test of preponderance of probability)

M/s.GTC Industries 164

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> ***Held : 46. In situations like this case, one may fall into realm of „preponderance of probability" where there are many probable factors, some in favour of the assessee and some may go against the assessee. But the probable factors have to be weighed on material facts so collected. Here in this case the material facts strongly indicate a probability that the wholesale buyers had collected the premium money for spending it on advertisement and other expenses and it was their liability as per their mutual understanding with the aseessee. Another very strong probable factor is that the entire scheme of „twin branding" and collection of premium was so designed that assessee company need not incur advertisement expenses and the responsibility for sales promotion and advertisement lies wholly upon wholesale buyers who will borne out these expenses from alleged collection of premium. The probable factors could have gone against the assessee only if there would have been some evidence found from several searches either conducted by DRI or by the department that Assessee Company was beneficiary of any such accounts. At least something would have been unearthed from such global level investigation by two Central Government authorities. In case of certain***

donations given to a Church, originating through these benami bank accounts on the behest of one of the employees of the assessee company, does not implicate that GTC as a corporate entity was having the control of these bank accounts completely. Without going into the authenticity and veracity of the statements of the witnesses Smt. Nirmala Sundaram, we are of the opinion that this one incident of donation through bank accounts at the direction of one of the employee of the Company does not implicate that the entire premium collected all throughout the country and deposited in Benami bank accounts actually belongs to the assessee company or the assessee company had direct control on these bank accounts. Ultimately, the entire case of the revenue hinges upon the presumption that assessee is bound to have some large share in so called secret money in the form of premium and its circulation. However, this presumption or suspicion how strong it may appear to be true, but needs to be corroborated by some evidence to establish a link that GTC actually had some kind of a share in such secret money. It is quite a trite law that suspicion how so ever strong may be but cannot be the basis of addition except for some material evidence on record. The theory of „preponderance of probability" is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material

especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee.

If all above is put in one basket and then revenue's stated principal allegation of penny stock charge is tested (which primarily hinges on abnormal unexplained price rise and/or penny stock-paper/shell company involved etc), it is apparent that same does not get imprimatur in aforesaid jurisprudence as at one side there is no evidence in revenue possession here which could remotely display cash circulation at end of assessee and at other side assessee side has fulfilled ingredients of section 10(38) of the Act by impeccable documentary evidence. Principle of interpretation of **section 10(38)** (dealing with LTCG exemption in Chapter III of the Act dealing with income not forming part of total income) in wake of **deeming fictions of section 68,69 etc so** as to overrule the exemption claimed by assessee by applying those deeming fictions in authors humble opinion on basis of above discussion (**specially 5 judge constitution bench ruling in Dilip Kumar case and LIS (registered) (supra))** in given state of affairs/circumstances where there is **no cash circulation evidence** and entire case of revenue is set up on dogmatic grounds , and assessee has duly complied all pre-requisites for section 10(38) exemption , merely on **suspect/doubtful ground of unexplained humongous price rise and shell company character etc** might not be adequate to displace assessee's valid exemption in section 10(38) of the Act so as to infer **imaginary/artificial** unexplained ***deemed* income** in hands of assessee in section 68.69 etc (who is mere share seller) in authors humble opinion. Author humbly relies on para 27 of recent Allahabad high court decision in s Kesharwani Sheetalaya case (supra) on formation of valid and objective opinion

in deeming fiction of section 68, 69 etc on part of concerned AO which must be on basis of reasonable and just enquiry which cant be left overlooked and said opinion/satisfaction on part of concerned AO in deeming fiction of section 68,69 etc must not be illusory and imaginary. Further author relies on:

The Hon'ble Supreme Court in the case of Omar Salay Mohamed Sait v. CIT [1959] 37 ITR 151 (SC) had held that no addition can be made on the basis of surmises, suspicion and conjectures. In the case of CIT Daulat Ram Rawatmull [1973] 87 ITR 349 (SC) (SC) the Hon'ble Supreme Court held that, the onus to prove that the apparent is not real is on the party who claims it to be so. The burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidences, which would directly prove the fact of bogusness or establish circumstance unerringly and reasonably raising interference to that effect. The Hon'ble Supreme Court in the case of Umacharan Shaw & Bros. v. CIT (1959) [1959] 37 ITR 271 (SC) held that suspicion however strong, cannot take the place of evidence. In this connection one may refer to the general view on the topic of conveyance of immovable properties. The rates/sale prices are at variance with the circle rates fixed by the Registration authorities of the Government in most cases and the general impression is that cash would have changed hands. The courts have laid down that judicial notice of such notorious facts cannot be taken based on generalisation. ***Courts of law are bound to go by evidence****.*

Be that as it may, analyzing the subject from different angle, few important grounds which have emerged in recent ITAT decisions to delete addition made on a/c of denial of LTCG exemption in section 10(38) are highlighted next:

One ground which has weighed with various benches of ITAT to hold in favor of assessee is assessee is a **habitual and regular (e.g professional) investor** holding handsome investment portfolio and regularly sell/purchase shares (refer Delhi bench of ITAT recent decision in case of **Anoop Jain** ITA 6703/Del/2013 order dated 10.01.2020 (Script name Lifeline Pharma); Delhi bench of ITAT in **Deepak Nagar** 73 ITR (Trib) 74; Delhi bench of ITAT in **Riaz Munshi** case ITA 8314/Del/2018 order dated 11.03.2020 (Script name Esteem Bio Organic Food) Delhi ITAT **Reeshu Goel** (ITA 169/Del/2019 order dated 07.10.2019 Script Name :CCL International Ltd); Mumbai ITAT **Vijay rattan Mittal** (ITA 3429/Mum/2019 order dated 01.10.2019 Script involved pine Automation Limited/ 'PAL') in all these cases **habitual and regularity of investment** played a significant role to hold in assessee's favor. Further another pivotal factor which has weighed with ITAT benches to delete disallowance of section 10(38) exemption is that there is a **final SEBI order in assessee's favor** where charges of wrong doing in interim order are dropped/terminated (like in Mumbai ITAT Vijay rattan Mittal (ITA 3429/Mum/2019 order dated 01.10.2019 Script involved pine Automation Limited/ 'PAL'). Further in all these cases another common feature which is notable is on facts of the script ITAT has held the **concerned script not to be penny stock** like in case of Riaz Munshi and Reeshu Goel (supra) etc) where financial results of the company script involved has been the basis to decide whether that company is paper/shell company or not. Even Chennai benches where otherwise all alleged penny stock matters are remanded back at Chennai bench exception is made in two cases of Shri Nirav Kumar Mahendra Kumar Sapani ./ITA No.2032/Mds/2017 order dated 08.02.2018 (*held :…When the assessees established the fact that the shares were purchased on the market rate*

through recognised broker, it cannot be said that the price of the shares were artificially hiked for earning higher income) & Vijay Kumar Baid (HUF) /I.T.A. No.2300/CHNY/2018 (order dated 24-01-2019) (followed Nirav Kumar Mahendra Kumar Sapani case supra). So if assessee's case can satisfy any of these ***four*** important/golden parameters then very good arguable case lies in assessee's favor in authors humble opinion. Like wise Delhi ITAT in cases of Karuna Garg (ITA 1069/2019 order dated 06.08.2019 & Swati Luthra (ITA 6480/Del/2017 order dated 28.06.2019) has given special emphasis on the point that if in some script some adverse interim order was passed by SEBI qua certain persons , **whether that covers the period of assessee's subject purchase/sale of shares? and whether assessee's subject transaction are also subject matter of said adverse interim order ? and if answer is no** then it has to go in assessee's favor **(refer para 16 of swati luthra case order and para 24 & 26 of Karuna Garg order).** In all these decisions it may be worth noting here that two orders which are cited by revenue in routine manner (of Udit Kalra & Suman Poddar (supra)) are discussed and distinguished on above stated aspects. This is besides the fact that on law point also, atleast in 3/4 income tax related decisions Hon'ble Apex court has laid down that mere SLP dismissal does not create binding force in article 141 of Indian constitution reference may be made to **243 ITR 383, 394 ITR 300, 259 ITR 1, 245 ITR 360 and 104 taxmann.com 25** . This is for the point that mere SLP dismissal in Suman Poddar case does not create binding effect in article 141 for other cases. Like wise in authors humble opinion as explained at length in Hon'ble Delhi high court leading decision in **Divine leasing case reported at 299 ITR 268** mere dismissal of appeal in udit kalra case & suman poddar (supra) by hon'ble high court in section 260A, ipso facto, does not create binding precedent for other

cases. That **such dismissals should be *in personam and not in rem*. *(Refer karnataka high court decision in case of GMR Energy case in ITA 358/2018 order dated 08/01/2019 para 7).***

Even cases where loss is incurred in so called penny stock and same is also disallowed on allegation that same is sham and bogus again with respect it does not give respect and regard to audited trading/book results (which support genuineness of loss in share sale) and here it is unlawfully interfere in assessee's discretion to carry on business operations as to the decision about timing of sale of shares which have resulted in loss (refer sc 65 ITR 381 Walchand case that assessee to decide trading operations) **apart from no cash circulation evidence which in authors opinion constitute the quintessence of the entire matter.** In aforesaid context Hon'ble Supreme court in Mangalore Ganesh Beedi Works 378 ITR 640 case has held that: *"…. In D. S. Bist & Sons v. CIT[11] it was held that the Act does not clothe the taxing authorities with any power or jurisdiction to re-write the terms of the agreement arrived at between the parties with each other at arm's length and with no allegation of any collusion between them. 'The commercial expediency of the contract is to be adjudged by the contracting parties as to its terms.'*: (Also see Hon'ble Apex Court in the case of CIT vs Dhanrajgirji Raja Narasingirji reported in 91 ITR 544 (SC)).

We are listing assessee favoring selected /key high court decisions on issue of LTCG – denial of expemption:

a) The Hon'ble Punjab and Haryana High Court in the case of PREM PAL GANDHI [ITA- 95-2017 (O&M)] dated 18.01.2018 (401 ITR 253)

b) Hon'ble Calcutta High Court in the case of Principal CIT vs Rungta Properties in ITA No.105 of 2016 dated 08 May, 2017

c) Hon'ble Rajasthan high court in case of Pooja Aggarwal DBIT Appeal No. 385/2011 dated 11.09.2017

(This is to strengthen worst case pleading that atleast two views are possible on subject issue and so assessee favoring view to be taken refer SC in DIlip kumar case supra).

Apropos principle of natural justice violation it may be apposite to refer to next mentioned jurisprudence to highlight fatal impact of natural justice violation *(apart from statutory prescription of section 142(3) of the Act where from it can be culled out that AO in scrutiny assessments u/s 143(3) etc are mandatorily required to confront back material to assessee before utilizing it against the assessee unless 144 assessment there as other wise that material needs to be expunged and excluded which has not been so confronted to assessee and then tenability of addition in assessment order dehors that back material to be seen) :*

- Odeon Builders Pvt. Ltd. …Hon'ble Supreme court of India recent verdict reported at 418 ITR 315
- Hon'ble Allahabad high court order reported at 96 ITR 97 in turn relying on Constitution bench supreme court decision reported at 26 ITR 1:
- Hon'ble Supreme Court in case of Anadaman Timber industries vs. Commissioner of Central Excise (2015) 281 CTR 241 (SC);
- Hon'ble Supreme Court in case of Kishinchand Chellaram v. CIT (1980) 125 ITR 713 (SC);
- The Hon'ble Bombay High Court in the case of H.R. Mehta vs. ACIT, 387 ITR 561 (Bombay);
- Hon'ble Supreme court in NDTV case of 3rd April 2020

In all above citations it may be found that violation of principle of natural justice is held fatal to addition and assessment made *as after expunging stated*

unconfronted material being only referred in assessment order, nothing was there in the assessment order to support addition made.

