
(2013) 11 GAU CK 0002
In the Gauhati High Court
Case No : I.T.A. No. 12 of 2010

Commissioner of Income Tax

APPELLANT

Vs

Smt. Sanghamitra Bharali

RESPONDENT

Date of Decision : 06-11-2013

Acts Referred:

Citation : (2014) 265 CTR 555 : (2014) 361 ITR 481

Hon'ble Judges : Indira Shah, J;I.A. Ansari, J

Bench : Division Bench

Judgement

I.A. Ansari, J.—This is an appeal preferred by the Revenue u/s 260A of the income tax Act, 1961 (hereinafter referred to as "the Act"), against the order dated March 18, 2010, passed by the learned income tax Appellate Tribunal, Guwahati Bench, Guwahati, in I.T.A. No. 166 (Gau) of 2007. The appeal has been heard on the following substantial questions of law:

(i) Whether, on the facts and in the circumstances of the case, the Tribunal was justified and correct in law in directing the Assessing Officer to treat the transaction relating to long term capital gain as genuine and is not the said finding perverse?

(ii) Whether, on the facts and in the circumstances of the case, the Tribunal was justified and correct in law in allowing the claim of the respondent for exemption u/s 54F of the income tax Act, 1961?

(iii) Whether, on the facts and in the circumstances of the case, the Tribunal was justified and correct in law in directing the Assessing Officer to delete the addition of Rs. 15 lakhs as income from undisclosed source from the income of the respondent and is not the said decision perverse?

(iv) Whether, on the facts and in the circumstances of the case, the Tribunal was justified and correct in law in directing the Assessing Officer to delete the addition of Rs. 80,000 as income from undisclosed source from the income of the

respondent and is not the said decision perverse?

Question Nos. 1 and 2

2. Since both these questions are closely interwoven, both these questions are being discussed and decided together,

3. The material facts and various stages, which have given rise to the present appeal, may, in brief, be set out as under:

(i) The assessee filed return of her income for the assessment year 2001-02, showing a total income of Rs. 1,49,348 and the assessment was completed u/s 143(3) of the Act on March 25, 2004, determining the total income to be Rs. 2,10,630. The said order of assessment was set aside by the Commissioner of income tax in exercise of the revisional power u/s 263 of the Act and the Assessing Officer was directed to make a fresh assessment keeping in view the observations made in the revisional order passed u/s 263 of the Act.

(ii) Following the revisional order passed u/s 263 of the Act, fresh assessment proceedings were initiated by the Assessing Officer. The assessee had shown a long term capital gain of Rs. 18,33,160 claiming that the capital gain had been made on account of investment in purchase of flat at Mumbai. The capital gain was also claimed on account of sale of shares of one Birdhichand Pannalal Agency Ltd.

(iii) Summon u/s 131 of the Act was issued to Sri Birdhi Chand Baid, director of the company, but there was no compliance. The address of Birdhichand Pannalal Agency Ltd. furnished by Guwahati Stock Exchange Ltd. was different from the one furnished by the Registrar of Companies (NER), Shillong.

(iv) In order to verify the genuineness of existence and activities of Birdhichand Pannalal Agency Ltd., an inspector of the income tax Department was deputed to verify the existence and activities of Birdhichand Pannalal Agency at the addresses furnished by the Guwahati Stock Exchange as well as the one furnished by the Registrar of Companies (NER), Shillong. However, it was found that the same were occupied by some other persons and no company by name and style of Birdhichand Pannalal Agency Ltd. was in existence there. The assessee was then asked to furnish address of the company but the assessee failed to do so.

(v) The annual returns of Birdhichand Pannalal Agency Ltd., including the profit and loss account and balance-sheet for the assessment years 1998-99 to 2004-05 were obtained from the Registrar of Companies (NER), Shillong, and, on verification of the same, it was found that the profit before tax of the company, as on March 31, 1999, was Rs. 22,000, as on March 31, 2000, was Rs. 8,091 and as on March 31, 2001, was Rs. 14,390 only. No dividend was declared by the company as there was no adequate profit. The assessee purchased 28,000 numbers of shares of the company on November 12, 1999, at Rs. 2.50 per share and the same were sold on December 4, 2000, at Rs. 67.97 per share. Thus, the

share of the company was shown to have risen from Rs. 2.50 per share to Rs. 67.97 within a span of one year. The share broker was also examined u/s 131 of the Act and, in the course of examination, he stated that all records relating to purchase and sale of shares in question were lost and, therefore, the actual purchase and sale could not be verified from the broker. The assessee submitted her return of income for the assessment year 2000-01 relevant to the year of purchase on December 22, 2000, i.e., after the shares were shown to have been sold on December 4, 2000.

(vi) The Assessing Officer, in the order of assessment noted that though the shares were sold through bank account of the assessee, purchase of shares were not made through the bank account of the assessee. The Assessing Officer observed that since the return for the assessment year 2000-01 relevant to the year of purchase was filed after the date of sale and that purchase of shares was not done through the bank account of the assessee the actual event of purchase of the shares of the assessee could not be verified and, therefore, it was apparently an afterthought and a modus operandi adopted to convert the undisclosed income into capital gain. The director of the company was also summoned but no such person was found available at the address of the company obtained from Guwahati Stock Exchange. The Assessing Officer, therefore, treated the capital gain as bogus and disallowed the long-term capital gain, sought to be exempted u/s 54 of the Act to the tune of Rs. 15,33,160 and added back the same as income from undisclosed sources.

