

## **SOME GIST OF IMPORTANT CASE LAWS**

1. The decisions of the **Hon'ble Calcutta High Court in the case of CIT-Vs Carbo Industrial Holdings Ltd (244 ITR 422) and CIT –Vs- Emerald Commercial Ltd (250 ITR 549)** are relevant to the issue where the Hon'ble High Court has held that where the payments are made by Account Payee Cheques and the existence of the brokers is not disputed share transactions cannot be held to be bogus.
  
2. The decisions of the **Hon'ble Calcutta High Court in the case of CIT-Vs Carbo Industrial Holdings Ltd (244 ITR 422) and CIT –Vs- Emerald Commercial Ltd (250 ITR 549)** are relevant to the issue where the Hon'ble High Court has held that where the payments are made by Account Payee Cheques and the existence of the brokers is not disputed share transactions cannot be held to be bogus.
  
3. Findings in **Bhagwati Prasad Agarwal**- Exchange shows that the name of the assessee is not appearing in respect of the transactions-in-question. The tribunal found that the chain of transaction entered into by the assessee have been proved, accounted for, documented and supported by evidence. The assessee produced before the Commissioner of Income Tax (Appeal) the contract notes, details of his DEMAT account and, also, produced documents showing that all payments were received by the assessee through bank. We do not, therefore, think that this appeal involves any substantial question of law requiring interference by this court under section 260A of the Income Tax Act, 1961. The appeal is, therefore, summarily dismissed.
  
4. **Hon'ble Kolkata ITAT in the case of Dolarraji Hemani vs. ITO (I.T.A. No. 19/Kol/2014) (AY 2005-06) (Dt. of pronouncement 02.12.2016) wherein it has been stated that –**

*“We find that the similar issue had been adjudicated by the co-ordinate bench of this tribunal in the case of DCIT vs Sunita Khemka in ITA Nos. 714 to 718/Kol/2011 dated 28.10.2015 and in the case of ITO vs Rajkumar Agarwal in ITA No. 1330 (Kol) of 2007 dated 10.8.2007 wherein it was held that when purchase and sale of shares were supported by proper contract notes , deliveries of shares were received through demat accounts maintained with various agencies, the shares were purchased and sold through recognized broker and the sale considerations were received by account payee cheques, the transactions cannot be treated as bogus and the income so disclosed was assessable as*

LTCC. We find that in the instant case, the addition has been made only on the basis of the suspicion that the difference in purchase and sale price of these shares is unusually high. The revenue had not brought any material on record to support its finding that there has been collusion / connivance between the broker and the assessee for the introduction of its unaccounted money.”

**5. Roshan Raja (ITAT Mumbai) 2016 TaxPub(DT) 2777 (MumTrib)**

Held: Where assessee claimed the income from longterm capital gain on sale of listed equity shares and subject to STT as exempt under section 10(38), no adverse finding had been rendered in respect of the direct material evidence placed on record in respect of her transactions. The addition under section 68 was not justified and therefore, AO was directed to accept the LTCC income shown as exempt under section 10(38).

**6. In the case of Pavillion Commercial Pvt Limited Vs. ITO Ward 5(2)/Kolkata ITA No. 935/Kol/2012 date of pronouncement 12/08/2016** held that we find that the transactions were complete in terms of documentation and there was no defect in the papers submitted by the assessee in support of the transactions. We also find that there were entries for the sale purchase of the shares in the bank statements, contract notes, demat account of the assessee. In our considered view we find that the assessee has proved the transaction on the basis of documents and therefore the suspension of the broker by SEBI will not hold the transaction invalid.

**7. ITO vs. Indravadan Jain (HUF) (ITAT Mumbai)Date of Pronouncement – 27/05/2016**

Held: merely because the investigation was done by SEBI against broker or his activity, assessee cannot be said to have entered into ingenuine transaction, insofar as assessee is not concerned with the activity of the broker and have no control over the same...