Further reference may be made to:

APPELLATE TRIBUNAL, FOREIGN EXCHANGE MANAGEMENT ACT AT NEW DELHI

Date of Decision:-13.04.2018

(1) FPA-FE-01/DLI/2018

Shri Ashwani Kumar Mehra … Appellant

Versus

Shri A.H. Khan Directorate of Enforcement, Delhi … Respondent

CORAM

JUSTICE MANMOHAN SINGH: CHAIRMAN

SHRI G.C. MISHRA: MEMBER

JUDGEMENT

FPA-FE-01/DLI/2018, FPA-FE-03/DLI/2018, FPA-FE-04/DLI/2018

& FPA-FE-05/DLI/2018

"54. "The Hon"ble Supreme Court of India in the case of Ayaaubkhan Noorkhan Pathan v. State of Maharashtra & others reported in (2013) 4 SCC 465, has inter alia held that 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." The Constitution Bench of the Hon"ble Supreme Court of India in State of M.P. v. Sadashiuva Vishampayan reported in AIR 1961 SC 1623, has also confirmed the

principle that, the rules of natural justice require that a party should be given the opportunity of cross-examining a witness.

i) In ***Prem Singh Vs. Special Director, Enforcement Directorate, CRL A. 276 of 2008, Delhi High Court, decided on 24.04.2014****, whereby it was held that the denial of right to cross examine the witnesses would cause prejudice to the accused as statements of witnesses are not substantive evidence in themselves. It was held in the said judgement that delay is not a ground for disallowing the opportunity to cross examine witnesses. The court laid down that:*

—18. The impugned order of the AO fails to discuss this aspect although it has noticed the submission of learned counsel for the appellants that the said statements had been retracted as they had been given under threat and coercion. In order to determine whether the claim of the appellants that they were subjected to torture, threat and coercion was a credible one, the SD sought to have permitted the appellants to cross-examine the officers of the ED who recorded the statements. As regards Prem Singh, his statement is stated to have been recorded by A.K. Narang, Assistant Director. The statement of Rajendra Singh was recorded by Devender Malhotra. Neither of these officers was tendered for cross-examination. In the considered view of the Court, in the context of the specific allegation that the retracted confessional statements were obtained under torture and coercion, that aspect ought to have been examined by the SD. ***In the circumstances, the reasons given by the SD in the impugned AO for disallowing the request of the appellants for cross examination of the ED officials only because it would tantamount to "further delay in finalising the proceeding" were not tenable or justified. The denial of cross examination of the ED officials by the appellants indeed has caused them severe prejudice since the ED was***

relying on the said statements as if they were by themselves substantive evidence."

(iii) The Hon'ble High Court of Delhi in ***Devashis Bhattacharya Vs. Union of India 159 (2009) DLT 780****, while deciding a case under Foreign Exchange Regulation Act, 1973 had observed that:*

—18. It is well settled that where an action under the statute entails civil consequences, then even if an opportunity of being heard may not be explicitly set out in the applicable legal provisions, the adherence to the principles of natural justice has to be read into such a statute.

19. There can be no dispute that the action permitted under section 61 of the FERA, 1973 certainly results in drastic penal consequences…||

(iv) The Hon'ble Supreme Court of India in ***Ramesh Ahluwalia Vs. State of Punjab & Ors. 2012 (10) SCALE 46*** *had observed that:*

—18. This is in conformity with the principle that justice must not only be done. Actual and demonstrable fair play must be the hallmark of the proceedings and the decisions of the administrative and quasi judicial courts. In particular, when the decisions taken by these bodies are likely to cause adverse civil consequences to the persons against whom such decision are taken.||

IV-A The Hon'ble Supreme Court of India in ***Ashiwin S. Mehta and Anr. Vs. Union of India (UOI) and Ors. (2012) 1 SCC 83*** *had observed that:*

—27. It is thus, trite that requirement of giving reasonable opportunity of being heard before an order is made by an administrative, quasi judicial or judicial authority, particularly when such an order entails adverse civil consequences, which would include infraction of property, personal rights and material

deprivation for the party affected, cannot be sacrificed at the alter of administrative exigency or celerity.||

IV-B The Constitutional Bench of the Hon'ble Supreme Court of India in ***Khem Chand Vs. Union of India AIR 1958 SC 300*** *has defined the meaning of the term —reasonable opportunity|| to include an opportunity to defined by cross-examining the witnesses produced against the accused. The Hon'ble court held that:*

—To summarize: the reasonable opportunity envisaged by the provision under consideration includes-

(a) An opportunity to deny his guilt and establish his innocence,which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(b) An opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defense; and finally

(c) An opportunity to make his representation as to why the proposed punishment should not be inflicted on him.||

iv). The Hon"ble Supreme Court of India in **Ayubkhan Noorkhan Pathan Vs. The State of Maharashtra & Ors. Decided on 08.11.2012, Civil Appeal No. 7728 of 2012**, after relying upon various authoritative judgments, has observed that cross-examination is an integral part and parcel of the Principles of Natural Justice. It held that *Cross-examination is one part of the principles of natural justice.||*

(v) A Constitution Bench of the Hon"ble Supreme Court in **State of M.P. v. Chintaman Sadashiva Vaishampayan, AIR 1961 SC 1623,** has held that the Principle of Natural Justice require that a party be given the opportunity to

adduce all relevant evidence upon which it relies, that evidence of the opposite party be taken in his presence, and that he be given the opportunity to cross examine the witnesses examined by that party. Not providing the said opportunity to cross-examine is violative of the Principles of Natural Justice.