4. While disallowing the said claim of the assessee, the Assessing Officer observed as under:

It is, therefore, evident from the above facts and circumstances that the company, M/s. Birdhichand Pannalal Agencies Ltd., is playing an accommodative role in deployment of undisclosed surplus funds of the assessee. As discussed above, it is apparent that the entire event of purchase was created back dated on December 4, 2000, when the shares were shown as sold, which is why there is no record of actual purchase by the assessee even with the broker. As there are no record of purchase, therefore, these were shown as purchased outside the bank accounts of the assessee. Non-existence of the company and its director at the address given and its dismal profit year after year also proves the accommodative role played in converting undisclosed income of the assessee. Therefore, the capital gain is treated as bogus. The alleged long-term capital gain sought to be exempt u/s 54 of the income tax Act, 1961, to the tune of Rs. 18,33,160 is disallowed and is added back as income from undisclosed sources.

5. On an appeal being filed, the Commissioner of income tax (Appeals) upheld the Assessing Officer's order disallowing the claim of the assessee. While upholding the order of assessment; the Commissioner of income tax (Appeals) observed that the appellant had failed to controvert the stand taken by the Assessing Officer inasmuch as the Assessing Officer brought sufficient numbers of materials on record to show that the assessee's claim was untenable.

6. The assessee preferred a second appeal before the income tax Appellate Tribunal; Guwahati Bench/Guwahati, assailing the judgment of the Commissioner of income tax (Appeals) on the following ground:

For that the learned Commissioner of income tax (Appeals) had erred in law and in facts in confirming the rejection of income earned by way of long-term capital gains of Rs. 18,33,160 on sale of shares considering the same as bogus as well as in confirming the rejection of exemption u/s 54F of the same amount.

7. The learned income tax Appellate Tribunal set aside the orders of the Revenue authorities and directed the Assessing Officer to treat the said transaction as genuine and deleted the addition made on this account. The learned Tribunal, in its order, observed that neither the Assessing Officer nor the Commissioner of income tax (Appeals) had pointed out that the documents filed by the assessee were either false or not supported by evidence. The learned Tribunal observed that the Revenue authorities had not considered the papers and documents filed by the assessee for both purchase as well as sale of shares. The learned Tribunal, on the basis of copies of documents filed by the assessee, i.e., copies of bills, credit notes, contract notes, party ledgers, quotations of shares as on December 4, 2000, and undertaking from the assessee to the effect that original share certificates were not in the possession of the assessee came to the conclusion that the transaction was not bogus. The learned Tribunal, therefore, held as under:

Since, in the present case, the assessee has established that both the purchase as well as sale of the shares along with supporting evidence such as contract notes ledger, account of the brokers and the transactions are properly entered in the books of account which were already available on record with the Revenue authorities, we find no reason to disbelieve the same. Hence, we set aside the orders of the Revenue authorities on this issue and direct the Assessing Officer to treat the said transactions as genuine and delete the addition made on account of this.

8. We have heard Dr. Ashok Saraf, learned senior standing counsel for the Revenue and Mr. A. Mazumdar, learned counsel appearing for the assessee.

9. While assailing the order, passed by the learned Tribunal, Dr. Saraf, learned senior standing counsel, appearing for the Revenue, has submitted that the issue has to be examined considering the facts and surrounding circumstances and applying the test of human probabilities. He submitted that having regard to the facts and circumstances of the case, an inference could reasonably be drawn that the said transaction of purchase of shares was bogus, an afterthought and a modus operandi to convert the undisclosed income in the guise of capital gain. Dr. Saraf submitted that it cannot be believed that shares of a company, which is not in existence and whose profits, after tax, were so nominal that it (company) could not even declare dividends to shareholders had risen from Rs. 2.50 to Rs. 67.97 within a span of one year. The learned senior standing counsel has further

submitted that no documents and/or papers, in support of the said purchase and sale of shares could be produced by the broker as the same were lost and that even before the first appellate authority no such papers and documents were produced but the learned Tribunal in its order has set aside the orders of the Revenue authorities on the ground that the Revenue has not considered the papers filed by the assessee in support of purchase as well as sale of the said shares. Dr. Saraf's submission is that no ground was taken before the learned Tribunal to the effect that papers and documents were submitted but not considered by the Revenue authorities. This apart, submits Dr. Saraf, the Assessing Officer has clearly recorded in the order of assessment that the transaction of purchase and sale of shares could not be verified as the broker stated that all the records were lost. It is the further submission of Dr. Saraf that the power of a Tribunal remains confined to the subject matter of appeal and a Tribunal can decide the issue on the basis of the facts, which were placed before the appellate authority. It is Dr. Saraf's contention that no new case could have been made out suo motu by an income tax Appellate Tribunal as has been done in the present case.

10. While supporting the order of the learned Tribunal, Mr. Mazumdar, learned counsel for the assessee, has submitted that since the learned Tribunal, on the basis of the documents and papers, came to the conclusion that the transaction was not bogus, no interference is called for by this court. Mr. Mazumdar has also submitted that simply because the transaction was off market transaction, the same cannot be treated to be a sham transaction. Mr. Mazumdar, learned counsel, has further submitted that since the transaction of purchase and sale of the shares was through broker but merely because the company was not found located at the given address the transaction cannot be treated to be bogus.