**8. Judgement of Kolkata Tribunal Rahul Vashist vs. ITO, ITA NO. 140/K/09, Order dated 10.08.2007**

Facts

- Purchase and sale of 16000 shares of M/s PSL Financial Services Pvt Ltd
- Share costing at Rs 3 were sold at Rs 198/-
- Payment and receipts were thorough account payee cheques
- All the transaction were made through registered broker.
- The Script was suspended by SEBI

#### Contrary Findings of the Assessing Officer

- The party from whom shares were purchased and the party from whom shares were sold(both through broker) were not available
- Payment from purchase was made after a period of 6 months.
- The shares were Dematerialised after 16 months of purchase.
- Offiline Transaction.

#### Findings of the tribunal

Further, the fact that M/s Ahilya Commercial Pvt. Ltd., through whom the shares are sold, has been barred from entering transactions, w.e.f. September 2005 whereas these transactions entered by the assessee are entered much prior to the suspension of the share broker i.e. on 24.12.2004. Therefore, there is no reason to disbelieve this transaction. From the documents filed by the assessee. i.e., the contract note and ledger note of the brokers and balance sheet wherein the assessee has shown the respect shares in the assets aside in the balance of the share broker on the credit side. Similarly, on sale of shares, the assessee has reflected the sale in the respective dates. The contention of the revenue that the assessee had made payments after the lapse of 16 months is not acceptable, since, in this case, the assessee has entered into several transactions both purchase / sales which is apparent from the ledger copy of M/s S.B. Buthra & Co. which was placed at page no. 6 of the paper book. The endorsement of the company made on 30.08.2003 on the share certificates and confirmation by the PSL Financial Services Ltd. Clearly establishes that the assessee has purchased the shares on 20.06.03. Similarly, the sale transactions are also reflected in the books of the assessee which are supported by the contract notes as well as bank statement which were placed in the paper book.

#### **9. Dy. CIT vs. Rohini Builders 256 ITR 360 (Guj.)**

“If the capacity of the creditors is proved by showing that amounts were received by the assessee by account payee cheques drawn from bank accounts of the creditors, then the assessee was not expected to prove the genuineness of the cash deposited in the bank account of those creditors because under the law the assessee can be asked to prove the source of the credits in its books of account but not the source of the source”.

#### **10. ITAT Kolkata : Income-tax Officer, Wd-38(1), Kolkata -Vs- Shri Jamna Das Gupta, I.T .A No. 692/Kol/2010, Order dated 31.08.2010**

“Once the depositors have accepted the fact that the amounts ‘have been advanced by them by way of banking channels and they have produced their bank statements in support of their contention no adverse inference can be drawn in the hands of the appellant merely on the ground that before the issue of loan cheques an equivalent amount was deposited in the account of the depositors. The onus to explain the deposit in their bank accounts is on the depositors and if any adverse inference has to be drawn on the basis of examination of these accounts unless nexus is established

between the depositors in the bank accounts of the depositors and flow of fund from the appellant such adverse inference has to be drawn only in the hands of the depositors and flow of fund from the appellant such adverse inference has to be drawn only in the hands of the depositors and not the appellant.”

**11. ACIT vs. Surya Kanta Dalmia (2005) 97 ITD 235 (CAL)**

“Sec. 68 came up for consideration before various High Courts and it has been held that the assessee has to prove three conditions: (1) identity of the creditor;(2) capacity of such creditor to advance money; and (3) genuineness of the transactions. If all the aforesaid three conditions are proved, the burden shifts on the Revenue to prove that the amount belongs to the assessee. It has been held by the various High Courts that the assessee cannot be asked to prove source of source or the origin of origin vide S. Hastimal v . CIT (1963) 49 ITR 273 (Mad), Tolaram Daga v . CIT (1966) 59 ITR 632 (Assam), Sarogi Credit Corpn. v . CIT 1975 CTR (Pat) 1 : (1976) 103 ITR 344 (Pat). This view finds support from the recent decision of Hon'ble Allahabad High Court in the case of CIT v . Jauharimal Goel (2005) 147 Taxman 448 (All)”.

