

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI**

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER

ITA NO.1153/MUM/2018 (A.Y: 2007-08)

Late Smt. Godavaridevi D. Raimalani Flat No. G-85, Star Apartment S.V. Road, Borivali West Mumbai – 400 092 PAN: AAAPR 8620 B	v.	Income Tax Officer, Ward – 32(1)(5), C-11, 3 rd Floor Bandra Kurla Complex, Bandra (E), Mumbai – 400 051
(Appellant)		(Respondent)

ITA NO.1154/MUM/2018 (A.Y: 2007-08)

Smt. Kajal Anoop Raimalani Flat No. G-85, Star Apartment S.V. Road, Borivali West Mumbai – 400 092 PAN: ACVPR 8518 H	v.	Income Tax Officer, Ward – 32(2)(2), C-11, 3 rd Floor Bandra Kurla Complex, Bandra (E), Mumbai – 400 051
(Appellant)		(Respondent)

**ITA NOS. 1155 & 1163/MUM/2018
(A.Ys: 2008-09 & 2009-10)**

Smt Meenadevi A. Raimalani Flat No. G-90, Star Apartment S.V. Road, Borivali West Mumbai – 400 092 PAN: AAAPR 8618 R	v.	D.C.I.T., Circle - 32(2), C-11, 3 rd Floor Bandra Kurla Complex, Bandra (E), Mumbai – 400 051
(Appellant)		(Respondent)

ITA NO.1156/MUM/2018 (A.Y: 2008-09)

M/s. Muralidhar R. Raimalani HUF Flat No. 1304, 13 th Floor, Raheja classique, New Link Road, Andheri (W), Mumbai – 400 002 PAN: AAFHR 4620 A	v.	D.C.I.T., Circle - 32(2), C-11, 3 rd Floor Bandra Kurla Complex, Bandra (E), Mumbai – 400 051
(Appellant)		(Respondent)

ITA NO.1162/MUM/2018 (A.Y: 2007-08)

M/s. Gaurav Muralidhar Raimalani HUF 2/201, Anjana Apartment, S.V. Road, Borivali (West), Mumbai – 400 092 PAN: AAEHG 3067 H	v.	Income Tax Officer - 32(1)(5) C-11, 3 rd Floor Bandra Kurla Complex, Bandra (E), Mumbai – 400 051
(Appellant)		(Respondent)

Assessee by : Shri K. Gopal
Department by : Shri Chaitanya Anjaria

Date of Hearing : 01.01.2019
Date of Pronouncement : 30.01.2019

ORDER

PER C.N. PRASAD (JM)

1. All these appeals are filed by different assessees of same group for various Assessment Years against different orders of the Learned Commissioner of Income Tax (Appeals)-44, Mumbai [hereinafter in short

“Ld.CIT(A)”] in sustaining the addition made by the Assessing Officer in respect of purchase and sale of shares as non-genuine transaction u/s.69C of the Act and consequently disallowance of commission paid by the assessee for purchase of shares.

2. In all these cases the assessments were reopened by issue of notice u/s. 148 of the Act based on the information received from the office of DGIT(Inv.), Mumbai, consequent to search and seizure action on 25.11.2009 in the case of M/s. Mahasagar Securities Ltd. It was found that the said company was indulged in issuing accommodation entries in respect of speculation business, short term / long term capital gain, share application money, commodity trading. Statement of Shri Mukesh M. Choksi [for short “MMC”] and Shri Jayesh K. Sampat [for short “JKS”] were recorded in which they have admitted they are providing only accommodation entries to various parties. Based on this information the assessments were reopened and assessments of these assessee’s were completed u/s. 143 r.w.s. 147 of the Act treating the purchase and sale of shares as non-genuine thereby denying the assessee’s claim for short term capital gain and in some cases the investment of the assessee in shares was doubted accordingly the same was brought to tax and further the commission payable on such accommodation entries was estimated @5% of the sale of shares and this was added u/s. 69C of the Act.

3. In the course of the assessment proceedings, the assessee submitted that the purchase and sale of shares were genuine and to prove the transaction as genuine transaction assessee produced sales bill, copy of ledger account with broker, Demat Account cum bank statements. It is also further submitted that the shares purchased and sold are received in Demat Account and delivery was issued out of Demat account for sale of shares. It was also further submitted that the payment for purchase of shares have been made by cheque and sale consideration has been received through cheque and this is evident from bank statement.