11. The learned counsel for the assessee has contended that the official quotation, as on December 4, 2000, i.e., the date of sale of shares at Gauhati Stock Exchange was Rs. 68 and the rate at which the assessee sold the shares through the registered broker was commensurate to the official quotation. Mr. Mazumdar contends that the purchase of shares on November 12, 1999, and sale of shares on December 4, 2000, being evidenced by documents, like ledger of registered dealer, etc., the said transaction cannot be said to be a sham transaction. Mr. Mazumdar has also contended that Skylimit International, which has purchased the shares from the assessee, has also confirmed the transaction in its deposition before the Assessing Officer.

12. In support of his contention, learned counsel for the assessee relies on the decision, in CIT v. Vivek Mehta [2012] 204 Taxman 177 (P&H), wherein it has been held that when the purchaser confirms the purchase of shares from the assessee by cheque, the initial burden on the assessee stands discharged and it is for the Revenue to establish that the transaction in question was bogus. Mr. Mazumdar has also relied on a decision in Commissioner of Income Tax Vs. Smt. Jamnadevi Agrawal and Others, , wherein the court has held that the fact that

some of the transactions were off market transactions cannot be a ground to treat the transactions as sham transactions.

13. Reacting to the submissions made by Mr. Mazumdar, Dr. Saraf submits that the assessee has nowhere submitted materials to show that the shares purchased by her were quoted in the stock exchange at 2.50 paisa per share on the day of purchase. Further/the transaction of purchase was in cash. Dr. Saraf points out that no evidence has been brought on record to show that shares purchased were quoted at 2.50 paisa on the date of purchase in the stock exchange and, hence, simply because the shares were sold at a price quoted in the stock exchange on the date of sale, it cannot be said that the transaction was a genuine transaction.

14. Before entering into the merit of the appeal, it will be necessary to examine the scope of an appeal before the Appellate Tribunal and the scope of relief that could be granted by the Tribunal.

15. The powers of the Tribunal, in dealing with appeals, are expressed u/s 254 of the Act, in widest possible terms inasmuch as section 254 of the Act reads as under:

254. Orders of Appellate Tribunal.--(1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

(2) The Appellate Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the Assessing Officer:

Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard:

Provided further that any application filed by the assessee in this sub-section on or after the 1st day of October, 1998, shall be accompanied by a fee of fifty rupees.

(2A) In every appeal, the Appellate Tribunal, where it is possible, may hear and decide such appeal within a period of four years from the end of the financial year in which such appeal is filed under Sub-section (1) or sub-section (2) of section 253:

Provided that the Appellate Tribunal may, after considering the merits of the application made by the assessee, pass an order of stay in any proceedings relating to an appeal filed under sub-section (1) of section 253, for a period not exceeding one hundred and eighty days from the date of such order and the

Appellate Tribunal shall dispose of the appeal within the said period of stay specified in that order:

Provided further that where such appeal is not so disposed of within the said period of stay as specified in the order of stay, the Appellate Tribunal may, on an application made in this behalf by the assessee and on being satisfied that the delay in disposing of the appeal is not attributable to the assessee, extend the period of stay, or pass an order of stay for a further period or periods as it thinks fit; so, however, that the aggregate of the period originally allowed and the period or periods so extended or allowed shall not, in any case, exceed three hundred and sixty-five days and the Appellate Tribunal shall dispose of the appeal within the period or periods of stay so extended or allowed:

Provided also that if such appeal is not so disposed of within the period allowed under the first proviso or the period or periods extended or allowed under the second proviso, which shall not, in any case, exceed three hundred and sixty-five days, the order of stay shall stand vacated after the expiry of such period or periods, even if the delay in disposing of the appeal is not attributable to the assessee.

(2B) The cost of any appeal to the Appellate Tribunal shall be at the discretion of that Tribunal.

(3). The Appellate Tribunal shall send a copy of any orders passed under this section to the assessee and to the Commissioner.

(4) Save as provided in section 256 or section 260A, orders passed by the Appellate Tribunal on appeal shall be final.

16. Section 254 of the Act provides that the Appellate Tribunal, upon giving both the parties an opportunity of being heard, pass such order as it thinks fit.

17. Coupled with the above, rule 11 of the income tax (Appellate Tribunal) Rules, 1963, provides that the appellant shall not, except with the leave of the Tribunal, urge or be heard in support of his ground not set forth in the memorandum of appeal or taken by leave of the Tribunal provided parties, who may be affected, has had sufficient opportunity of being heard on that ground.

18. The Supreme Court, in *Hukumchand Mills Ltd. Vs. Commissioner of Income Tax, Central Bombay and Others*, , while examining the power of the Appellate Tribunal, u/s 33(4) of the Indian income tax Act, 1922, held that while the word "thereon" restricts the jurisdiction of the Tribunal to the subject matter of appeal, the words "pass such order as the Tribunal thinks fit" includes all power except possibly the power of enhancement, which are conferred upon the Commissioner by section 31 of the said Act. The Tribunal has, therefore, jurisdiction to go into every aspect of the assessment proceeding and also determine if the question as to whether such assessment was made in accordance with the law or not provided a ground is taken before the Tribunal or additional ground, by amendment, is allowed to be taken by the Tribunal. The Tribunal has also

jurisdiction to decide the question of law, which arises from the facts as found by the taxing authority, which has a bearing on the taxable liability of the assessee.