(vi). In **Lakshman Exports Ltd. v. Collector of Central Excise, (2005) 10 SCC 634,** the Apex Court, while dealing with a case under the Central Excise Act, 1944, considered whether to grant permission for cross-examination of a witness. In that case, the assessee had specifically asked to be allowed to cross examine the representatives of the concerned firm, in order to establish that the goods in question had been accounted for in the firm‟s books of accounts and excise duty had been paid thereof. The Court held that such a request could not be turned down, as the denial of the right to cross-examine, would amount to a denial of the right to be heard i.e. audi alteram partem.

(vii). In **K.L. Tripathi v. State Bank of India & Ors., AIR 1984 SC 273,** the Hon‟ble Supreme Court has held that in order to sustain a complaint of violation of the Principles of Natural Justice on the ground of denial of opportunity to cross-examine, it must be established that some prejudice has been caused to the party by the procedure followed. A party which does not want to controvert the veracity of the evidence on record or does not want to controvert the testimony gathered behind its back cannot expect to succeed in any subsequent grievance raised by him on the ground that no opportunity of cross-examination was provided to him especially when the same was not requested and especially when there was no dispute regarding the veracity of the statement.

(viii). In **Rajiv Arora v. Union of India & Ors.**, AIR 2009 SC 1100, the Apex Court held:

—*Effective cross-examination could have been* done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Indian Evidence Act as also the principles of natural justice demand that the maker of the report should be examined save and except in cases where the facts are admitted or the witnesses are not available for cross-examination or similar situation. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review."

ix). The Hon"ble Supreme Court of India in **New India Assurance Company Ltd., v. Nusli Neville Wadia & Anr., AIR 2008 SC 876,** while considering a case under the Public Premises (Eviction of Unauthorised Occu pants) Act, 1971, held that though the statute may not provide for cross-examination, the same being a part of Principles of Natural Justice should be held to be an indefeasible right. It was held as follows:-

—*If some facts are to be proved by the landlord, indisputably the occupant should get an opportunity to cross-examine. The witness who intends to prove the said fact has the* ***right to cross-examine*** *the witness.* ***This may not be provided by under the statute, but it being a part of the principle of natural justice should be held to be indefeasible right"***

x). The Hon"ble Supreme Court in **Needle Industries (India) Ltd. & Ors. v. N.I.N.I.H. Ltd. & Ors., AIR 1981 SC 1298,** considered a case under the Indian Companies Act, and observed that:

—It is generally unsatisfactory to record a finding involving grave consequences with respect to a person, on the basis of affidavits and documents alone, without asking that person to submit to cross-examination||

(xi). Hon‟ble High Court in **Mehar Singh Vs. The Appellate Board Foreign Exchange 1986 (10) DRJ 19,** while dealing with a case under the Foreign Exchange Regulation Act, 1973, decided the appeal in favour of the Appellants on the short ground that the applications made to the Director of Enforcement and before the Appellate Board during the pendency of the appeal to summon four witnesses for cross-examination, were not dealt with by the authorities below. It was held:

—5. Non-summoning of the said witnesses for purposes of cross-examination has resulted in miscarriage of justice.||

55. In the nature of the seriousness of present case, the right to cross examination would have been given in view of gravity of the matter."

Even Hon'ble Apex court (Three judge bench) in case of Sona builder vs UOI in an income tax matter on violation of principle of natural justice and its impact has held as under **(civil appeal no 3685 of 1999 order dated 24/07/2001)):**

> *"4. Further, the notice alleged that the apparent consideration of the transactionbetween the appellant and the transferor was low based on the sale instance mentioned therein. To be able adequately to respond to that allegation, it was necessary for the appellant to ascertain what the merits and demerits were of thatproperty which had been auctioned, and to know what were the terms and conditions of the auction. No copy of any document relating to the sale instance was furnished by the Appropriate Authority to the appellant along with the notice, or at any time whatsoever.*
>
> ***5. There is no doubt in our minds that on both counts there has been a gross breach of the principles of natural justice because adequate***

opportunity to meet the case made out in the notice was not given to the appellant.

6. Having regard to the statutory limit within which the Appropriate Authority has to act and its failure to act in conformity with the principles of natural justice, we do not think we can remand the matter to the Appropriate Authority. We must set its order aside.

7. The appeal is accordingly allowed. The judgment and order under appeal is setaside. The order of the Appropriate Authority dated 31-5-1993 is quashed."