**12. Jalan Timbers vs. CIT (1997) 223 ITR 11 (Gau)**

“It is true that by proving the identity the assessee cannot be said to have discharged its onus. In the instant case, the amounts were shown in the IT return of the assessee. Besides, the creditors had also shown in the returns about the giving of the loan to the assessee. Strangely, the ITO while making the assessment in respect of the three creditors above named accepted the returns. This itself will go to show that the amount received by the assessee was at least prima facie genuine. As the ITO had accepted the returns of the three creditors it should go to mean that the amounts given by those creditors were also genuine.

**13. ITAT Kolkata :Income-tax Officer, Wd-38(1), Kolkata -Vs- Shri Jamna Das Gupta, I.T .A No. 692/Kol/2010, Order dated 31.08.2010**

“Once the depositors have accepted the fact that the amounts have been advanced by them by way of banking channels and they have produced their bank statements in support of their contention no adverse inference can be drawn in the hands of the appellant merely on the ground that before the issue of loan cheques an equivalent amount was deposited in the account of the depositors. The onus to explain the deposit in their bank accounts is on the depositors and if any adverse inference has to be drawn on the basis of examination of these accounts unless nexus is established between the depositors in the bank accounts of the depositors and flow of fund from the appellant such adverse inference has to be drawn only in the hands of the

depositors and flow of fund from the appellant such adverse inference has to be drawn only in the hands of the depositors and not the appellant.”

- The aforesaid view of ITAT has been upheld by the Hon'ble Calcutta High Court vide order dated 15.02.2011

**14. CHC in CIT vs. M/s. Dataware Private Limited, ITAT No. 263 of 2011, GA No. 2856 of 2011, decided on September 21, 2011**

If the creditor discloses his PAN and claims to be an assessee, the AO cannot himself examine the return and P&L A/c of the creditor and brand the same as unworthy of credence. Instead, he should enquire from the creditor's AO as to the genuineness of the transaction and whether such transaction has been accepted by the creditor's AO. So long it is not established that the return submitted by the creditor has been rejected by the creditor's AO, the assessee's AO is bound to accept the same as genuine when the identity of the creditor and the genuineness of transaction through account payee cheque has been established.

**15. Farrah Marker vs. ITO (ITAT Mumbai) AY 2005-06 dt. 27.04.2016-**

Long-term capital gains on sale of "penny" stocks cannot be treated as bogus & unexplained cash credit if the documentation is in order & there is no allegation of manipulation by SEBI or the BSE. Denial of right of cross-examination is a fatal flaw which renders the assessment order a nullity

**16. Mukesh R. Marolia vs. ACIT [2006] 6 SOT 247 (Mum)**

Finding

The sequence of the events and ultimate realisation is quite amazing. That itself is a provocation for the Assessing officer to jump into a conclusion that the transactions were bogus. But, whatever it may be, an assessment has to be completed on the basis of records and materials available before the assessing authority . Personal knowledge and excitement on events, should not lead the assessing officer to a state of affairs where salient evidences are overlooked. In the present case, howsoever unbelievable it might be, every transaction of the assessee has been accounted, documented and supported. Even the evidences collected from the concerned parties have been ultimately turned in favour of the assessee. Therefore, it is very difficult to brush aside the contentions of the assessee that he had purchased shares and he had sold shares and ultimately he had purchased a flat utilising the sale proceeds of those shares.

**17. Tribunal at Kolkata in case of DCIT vs Sunita Khema in IT A nos 714 to 718/ kol/2011-**

Held that the AO cannot treat a transaction as bogus only on the basis of suspicion or surmise. He has to bring material on record to support his finding that there has been collusion/connivance between the broker and the assessee for the introduction of its unaccounted money. A transaction of purchase and sale of shares, supported by Contract Notes and demat statements and Account Payee Cheques cannot be treated as bogus.