19. Moreover, the Supreme Court, in *National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax*, held as under (page 386):

The power of the Tribunal in dealing with the appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal u/s 254 only to decide the grounds which arise from the order of the Commissioner of income tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.

20. The scope of the relief sought for by an assessee in appeal determines the subject matter of appeal. The relief sought for may have at times to be inferred since the assessee may not indicate in specific terms what is the scope of relief that he seeks in appeal. This has, quite often, to be understood from a range of attack on the assessment order as reflected in the grounds of appeal. In fact, the grounds of challenge substantially determine the scope of the subject matter of appeal. With regard to such subject matters, if the assessee has chosen to make a challenge on a ground other than those raised by him earlier, it would be open to him to seek to urge such a ground. If the subject matter remains the same, the new case, projected by the assessee to obtain relief sought for in respect of such subject matter should be permitted.

21. The Supreme Court in *Commissioner of Income Tax, Madras Vs. Mahalakshmi Textile Mills Ltd.*, described the Tribunal's appellate jurisdiction in the widest terms possible, when it said that all questions, whether of law or of fact, which relate to the assessment of the assessee may be raised before the Tribunal and there is nothing in the Act which restricts the Tribunal to determine those questions only, which were raised before the Departmental authorities.

22. On the basis of the principles laid down by the Supreme Court, it must be held in this case that the assessee was not precluded from raising a new contention and the learned Tribunal was not precluded from examining and determining that contention merely on the ground that the same had not been put forward at the earlier stages of the proceedings in assessment and in the first appeal.

23. Thus, the subject matter of appeal may be capable of challenge on various

grounds some of which might have been raised and some might not have been raised earlier. Some grounds raised might have been dealt with or some of them might not have been dealt with but a decision on the subject matter is an implied decision on all matters, which are raised and which could have been raised, whether dealt with or not. Merely because a ground has not been raised, though could have been raised in support of the reliefs sought for in the appeal, it cannot be said that it cannot be raised before the Tribunal.

24. The matter can be viewed from a different angle also. It might happen that before the assessee came to the Tribunal, the assessee had not viewed the question urged by him for the purpose of seeking relief in the appeal from the proper perspective, a perspective from which he could have successfully mounted an assault on the order of assessment. In all these situations, in an appeal before the Tribunal, he is free to make a fresh approach, present his case from a different perspective and raise new grounds in support of the relief sought for by him. The fact that he had failed to make that approach before the first appellate authority should not stand in the way of his making the new approach. But all these must be related to the same subject matter as was in appeal before the first appellate authority. If the subject-matter remains the same, the new case presented by him to obtain reliefs sought for in respect of such subject-matter should be permitted.

25. In Commissioner of Income Tax Vs. Krishna Mining Co., , the Allahabad High Court has held as under (pages 707 and 708):

Although the powers of the Tribunal are thus expressed in very wide language, the word "thereon" restricts the use of such wide powers of the Tribunal to the subject matter of the appeal. What plainly follows is that the Tribunal's powers are limited to passing such orders as it thinks fit "on the appeal". In other words, the powers of the Tribunal are limited to the subject matter of the appeal.

It would not be permissible for the Tribunal to adjudicate or give a finding on a question which was not agitated or in regard to which no relief was claimed in the lower tribunals or which was not in dispute and which does not form the subject matter of the appeal.

...the Tribunal's decisions must be confined, as in the case of other judicial or quasi-judicial tribunals, to the questions brought before it on the appeal, and it must not travel outside it.

26. In Commissioner of Income Tax, Gujarat-I Vs. Cellulose Products of India Ltd.,], P. S. Poti C.J., speaking for the Full Bench, observed (page 513):

In all these situations, in an appeal before the Tribunal, he is free to make a fresh approach, present his case from a different perspective and raise new grounds in support of the relief sought by him. The fact that he has failed to make that approach before the first appellate authority should not stand in the way of his making the new approach. But all this must be related to the same

subject matter as was in appeal before the first appellate authority.

27. It was further held (page 514):

It is evident, therefore, that the attempt of the Tribunal in every case, where it is called upon to consider the question whether the new approach should be permitted should be to determine whether the subject matter would remain the same, even if the new ground is permitted to be raised.

Speaking of subject matter, it may happen that substantially a claim is urged by an assessee assuming that he is entitled to that claim under a certain provision of law indicated by him. It may be that he is entitled to relief in respect of such claim or part of it not because of that provision, but of some other provision of law. For the mere reason that he does not refer to or advert to the provision appropriately applicable will, be no reason to deny him the right to urge his case, since, in such a case also, the subject matter will not change by reason of allowing the question to be raised.

28. In the present case, the subject matter of appeal was rejection of long-term "capital gain" of Rs. 18,33,160 on sale of shares treating the same as bogus. Whether the said rejection was legally justified or not can be examined from different angles. There was no restriction, on the powers of the learned Tribunal, to examine the correctness of such a rejection from an angle different from the one adopted by the Assessing Officer or first appellate authority. We are, therefore, unable to agree with the submission of Dr. Saraf that since no specific ground was taken before the learned Tribunal, the learned Tribunal was not justified in looking into the matter from a different angle.