In authors humble opinion vide para 5 & 6 above it perspicaciously addresses the aspect that in such cases where there is flagrant violation and strangulation of natural justice principles (like no show cause notice issued or in two line show cause nothing confronted to assessee or where there is no back material being confronted to assessee with show cause notice etc) entire assessment is to be held as invalid and no set aside is to be made to give second innings for improvisation of fatal defects left at assessment stage. **Even Hon'ble Apex court in State Of Kerala vs K.T. Shaduli Yusuff Etc on 15 March, 1977 Equivalent citations: 1977 AIR 1627, 1977 SCR (3) 233 has succinctly held as under:**

"…The first part of the proviso which requires that before taking action under sub-section (3) of section 17, the assessee should be given a reasonable opportunity of being heard would obviously apply not only at the second stage but also at the first stage of the inquiry, because the best judgment assessment, which is the action under section 17, sub-section (3), follows upon the inquiry and the "reasonable opportunity of being heard" must extend to the whole of the inquiry, including both stages. The requirement of the first part of the proviso that the asses- see should be

given a "reasonable opportunity of being heard" before making best judgment assessment merely em- bodies the audi alterem partem rule and what is the content of this opportunity would depend, as pointed out above, to a great extent on the facts and circumstances of each case. *The question debated before us was whether this opportunity of being heard granted under the first part of the proviso included an opportunity to cross-examine Haji Usmankutty and other wholesale dealers on the basis of whose books of accounts the Sales Tax Officer disbelieved the account of the assessee and came to the finding that the return submit- ted by the assessee were incorrect and incomplete. But it is not necessary for the purpose of the present appeals to decide this question since we find that in any event the assessee was entitled to this opportunity under the 'second part of the proviso.*

The second part of the proviso lays down that where a return has been submitted, the assessee should be given a reasona- ble opportunity to prove the correctness or completeness of such return. This requirement obviously applies at the first stage of the enquiry before the Sales Tax Officer comes to the conclusion that the return submitted by the assessee is incorrect or incomplete so as to warrant the making of a best judgment assessment. The question is what is the content of this provision which imposes an obligation on the Sales Tax Officer to give and confers a corresponding right on the assessee to be afforded, a reasonable opportunity "to prove the correctness or completeness of such return". Now, obviously "to prove" means to establish the correctness ,or completeness of the return by any mode permissible under law. The usual mode recognised by law for proving a fact is

by production of evidence and evidence includes oral evi- dence of witnesses. The opportunity to prove the correct- ness or completeness of the return would, therefore, neces- sarily carry with it the right to examine witnesses and that would include equally the right to Cross-examine witnesses examined by the Sales Tax Officer. Here, in the present case, the return filed by the assessee appeared to the Sales Tax Officer to be incorrect or incomplete because certain sales appearing in the books of Hazi Usmankutty and other wholesale dealers were not shown in the book's of account of the assessee. The Sales Tax Officer relied on the evi- dence furnished by the entries in the books of account of Hazi Usmankutty and other wholesale dealers for the purpose of coming to the conclusion that the return filed by the assessee was incorrect or incomplete. Placed in these circumstances, the assessee could prove the correctness and completeness of his return only by showing that the entries in the books of account of Hazi Usmankutty and other whole- sale dealers were false, bogus or manipulated and that the return submitted by the assessee should not be disbelieved on the basis of such entries, and this obviously, the assessee could not do, unless he was given an opportunity of cross-examining Hazi Usmankutty and other wholesale dealers with reference to their accounts. Since the evidentiary material procured from or produced by Hazi Usmankutty and other wholesale dealers was sought to be relied upon for showing that the return submitted by the assessee was incor- rect and incomplete, the assessee was entitled to have Hazi Usmankutty and other wholesale dealers summoned as witnesses for cross-examination. It can hardly be disputed that cross-examination is one of the most efficacious methods of establishing truth and exposing

falsehood. Here, it was not disputed on behalf of the Revenue that the assessee in both cases applied to the Sales Tax Officer for summoning Hazi Usmankutty and other wholesale dealers for cross-examina- tion, but his application was turned down by the Sales Tax Officer. This act of the Sales Tax Officer in refusing to summon Hazi Usmankutty and other wholesale dealers for cross-examination by the assessee clearly constituted in- fraction of the right conferred on the assessee by the second part of the proviso and that vitiated the orders of assessment made against the assessee.

We do not wish to refer to the decisions of various High Courts on this point Since our learned brother has dis- cussed them in his judgment-. We are of the opinion that the view taken by the Orissa High Court in Muralimohan Prabhudayal v. State of Orissa(1) and the Kerala High Court in M. Appukutty v. State of Kerala(2) and the present cases represents the correct law on the subject. We accordingly dismiss the appeals with no order as to costs. (1) 26 S.T,C, 22. (2) 14 S.T.C, 489."

So on a/c of violation of principle of natural justice also, impugned assessments on subject issue may not pass legal muster in author humble opinion.

On last issue in this set of issues whether where an assessment order just discusses investigation wing report and recommendation only and no independent view of concerned AO is there in the assessment order, one may gainfully refer to Madras bench old decision in Kirtilal Kalidas case reported at 67 ITD 573 where at para 25 & 26 & 27 it is lucidly held that:

"..25. Not only the impugned assessments are barred by limitation but are also lawfully not sustainable for other reasons also, as contended by Shri

Santhana Krishnan. It was the contention of Shri Santhana Krishna that the AO did not act independently in making the enquiries and in framing the impugned assessments but was greatly influenced and carried away by the directions/instructions issued by the Dy. Director of Inspection (Inv.) as contained in his appraisal report dt. 14th November, 1995 and therefore the impugned assessments are vitiated in law being illegal and liable to be struck down. We find considerable force and merit in such an argument advanced by Sri Santhana Krishnan.