18. The Hon'ble ITAT, Kolkata in the case of **Rajkumar Agarwal (ITA 1330/Kol/2007 dated 10/08/07)** has held that when purchase and sale of shares were supported by proper Contract Notes, deliveries of shares were received through demat accounts maintained with various agencies, the shares were purchased and sold through recognized broker and the sale considerations were received by Account Payee Cheques, the transactions cannot be treated as bogus and the income so disclosed was assessable as LTCG.

**19. High Court of Rajasthan at Jodhpur in case of CIT Vs. Smt Sumitra Devi in ITA 54/2012 has held that:-**

True it is that several suspicious circumstances were indicated by the AO but then, the findings as ultimately recorded by him had been based more on presumptions rather than on cogent proof. As found concurrently by the CIT(A) and the ITAT, the AO had failed to show that the material documents placed on record by the assessee like broker's note, contract note, relevant extract of cash book, copies of share certificate, de-mat statement etc. were false, fabricated or fictitious. The appellate authorities have rightly observed that the facts as noticed by the AO, like the notice under Section 136 to the company having been returned unserved; delayed payment to the brokers; and de-materialisation of shares just before the sale would lead to suspicion and call for detailed examination and verification but then, for these facts alone, the transaction could not be rejected altogether, particularly in absence of any cogent evidence to the contrary.

20. **K.P. Varghese v. Income Tax Officer (SC) (1981) 131 ITR 0597** the Hon'ble Apex Court held that –

*“the consideration actually received by the assessee is more than what is declared or disclosed by him and the burden of proving such an understatement or concealment is on the revenue. This burden may be discharged by the revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has not correctly declared or disclosed the consideration received by him and there is an understatement or concealment of the consideration in respect of the transfer. Sub-section (2) has no application in the case of an honest and bona fide transaction where the consideration received by*

*the assessee has been correctly declared or disclosed by him, and there is no concealment or suppression of the consideration.”*

Further reliance for this proposition is also placed on the judgment of Hon'ble Apex Court in the case of **Uma Charan Shaw & Bros. Co. vs. CIT (37 ITR 271)**. It has been further held in the following cases that suspicion howsoever strong cannot take the place of proof:

- a) 37 ITR 151(SC) Omar Salay Mohammad Sait vs. CIT
- b) 26 ITR 736 (SC) DhirajlalGirdharilal vs. CIT
- c) 26 ITR 775 (SC) Dhakeshwari Cotton Mills Ltd. vs. CIT
- d) 37 ITR 288 (SC) Lal Chand BhagatAmbica Ram vs. CIT

**21. Arvind Asmal Mehta vs. ITO (ITAT Mumbai) AY 2009-10 dt. 29.02.2016-**

Held, the purchase of shares in the immediately preceding year was accepted by the Department in an order u/s 147 r.w.s 143(3) of the Act. The shares were evidenced by entries in the demat statement and consideration was received through banking channel. There was no clinching material to say that the impugned transaction was bogus. Also, the statement recorded during the search on M/s Alliance Intermediaries & Network Pvt. Ltd. does not contain any infirmity qua the impugned transaction. Therefore, the addition as income from undisclosed income was liable to be deleted.

**22. The judgment of Hon'ble jurisdictional High Court in the case of Commissioner of Income Tax vs. Korlay Trading Co. Ltd. (1999) 152 CTR 0017 : (1998) 232 ITR 0820, the head note of the case reads as under :**

*“Business income—Loss on sale of shares—Genuineness of transaction doubted—Assessee by furnishing name of company, number of shares purchased, date of sale, amount of purchase and sale money, etc. discharged its initial burden—Merely because broker through whom transaction was made failed to produce his books does not mean that transaction was not genuine— No investigation made by ITO to bring on record any material to disbelieve the claim of assessee—Transaction is proved—Finding of Tribunal is based on material and cannot be said to be perverse—Claim for loss was allowable”*