29. After having come to the conclusion that the learned Tribunal has the power to examine the issues from an angle different from the one, which the first appellate authority did, we shall, now, examine the correctness of the findings of the learned Tribunal in the present case.

30. With regard to the above, it may be noted that it is the specific finding of the Assessing Officer that no documents and papers could be produced in support of purchase and sale of shares as it was stated by the broker that the same were lost.

31. The said findings were not challenged by the assessee before the appellate authority. Before the learned Tribunal, the assessee contended that the assessee submitted copies of bills, credit notes, contract notes, party ledgers, quotations of shares as on December 4, 2000, etc., in support of the purchase and sale of shares. The learned Tribunal in this connection held as under:

The Assessing Officer could not verify the documents, etc., of the shares broker as, according to him, the shares purchase register and sale register were lost by the share broker. The assessee purchased the shares on November 12, 1999, and sold out such shares on December 4, 2000. The Assessing Officer examined the share broker Sri Ashok Kumar Agarwala on July 8, 2005, u/s 131 of the Act

after a lapse of almost five years. An FIR was also lodged before the police on the subsequent date on which the books were lost, the share broker replied to almost all the queries asked by the Assessing Officer, thus, the learned counsel submitted that it is evident that shares were transacted through registered share broker and transaction were made through bank.

32. The genuineness of a transaction, such as the case at hand, has to be examined from the surrounding circumstances. It is no doubt true that in all cases in which receipt is sought to be taxed as income, the burden lies on the Revenue to prove that it is within the taxing provision but once that burden is discharged, the burden of proving that it is not taxable because it falls within exemption provisions under the Act lies on the assessee.

33. If the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory and there are evidence and circumstances pointing out to the effect that what had been shown was not real and if the assessee fails to controvert such facts and circumstances then such facts and circumstances can certainly be used against the assessee by holding that the said receipt was in the nature of income.

34. In the present case, the assessee has not been able to prove that the shares were purchased on November 12, 1999, inasmuch as there is no documentary evidence proving the said fact inasmuch as the said purchase was made in cash. Further, the assessee has also not been able to show that the said shares were listed in the stock market at Rs. 2.50, on the day of purchase, inasmuch as the assessee has produced the quotation of the shares as on the date of sale issued by the Guwahati Stock Exchange but no such quotation on the date of purchase was produced by the assessee.

35. There is no dispute that the sale amount was received by the assessee through bank but what is disputed is as to whether the long-term capital gain claimed by the assessee was really a long-term capital gain or not.

36. Reliance placed by Mr. Mazumdar on the decision of the Bombay High Court in Commissioner of Income Tax Vs. Smt. Jamnadevi Agrawal and Others, is misplaced. In Smt. Jamnadevi Agrawal (supra), the assessee had produced documentary evidence to show that the shares purchased and sold were in conformity with the market price prevailing on the respective dates but this has not been done in the present case. The Bombay High Court in its decision observed as under (page 660):

From the documents produced before us, which were also in the possession of the Assessing Officer, it is seen that the shares in question were in fact purchased by the assessee on the respective dates and the company has confirmed to have handed over the shares purchased by the assessee. Similarly, the sale of the shares to the respective buyers is also established by producing documentary evidence. It is true that some of the transactions were off-market transactions. However the purchase and the sale price of the shares declared by

the assessees were in conformity with the market rates prevailing in the respective dates as is seen from the documents furnished by the assessees. Therefore, the fact that some of the transactions were off-market transactions cannot be a ground, to treat the transactions as sham transactions.

37. Thus, the decision of the Bombay High Court in Smt. Jamnadevi Agrawal (supra) does not support the case of the assessee.

38. The Punjab and Haryana High Court's decision in CIT v. Vivek Mehta (supra) also does not support the case of the assessee inasmuch as the transaction of sale and purchase of shares, in the said case, were as per the value prevalent in the stock exchange and the said finding of fact was recorded on the basis of evidence produced on record. There is no dispute that simply because the transactions are off market transaction, the same cannot be a ground to treat the transaction as a sham transaction.

39. However, in the case in hand, the assessee although has produced documentary evidence to show that shares were sold at a price prevailing in the stock market on the date of sale but no documentary evidence were produced to show that on the date of purchase, the market price of the shares was the same at which the shares were claimed to have been purchased.

40. No doubt apparent must be considered real until it is shown that there are reasons to believe that the apparent is not real and for that purpose, taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be examined and considered by applying the test of human probabilities.

41. In the present case, the facts that two different addresses were given of the companies, one in the Gauhati Stock Exchange and the other in the office of Registrar of Companies, no such company was found to be in existence at both the places, the assessee had failed to furnish the address of the company and when the notice sent to the director of the company was returned on the ground that no such person was found available at the address of the company, the claim that shares of the company rose from Rs. 2.50 to Rs. 67.97 within a span of one year, when the profit, upon payment of tax of the company for three years, was negligible and no dividend could be declared because of the inadequacy of profits, coupled with the facts that the purchase of shares was made in cash, the share broker failed to produce the records relevant to the purchase and sale of shares on the ground that the same were lost, the share quotation price of the purchase was not produced before any authority, the returns of income, relevant to the purchase and sale of shares was filed after the transaction of sale as claimed was over are clearly relevant circumstances pointing out towards the fact that the transaction was not genuine and the same was an afterthought and a sort of modus operandi to convert the undisclosed income into a capital gain.