26. The enquiries by the AO for making the assessment of income are quasi-judicial proceedings and the act of framing the assessment is quasi-judicial act. It is a trite law that a judicial or quasi-judicial authority should act independently and that there shall not be any interference, nor any advice, opinion, instructions, directions can be given to any IT authority in such proceedings, etc., by any stranger/outsider even if such stranger/outsider is higher or highest authority in the hierarchy of the Department. If an order is passed or a decision is rendered by an IT authority in such quasi-judicial proceeding at the behest of or upon the directions or instructions, of any superior officer or authority then such an order/decision is illegal and a nullity in law because it shall be deemed in law that such an order/decision is not of that quasi-judicial authority but of some other authority who directed or issued orders/instructions to the lower authority to act and thereafter pass an order/decision in a particular manner. Though there are several decided case law on the subject we would only refer to and discuss few decisions in this regard as below:

(i) The Hon'ble Supreme Court in the case of M. Chockalingam & M. Meyyappan vs. CIT (1963) 48 ITR 34 (SC) at p. 40 have laid down as under:

> *"The authorities acting under the Indian IT Act have to act judicially and one of the requirements of judicial action is to give a fair hearing to a person before deciding against him."*

(ii) As far back as in August, 1967, the Hon'ble Andhra Pradesh High Court in the well known case of Raja V. V. V. R. K. Yachendra Kumara Rajah of Venkatagiri vs. ITO (1968) 70 ITR 772 (AP) have laid down as under :

"It is now well settled that the assessment proceedings before the ITO are quasi-judicial in nature and while making assessments the ITO has solely to be guided by the provisions of law. He cannot avail of any instruction or direction given by his higher authorities including the Central Board of Direct Taxes for making a particular assessment. While passing assessment orders he is only bound by what has been decided by the appellte authorities mentioned in the IT Act and the opinion expressed by the High Court or the Supreme Court. It is also now well settled that, as far as the income-tax is concerned, the principle of res judicata is not applicable and the ITO is not bound by the decisions rendered by him in an earlier order in regard to the same assessee. When these principles are kept in view, it becomes clear that the orders, instructions or directions that can be issued under s. 119(1) are administrative directions which cannot in any manner fetter the discretion of the ITO in making the assessment. This becomes more clear from the proviso to sub-s. (1) of s. 119 which says that no orders, instructions or directions shall be given by the Board so as to interfere with the discretion of the AAC in the exercise of his appellate function. The AAC's functions are not executive. They are only judicial and this proviso has been enacted to make it clear that the orders, instructions or directions of the Board will not interfere with the judicial or quasi-judicial functions."

(iii) The Hon'ble Supreme Court again in the case of Sirpur Paper Mill Ltd. vs. CWT (1970) 77 ITR 6 (SC) have clearly stated as under :

"The power conferred by s.25 is not administrative: it is quasi-judicial. The expression "may make such inquiry and pass such order thereon" does not confer any absolute discretion on the CIT. In exercise of the power the CIT must bring to bear an unbiased mind, consider impartially the objections raised by the aggrieved party, and decide the dispute according to procedure consistent with the principles of natural justice : he, cannot permit his judgment to be influenced by matters not disclosed to the assessee, nor by dictation of another authority. Sec. 13 of the WT Act provides that all officers and other persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Board. These instructions may control the exercise

of the power of officers of the Department in matters administrative but not quasi-judicial."

27. In the instant cases there is no denial that the DDI had given directions/instructions to the AO in his appraisal report to make enquiries in a particular manner and frame the block period assessments. The case of the assessee's counsel is that had there been no directions/instructions from the D.D.I. to the AO the impugned assessments would have been totally different and perhaps beneficial to the appellants. But since the mind of the AO was controlled by the directions/instructions of the D.D.I. as contained in the appraisal report, the AO had no other option or choice left except to make enquiries as dictated by the D.D.I. and frame assessments as per the wishes and desire of the D.D.I. as contained in the appraisal report. The written refusal by the Senior Departmental Representative to furnish us a copy of the questioned appraisal report or at least to place the said appraisal report for our perusal and study compel us to accept the arguments of the assessees' counsel that the impugned assessments are vitiated and illegal. It is well-established principles of law of evidence that if a particular document is not filed or produced or withheld deliberately by a party to a proceeding who is having the possession and custody of such document, then, the Court will be perfectly justified in presuming and drawing an inference that the contents of such a withheld document are favourable to the opposite side and adverse to the party possessing such document and refusing to part with it or file before the Court for the purpose of determination of the lis. In the instant case such a situation prevails. The Departmental authorities are in custody and possession of the appraisal report of the D.D.I which according to the appellants are adverse to their interest inasmuch as the AO has been influenced, dictated and directed to act not on his own independently but as directed and dictated by the superior officer in a particular document, namely, in the instant case the appraisal report of the D.D.I. It is on account of this conduct and attitude of the Departmental authorities in withholding the appraisal report which compels us to draw an inference that what the assessees' counsel Sri Santhana Krishnan submitted is true and correct and, therefore, we believe the same to be true, correct and acceptable. It is on the account of these reasons that the impugned assessments, as contended by Sri Santhana Krishnan, are vitiated and are not sustainable in law requiring vacation…"

So summary of above discussion is:

i) Merely because revenue suspects certain transaction of online share sale to be alleged /purported penny stock even then unless revenue overrules protean and surfeit documentary evidence of assessee by some cogent/reliable evidence establishing /proving wrong doing on part of assessee in its subject transaction like by some cash circulation etc ,then adverse inference in deeming provisions of section 68 , 69 etc may not be tenable/possible on mere unproven allegation of non genuine transaction which requires objective formulation of opinion of concerned AO on basis of reasonable and just inquiry;

ii) Section 106 of Indian evidence law (specific burden to prove allegation levelled) applies to such cases where concerned AO in case specific and transaction specific manner may require to establish actual and real existence of wrong doing on part of assessee;

iii) Section 10(38) dealing with exemption in relevant period to stated long term capital gains where STT is paid etc need to be harmonized with deeming provisions of section 68,69 etc;