**23. Baijnath Agarwal v. Asstt. CIT(2010) 043 DTR 0149**

'The revenue is also influenced that the assessee could not prove the name and address of the buyer of the shares. In the stock exchange when the transaction is entered into, the assessee is not aware of the buyer of the shares. He enters into transaction only through a share broker. Therefore, the observation of the assessing officer that the assessee could not identify the buyer cannot be the basis of regarding the transaction to be non-genuine one. I also noted that the revenue has been influenced with the fact that the assessee has delivered the blank transfer share certificates to the broker when the delivery Of the shares was given. Since the deal has to take place between the brokers, the assessee has to give only blank transfer share certificate to the broker without mentioning the name of the buyer. There is nothing wrong in my opinion and this is a usual practice in the business. From the entire appreciation of the evidence, I noted that the assessee had acquired the shares, the purchase of which was duly declared by the assessee in earlier years which stand accepted by the revenue. That assessment has not been reopened. The shares were sold through stock brokers who were registered with the stock exchange. Shares were sold at the prices quoted at the stock exchange at the relevant time. The payment of sale consideration had also flown from the bank account of the broker but the broker has deposited the cash in his account as per the revenue..... I cannot take any adverse view about the genuineness of the transaction.'

**24. KALRA GLASS FACTORY VS SALES TAX TRIBUNAL – SUPREME COURT  
167 ITR 488 OF 1987**

IT has been held that the elementary principle of natural justice as applied to Income Tax proceedings, is that the assessee should have the knowledge of the material that is going to be based against him so that he may be able to meet it where for instance the statement of a person is recorded behind the back of the assessee, but not tested by cross examination, such a statement cannot be allowed to be used to the prejudice of the assessee.

**25. LAXMANBHAI S. PATEL V. CIT 327 ITR 291 (2010)**

The Hon'ble High Court of Gujarat has held that the legal effect of the statement recorded behind the back of the assessee and without furnishing the copy thereof to the assessee or without giving an opportunity of cross-examination, if the addition is made, the same is required to be deleted on the ground of violation of the principles of natural justice.

**26. Kailashben Mangarlal Chokshi Vs CIT (2008) 174 Taxmann 466 (Guj.) / (2008)  
14 DTR 257 (Guj.)**



Merely on the basis admission, the assessee could not have been subjected to additions, unless and until some corroborative evidence was found in support of such admission. Further statement recorded at such odd hours (at midnight) could not be considered to be voluntary statement, it was subsequently retracted and necessary evidence was led contrary to such admission. Addition was deleted.

**27. Shree Chand Soni Vs DCIT (2006) 101 TTJ (JD) 1028**

Search and seizure – Block assessment – consumption of undisclosed income – Addition based on the assessee's statement under s. 132 (4) – Admittedly, no incriminating document was found to support the impugned addition regarding bogus capital – Statement recorded under s. 132(4) does not tantamount to unearthing any incriminating evidence during the course of search – Therefore, no addition could be made only on the basis of such statement.

**28. CIT vs. Shri Atul Jain (2008) 299 ITR 383 (Del)**

**Facts**

- Assessee purchased shares of Globe Commercial Limited through 'M' - share broker.
- Shares were sold through another broker'S'.
- Assessee booked Long Term Capital Gains.
- Information received by A.O. from DDIT (Inv.) - Assessee had taken a bogus entry of LTCGs by paying cash + premium.

**Held:**

Reasons recorded were vague and not proper. I A.O. has to record his satisfaction about the correctness or otherwise of the information. The A.O. cannot accept the truth of the vague information in a mechanical manner.

**29. CIT vs SFIL Stock Broking Ltd -(2010) 325 ITR 285 (Del)**

Reasons recorded as "Information received from Dy. Director of IT (Inv.), ....that one of my assessee M/s SFIL Stock Broking Ltd., has made bogus claim of long-term capital gains shown as earned on account of sale/purchase of shares .He has directed the A.O. to get notices u/s 148. Subsequently, I have been directed by the Addl. CIT R8/2002-03/572, dt. 26th Aug., 2003 to initiate proceedings under S. 148 in respect of cases pertaining to this ward. Thus, I have sufficient information in my possession to issue notice under S. 148 in the case of M/s SFIL Stock Broking Ltd. on the basis of the reasons recorded as above."