42. From the facts and circumstances narrated above, it cannot be said that the

explanation offered by the assessee as regards long-term capital gain was rejected unreasonably and that the finding that the said amount was not on account of long-term capital gain is based on no evidence.

43. Having considered the facts and the circumstances and the materials available on record, an inference can be reasonably drawn that in reality, the transaction was bogus and it was simply a sort of modus operandi to convert the undisclosed income into a long-term capital gain claiming the same to be exempted.

44. The nature of the Tribunal's jurisdiction envisages that the Tribunal will indicate the disputed queries, the evidence, the pros and cons and then record reasons in support of the decision. The practice of recording decisions without reasons has been deprecated by the Supreme Court in *Esthuri Aswanthiah Vs. Commissioner of Income Tax, Mysore*, as well as in *CIT v. Walchand and Co. P. Ltd.* [1967] 65 ITR 381 (SC).

45. In *Nawabganj Sugar Mills Co. Ltd. Vs. Commissioner of Income Tax, Delhi and Rajasthan*, the Supreme Court has held that the Tribunal has to act judicially in the sense that it has to consider with due care all material facts in favour of and against the assessee, and then record its findings on the contentions raised by the assessee and the Commissioner in the light of evidence and the relevant law. The Supreme Court in *Nawabganj Sugar* (supra) also held that an order, recorded on a review of only one part of the evidence ignoring the remaining evidence cannot be regarded as having conclusively determined the questions of fact raised before the Tribunal.

46. Hence, when the Revenue adduced evidence to show that a particular transaction was not a genuine order passed by the Tribunal without enquiring into all relevant facts and evidence would not be valid. The High Court has indeed the jurisdiction to interfere with the findings of the Appellate Tribunal if it appears that either the Tribunal has misunderstood the statutory language because the proper construction of the statutory language is a matter of law, or it has arrived at a finding based on no evidence or where the finding is inconsistent with the evidence or contradictory thereto or it has acted on material, partly relevant and partly irrelevant, or where the Tribunal, draws upon its own imagination and imports facts and circumstances not apparent from the record, or bases its conclusions on mere conjectures and surmises or where no person judicially acting and properly instructed as to the relevant law could have come to the determination reached. In all such cases/the findings arrived at are vitiated.

47. The learned Tribunal, in the present case, without examining the surrounding circumstances and without applying the principle of human probability, came to a conclusion that the assessee had established both purchase and sale of shares by producing copies of bills, credit notes, contract notes, party ledgers, quotations of shares as on December 4, 2000, and that the transaction was properly

entered into the books of account set aside the addition made by the Assessing Officer without considering the fact that simply entry of transaction in the books of account cannot lead to an irresistible conclusion that what was shown in the books of account was real and the transaction was genuine. The learned Tribunal has simply brushed aside the surrounding circumstances, which created a serious doubt on the genuineness of transaction. It is highly improbable that a company whose shares rose by more than 25 times, within a span of one year, is not in existence nor the directors of the company are traceable at the address given.

48. Under such circumstances, we do not think that the Assessing Officer committed any error in rejecting the claim of the assessee and, in fact, applying the test of human probabilities, the Assessing Officer rightly concluded that the assessee's claim about the amount, being the long- term capital gain is not genuine and that the said, finding arrived at by the Assessing Officer cannot be said to be a finding, which is not based on no evidence. Under such circumstances, we have no other option but to interfere with, the order passed by the learned Tribunal, Guwahati Bench, Guwahati, on this score and restore and confirm the orders passed by the Assessing Officer and the Commissioner of income tax (Appeals) in this regard.

Question No. 3

49. The assessee had shown Rs. 15 lakhs as advance from M/s. Venus Hospitals Pvt. Ltd. against sale of a flat at Housefed, Guwahati, for Rs. 16 lakhs. The entire payment was made in cash on April 1, 2000, May 25, 2000, and June 26, 2000, at 5 lakhs each. The assessee submitted that the possession of the flat was not handed over to the company because the company had failed to pay the remaining amount of Rs. 1 lakh. In order to verify the genuineness of the company the principal officer of the company, M/s. Venus Hospitals Pvt. Ltd., was summoned u/s 131 of the Act but the notice was returned unserved on the ground that no such company was found in existence at the said address. The assessee was asked to produce the principal officer of the company and, accordingly, the assessee presented, Sri Sanjay Kumar Kabra, director of the company, whose statement was recorded u/s 131(1) of the Act. The director of the company stated that the agreement of purchase of the flat was cancelled in the year 2003 and that the company had also received back Rs. 6 lakhs. The Assessing Officer asked the director as to why the payment, for purchase of flat was made in cash and repayment of Rs. 3.5 lakhs was received in cash and the balance of Rs. 2.5 lakhs was received in self-cheque of the assessee and not received in crossed account payee cheque in the name of M/s. Venus Hospitals Pvt. Ltd. despite having the bank accounts of the company and the assessee, the director could not give any satisfactory reason for the same. The cancellation agreement of the said flat was also on a plain sheet of paper without having any proper documentary value. The Assessing Officer enquired from the director of the company the reason for the proposed purchase of flat and the director replied that it was proposed to set up a laboratory/diagnostic centre. The said

director could not give any satisfactory reply to the question as to why a residential flat was proposed for setting up of a laboratory/diagnostic centre for a residential place is not allowed to be used for such a purpose. This apart, the director also admitted that the company had no activity since its inception.