iv) Charge of alleged non genuine transaction in section 68,69 etc on touchstone of artificial price fluctuation and paper/shell company involved etc vis a vis denial of exemption in section 10(38) needs to approached as per dictum of 5 Judge bench in Dilip Kumar case (supra) and Lis (regtd) (supra) with no taxation on mere intendments and in stated ambiguous scenario;

v) Charge of preponderance of probability needs to be appreciated as per Mumbai ITAT Special bench in GTC Case supra;

vi) Suman Poddar and Udit Kalra cases in Cressanda Solution and Kappac Pharma resp. cant be treated as binding precedent for other cases given scope of article 141 of Indian constitution and section 260A of the Act , where mere SLP dismissal and simplictor appeal dismissal in section 260A are held in various cases not to constitute binding precedent for other cases;

vii) On facts also, on ground of online share purchase, habitual and regular investor , company involved on basis of its financial cant be called as paper company ; favorable SEBI final order exonerating assessee etc are various features which can distinguish Suman Poddar and Udit Kalra on factual aspects;

viii) Violation of principle of natural justice in such cases where nothing is confronted to assesssee in asst. stage as per section 142(3), in wake of various hon'ble apex court verdicts (supra), assessment may be argued to be invalid and no second innings to be provided as per three judge bench apex court ruling in Sona Builder case (supra);

ix) Mere passing of assessment order on sole and only recommendations and instructions of investigation wing is held to be vitiating the entire order;

Reopening u/s 148

3. Now in cases of section 148 where reopening is made in context of alleged penny stock charge , if as found in some cases reasons merely say that reopening only made to inquire/verify/examine/scrutnize on penny stock report of DIT investigation wing then on ground of lack of independent application of mind (refer Delhi ITAT SBS Realtor case ITA 7791/2018 order dated 01.04.2019 Para

6,7,11,12 relying on it, it may be argued that , notice issued u/s 148 for verification etc is invalid and where AO recorded his satisfaction on mere DIT inv. report without anything more, same is not valid- reference made to delhi high court citations in 329 ITR 110, 338 ITR 51, 384 ITR 147, 396 ITR 5, 395 ITR 677) and that on ground of reopening is made to substitute scrutiny in section 143(2), to find out escapement of income (refer Patna high court 266 Taxman 506, Bombay high court 417 ITR 334, Karnataka high court in 404 ITR 147 etc) , so reopening can be pleaded to be invalid. **Recent Bombay high court decision quashing one section 148 /reopening in case of one of alleged penny stock which may be referred is South Yarra Holdings vs. ITO, vide Writ Petition No.3398 of 2018, order dated 1st March, 2019, at para 7 of the order has observed as under:-**

> ***"7. It is a settled position in law that re-opening of an assessment has to be done by an Assessing Officer on his own satisfaction. It is not open to an Assessing Officer issue a reopening notice at the dictate and/or satisfaction of some other authority. Therefore, on receipt of any information which suggests escapement of income, the Assessing Officer must examine the information in the context of the facts of the case and only on satisfaction leading to a reasonable belief that income chargeable to tax has escaped assessment, that re-opening notice is to be issued."***

Revision u/s 263

4. Apropos issue of section 263 (revision by PCIT) in cases of alleged penny stock, one may gainfully refer to Delhi bench of ITAT decision in case of Smt. Manita ITA.No.3432/Del./201 Date of Pronouncement: 12.07.2019 (*Held:*

> *It would, therefore, prove that A.O. examined the issue of long term capital gains with reference to sale of shares at assessment stage in the light of evidence and material on record. Thus the reasons for which the case was selected for scrutiny have been satisfied by the A.O. Learned Counsel for the Assessee has pointed out several documents in the paper book to show that on the issue of long term capital gains, A.O. raised a query to the assessee*

which is duly responded by assessee supported by all the documentary evidences. The assessee also filed copies of bank statement, cash flow and cash book to prove availability of funds with the assessee to make investment with M/s. Mohit Ispat (P) Ltd., and expenses incurred for construction of home. All these documentary evidences were before A.O. Thus, it is not a case of even inadequate enquiry… Therefore, Ld. D.R. was not justified in contending that report of Investigation Wing have not been considered by the A.O. Since it was the sole reason for completing the scrutiny assessment, therefore, it could not be believed that A.O. would not have gone through the material available before him on record. May be the A.O. has not discussed the details in the assessment order but it would not give right to the Ld. Pr. CIT to hold that no investigation or enquiry have been made at assessment stage. It appears that A.O. has taken one of permissible view in the matter as per Law and if the Ld.Pr. CIT does not agree with the view of the A.O, the assessment order could not be treated as erroneous in so far as it is prejudicial to the interests of the Revenue..)

Kolkata bench of ITAT in case of **Tanish Dealers Pvt. Ltd. I.T.A. No.1153/Kol/2019**

Date of Pronouncement 01.07.2019 (Held

"…On examination of the material placed before him by the appellant, the AO was satisfied that the short term capital loss was incurred by the appellant on sale of shares listed on the Bombay Stock Exchange. The appellant had filed before the Ld. AO the relevant details and also produced the time stamped contract notes issued by its broker. All the transactions were made through registered share broker at rates prevailing on the stock exchange on the relevant dates. The payment for acquisition of shares and the subsequent sale proceeds were also transacted through the appellant's regular bank account.