50. In view of the facts and circumstances, pointed out above, the Assessing Officer held that the company appeared to be an entity existing on paper to accommodate undisclosed income of the assessee and the payment of the entire advance of Rs. 15 lakhs was added back to the assessee's income as income from undisclosed sources.

51. On an appeal being, filed before the Commissioner of income tax (Appeals), the said addition was upheld. On further appeal before the learned Tribunal, the learned Tribunal held, that the transactions, which were made in cash, were recorded in the books of account of the company. The learned Tribunal also recorded that there is no finding of the Assessing Officer that the cancellation agreement, prepared on a plain paper, was bad in law. The learned Tribunal further observed that since there was a credit of a cheque of Rs. 2.5 lakhs in the bank account of the company, it cannot be said that the company was not in existence. Since the purchaser, with whom the assessee had entered into the agreement, had filed all the documents like income tax returns, balance-sheet, etc., to prove the genuineness of the creditor, the learned Tribunal concluded that the revenue authorities were not justified in treating the transaction in question as bogus and also in treating the same as income from undisclosed source.

52. Dr. Saraf, learned senior standing counsel, appearing for the Revenue, contends that the learned Tribunal reversed the decision of the Assessing Officer and the Commissioner of income tax (Appeals) without any just and reasonable ground and/or material. Dr. Saraf submits that the findings of the learned Tribunal that the transaction was not bogus, without controverting the findings of the Assessing Officer, is not legally tenable. Dr. Saraf has further submitted that various circumstantial evidence supported the findings of the Assessing Officer in adding back the amount to the income of the assessee being undisclosed income and thereby the order of the learned Tribunal on this score too is liable to be set aside.

53. Mr. Mazumdar, learned counsel for the assessee, on the other hand, has supported the decision of the learned Tribunal and submitted that since the transactions were recorded in the books of account of the company, the Assessing Officer was not justified in treating the transaction as bogus and in adding back the amount received as advance on account of sale of fiat as undisclosed income.

54. The learned counsel for the assessee submits that the advance given to the assessee was duly reflected in the books of account of Venus Hospital Ltd. and the said hospital cannot be said to be not in existence inasmuch as it had filed all relevant records like balance-sheets, etc., proving the genuineness of the

transaction. The learned counsel for the assessee-respondent has, in this regard, relied upon the decision in *Nemi Chand Kothari Vs. Commissioner of Income Tax and Another*, wherein it has been held that the creditor's creditworthiness has to be judged vis-à-vis the transactions which have taken place between the assessee and the creditor and it is not the business of the assessee to find out the source of money of his creditor or of the genuineness of the transaction, which took place between the creditor and the sub-creditor and/or the creditworthiness of the sub-creditors for these aspects may not be within the special knowledge of the assessee.

55. Mr. Mazumdar, learned counsel for the assessee-respondent, has submitted that the burden of the assessee to prove the genuineness of the transactions as well as the creditworthiness of the creditor must remain confined to the transactions, which have taken place between the assessee and the creditor.

56. When the facts of the present case are cautiously and carefully examined, it becomes clear that M/s. Venus Hospital Ltd. which had advanced cash loan to the assessee is an income tax assessee and the transaction was duly reflected in its books of account. The said creditor also submitted its income tax return and balance-sheet to prove the genuineness of the transaction. There can be no doubt that in order to establish the receipt of cash credit as required u/s 68, the assessee must satisfy the three important conditions, namely, (i) identity of the creditor; (ii) genuineness of the transaction; and (iii) financial capability of the person giving the cash credit to the assessee, i.e., the creditworthiness of the creditor. However, the onus of the assessee is limited to the extent of proving the source from which he received the cash credit.

57. The creditworthiness of the creditor has to be judged vis-à-vis the transaction, which had taken place between the assessee and the creditor, and it is not the burden of the assessee to find out the source of the creditworthy capacity in order to prove the genuineness of transaction. In *Nemi Chand Kothari (supra)*, this court has held as under (page 263):

If sections 106 and 68 have to survive together, the logical interpretation will be that while the assessee has to prove only his special knowledge, i.e., the source from where he has received the credit and once he discloses the source from which he has received the money, he must also establish that so far as his transaction with his creditor is concerned, the same is genuine and his creditor had the creditworthiness to advance the loan, which the assessee had received. When the assessee discharges the burden so placed on him, the onus, then, shifts to the Assessing Officer if the Assessing Officer wishes to assess the said loan as the income of the assessee from undisclosed source, to prove either by direct evidence or indirect/circumstantial evidence that the money, which the assessee received from the creditor actually belonged to, and was owned by, the assessee himself. If there is direct evidence to show that the loan received by the assessee actually belonged to the assessee, there will be no difficulty in assessing such amount as the income of the assessee from undisclosed source

but if there is no direct evidence in this regard, then the indirect or circumstantial evidence has to be conclusive in nature and must, in such circumstances, unerringly point to the assessee as the person from whom the money had actually flown to the hands of the sub-creditor and, then, routed through the hands of the sub-creditor to the hands of the creditor. For this purpose, the circumstantial evidence has to be not only consistent with the hypothesis that the money belonged to the assessee, but that this hypothesis must also be inconsistent with the hypothesis that none other than the assessee owned the said money. If the conclusion be that the money received, as loan, by the assessee may or may not belong to him or if the possibility exists that the money received, as loan, by the assessee may not belong to him, then, in none of such two cases, the loan amount can be conclusively treated as income from undisclosed source of the assessee inasmuch as for assessing the money as income of the assessee from undisclosed source, there must be clinching evidence to show that the money actually belonged to none but the assessee himself. If no such clinching evidence is available, the money may be treated as the income from disclosed source of the creditor or of the sub-creditor, as the case may be. If the inquiry u/s 68 reveals that though the creditor had the creditworthiness, on the day on which he had advanced the loan to the assessee, yet the source of the creditor is not genuine, that is to say, though the transaction between the assessee and the creditor is genuine, the transaction between the creditor and the sub-creditor is not genuine, then, in such a situation, it cannot be read as a corollary nor can it lead to the lone and only conclusion, in the absence of any other material, that the money that has changed hands from the sub-creditor to the creditor was received by the sub-creditor from none other than the assessee himself.

58. Keeping in view the position of law, when we examine the factual matrix of the present case, we find that so far as the assessee is concerned, she had established the identity of the creditor, namely, Venus Hospital Ltd. The assessee has also discharged its burden, which rested on her, u/s 68 of the Act by proving that the amount received by her in cash by the said creditor was duly recorded in the books of account of Venus Hospital Ltd. and the same was examined and verified by the Assessing Officer. The identity of the said Venus Hospital has also been established inasmuch as it has filed all relevant documents like income tax return, balance-sheet, etc. Hence, the identity of the creditor and the genuineness of transaction have been proved.

59. The burden, therefore, shifted to the Assessing Officer to prove the contrary. The Assessing Officer has failed to show either directly or with the help of circumstantial evidence that the said amount belonged to the assessee. In the absence of any such evidence on record, more particularly, the identity of the creditor and the genuineness of the transaction in question having been proved the Assessing Officer could not have treated the said amount as income derived from undisclosed sources. We, therefore, find no infirmity in the finding arrived at by the learned income tax Appellate Tribunal on this score and we, therefore,

held that the learned Tribunal was justified in deleting the said addition of Rs. 15 lakhs.

Question No. 4

60. The assessee claimed to have taken advance of Rs. 80,000 in cash on October 30, 2000, against the sale of car. On examination of the returns filed up to 2004-05, the Assessing Officer observed that the said advance (still remained in the hands of the assessee without any car being delivered to the purchaser. The Assessing Officer in the order of assessment noted that as per the returns of income filed for the assessment years 2001-02 to 2004-05, by the assessee, there was no car belonging to the assessee for sale. The assessee did not submit any returns after the assessment year 2004-05 till the date of assessment and the said advance amount remained with the assessee. The purchaser of the car was summoned u/s 131 of the Act to verify the genuineness of the transaction but he failed to appear.

61. In view of the above, the Assessing Officer added back the aforesaid amount of Rs. 80,000 as undisclosed income. The Commissioner of income tax (Appeals) upheld the addition made by the Assessing Officer. However, on further appeal being preferred, the learned Tribunal deleted the said addition holding that the said transaction was genuine. The learned Tribunal held in this regard that the purchaser of the car was not asked by the Assessing Officer to be present for examination.

62. Upon a perusal of the order of the learned Tribunal, it appears that the assessee produced the copy of the balance-sheet filed by the purchaser, wherein the transaction was duly recorded. It was further submitted by the assessee that the said car was subsequently sold to another person for a sum of Rs. 2.25 lakhs, which was evident from the statement submitted along with the return for the assessment year 2002-03. From the perusal of the assessment order, it appears that the advance from the sale of car taken by the assessee on October 30, 2000 remained in the hands of the assessee.

63. From the evidence produced by the assessee before the authorities concerned, it appears that an advance of Rs. 80,000 was shown by the purchaser in his books of account and the purchaser is also an income tax assessee. Once the identity of the purchaser and the genuineness of the transaction is established, the transaction cannot be treated as bogus and the amount cannot be treated as an undisclosed income and added back u/s 68 of the Act.

64. In the present case, we find that the identity of creditor, the genuineness of the transaction as well as the creditworthiness of the creditor have been established and, in our view, the learned Tribunal was justified in deleting the addition of Rs. 80,000 made under section, 68 of the Act. The order of the learned Tribunal, therefore, on this score, is upheld.

65. Because of what have been discussed and pointed out above, this appeal is

partly allowed. We hereby partly set aside the order dated March 18, 2010, passed by the learned Tribunal in I.T.A. No. 166 (Gau) of 2007 and restore the order dated March 9, 2007, passed by the Assessing Officer in terms or the conclusions and findings, which we have recorded under questions Nos. 1 and 2.

66. With the above observations and directions, this appeal shall stand disposed of. No order as to costs.