It is noted that the listed shares were sold within a period of one year from the date of acquisition and therefore the gain/loss was short term in nature. In the facts and circumstances as discussed above therefore we find that the AO had discharged his duties as an investigator as well as that of an adjudicator and applied his mind on the issue before him and taking into consideration the explanation rendered by the appellant, had taken a reasonable and plausible decision to allow the claim of short term capital loss

as made by the appellant in the return of income. In this factual background therefore we are of the considered opinion that while passing the assessment order the AO did not follow a view which can be said to be 'unsustainable in law'. In the circumstances therefore, the jurisdictional facts for usurping the jurisdiction, being absent, we hold that the action of Ld. Pr. CIT was without jurisdiction and all subsequent actions are 'null' in the eyes of law"

Jaipur bench of ITAT decision in case **of Vinay Kumar Sogani** ITA No. 444/JP/2018

Date of Pronouncement: 26/07/2018 (Held : ..

once the assessee has produced evidence which established the genuineness of the transaction being holding of shares by the assessee in the demat account and purchase of the shares against the consideration paid through banking channel then in the absence of bringing any contrary fact or disapproving the evidence produced by the assessee, the mere setting aside issue by the Pr. CIT for denovo consideration is not sustainable. Though Explanation-2 to Section 263 mandates a proper enquiry as the AO should have conducted however, even in the opinion of the Pr. CIT, the AO has not conduced a proper enquiry as it ought to have been once the AO has examined therelevant record in support of the claim of the assessee then, the Commissioner in the proceedings U/s 263 of the Act it also required to have conducted an enquiry to contradict evidence. In the absence of any efforts on the part of the Commissioner to cause a routine inquiry on the issue that has already been conducted by the AO, the order passed by the Pr. CIT merely setting aside the issue to the AO for conducting the denovo assessment is not permissible…. Thus, when the entire evidence in support of the claim was available on the assessment record and the Assessing Officer has already examined the same, then the Pr. CIT directing a re-enquiry on the issue is not permissible U/s 263 of the Act)

Lastly one may refer to recent Ahmedabad bench ITAT decision in case of Shardaben Patel I.T.A. No. 1026/Ahd/2018 order dated 25/09/2019 wherein it is held that (while quashing revision order of PCIT in section 263 where one of allegation was relating to alleged bogus LTCG):

"To reiterate, the grounds for revision in the show cause notice is vague and opportunity given to the assessee is effectively no opportunity despite express request. The action of the Revisional Commissioner in violation of the express mandate of Section 263 of the Act cannot thus be countenanced. A question may momentarily arise that the gaffes in following principles of natural justice is only a procedural irregularity and therefore matter should be restored to the file of the PCIT to restart the proceedings from the place where the irregularity has occurred. We are not inclined to agree. The opportunity was specifically sought but denied. The breach of sacrosanct opportunity expressly enjoined by the legislature in Sect ion 263 of the Act is fundamental and goes to the root of the issue. It is not open to proceed to frame the revisional order by overriding express intent of law. Such flaw is fatal which seeks to ensue civil consequences and effects the rights of the assessee in a completed matter. The provisions of Sect ion 263 of the Act expressly enjoin providing opportunity. The assessee had on its part has exercised its right to seek background information to enable it to file an informed defense. The dissuasion of such categorical request renders the action of the Revisional Commissioner incompetent in law. The total absence of opportunity alone renders the revisional order null and void."

Penalty u/s 271(1)(c)

5. Apropos section 271(1)(c) penalty on issue of alleged penny stock where assessee for certain reasons has accepted addition on basis of decisions of **Durga Kamal Rice Mills 265 ITR 25,** the Hon'ble High Court of Calcutta has held as under:

> "When two views are possible and when no clear and definite inference can be drawn, in a penalty proceeding, penalty cannot be imposed….in quantum proceedings, a particular provision might be attracted for addition to the income of the assessee. ***But when it comes to the question of imposition of penalty, then independent of the finding arrived at in the quantum proceedings the authority has to find conclusively that the assessee owns the concealed amount."***

(Same is Gujarat High court in National Textile case 249 ITR 125: theory of equal hypothesis that is facts not proved versus facts disproved),

it is very clear that even if for some reasons assessee has accepted in quantum/merits addition on account of denial of stated LTCG exemption in section 10(38) which was on allegation of penny stock case, still in worst case scenario, it can be called as case of *fact not proved* but not in the category of *fact disproved* so no penalty u/s 271(1)(c) would be exigible.

Direct decisions may be referred in case of*: Delhi ITAT Mitesh Pravin Vador ITA.No.1176/Del./2019 Date of Pronouncement: 01.08.2019 & ITAT 'Delhi SMC Bench' in the case of Deepty Agarwal vs. ITO & Othrs. ITA No. 1301/Del/2018 dated 10th September, 2018 (Held …*

I further find that during the course of scrutiny assessment proceedings the AO has proceded by the assumption that the shares purchased and sold by the assessee comes into the category of penny stock companies. The AO has drawn support from outside information. In my considered opinion the surrender of exemption by the assessee on repetitive queries would not amount to furnishing of inaccurate particulars of income. The assessee has claimed exemption as per the provisions of law, though surrendered during the course of assessment proceedings. In my considered opinion, on the facts of the case, no penalty is leviable u/s 271(1)(c) of the Act…)

6. Conclusion

Since subject of alleged penny stock (sans proper authoritative definition of phrase penny stock in the Act) and application of deeming fiction of unexplained income in section 68,69 etc on ground of non genuine transaction is still in evolution stage as various hon'ble benches of ITAT in the country are adopting different stands (like Chennai benches setting aside the cases, Bangalore benches also setting aside the cases on ground of natural justice violation, Jaipur and Kolkata benches deleting the additions, and some recent Mumbai benches deleting the additions fully, and pune bench sustaining the additions , with Delhi benches taking fact specific view) it seems that a compendious rubric /edict from Hon'ble apex court (being *parens patriae*) only

would resolve this legal quandary in an egalitarian manner, in spirit of equality/uniformity principle enshrined in article 14 of holy Indian constitution, in authors humble and respectful opinion.