4. Assessee also objected for reopening of assessments based on the statement given by MMC and it was further requested to produce MMC for cross examination and cross verification of inspection of document on which the Assessing Officer is relying on. Therefore, it was contended that assessee is actually entered into genuine transaction of purchase and sale of shares and never been involved in any accommodation entries as admitted by MMC. It was contended that profit received from these transactions have been shown as short term capital gain in the return of income and therefore the said transactions cannot be treated as non-genuine. Ignoring these submissions of the assessee and in view of statements of MMC the Assessing Officer treated the transaction of purchases and sale of shares as non-genuine and accordingly denied the

short term capital gain reported by the assessee and the sale proceeds were brought to tax as unexplained investment / unexplained cash credits u/s. 68 / 69 of the Act. On appeal the Ld.CIT(A) sustained the action of the Assessing Officer.

5. Before me, the Ld. Counsel for the assessee referring to Page No. 1 & 2 of the Paper Book which are the letters submitted before the Assessing Officer dated 02.10.2014 & 23.02.2015 for A.Y. 2007-08 in the case of Smt Godavaridevi D. Raimalani in ITA.No. 1153/Mum/2018, submitted that assessee provided details of purchase and sale of shares script wise and the capital gains earned therein, copies of bills were also furnished. It was also submitted that source of investment in purchase of shares is out own capital, copy of broker note, Demat account, details of bank account were also furnished. Further referring to Page No. 2 of the Paper Book, Ld. Counsel for the assessee submitted that since the very basis of reopening the assessment is only the statements recorded from MMC & JKS the assessee objected for reopening of assessment based only on these statements and also specifically requested for providing the cross examination and cross verification and inspection of the documents on which the Assessing Officer is relying on and it was submitted that the assessee was not provided with any of the statements recorded nor any cross examination was provided to the assessee and therefore not

adhered to the principles of natural justice. He submitted that since the Assessing Officer did not provide the documents on which he is relying on and no cross examination was provided the assessment made by the Assessing Officer in denying the short term capital gain reported by the assessee and bringing the same to tax u/s. 68/ 69 of the Act is totally unjustified and bad in law.

6. He further placed reliance on the decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries v. CCE in Civil Appeal No. 4228 of 2006 dated 02.09.2015 and submitted that when the assessment was made on the basis of the statements recorded from third parties and those statements were not provided nor cross examination was given to the assessee, the Assessment Order made based on those statements is bad in law.

7. Ld. Counsel for the assessee further submits that following the decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries v. CCE (supra) the Ahmadabad Bench of the Tribunal in the case of Smt. Sunita Jain & Smt Rachna Sachin Jain v. ITO in ITA.No. 501 & 502/AHD/2016 dated 09.03.2017 on identical facts the Assessment Order has been quashed. Copy of the order is placed on record.

8. Coming to the merits, the Ld. Counsel for the assessee submitted that assessee denied that he has received any fraudulent bills from MMC group. Copy of ledger account, payment details of M/s. Alliance Intermediaries and Network Pvt. Ltd., [for short "AINPL"] along with scripts purchased and sold during all these Assessment Years were furnished. It was submitted that assessee purchased and sold shares through AINPL and the profit has been shown as short term capital gain. Ld. Counsel for the assessee submitted that the transaction of purchases and sales of shares are supported by brokers note, evidencing purchases and sale of shares and transaction is through banking channels. The shares purchased by the assessee are listed with Bombay Stock Exchange (for short "BSE"). Therefore, in view of these evidences the transaction of purchase and sale of shares cannot be considered as non-genuine / bogus. He placed reliance on the decision of the Mumbai Bench in the case of Shri Sunil Prakash v. ACIT in ITA.No. 6494/Mum/2014 dated 08.03.2017.

9. With respect to the addition made on estimation basis on account of commission paid, the Ld. Counsel for the assessee submitted that addition was made on estimation basis without any evidence on record and assumed that commission was paid in cash to MMC group for

accommodation entries while there was no such commission paid by the assessee.

10. Ld. Counsel for the assessee further submits that in the case of Smt. Kajal Anoop Raimalani in ITA.No. 1154/Mum/2018, the Assessing Officer accepted the short term capital gain reported by the assessee, however, he doubted the genuineness of investment made by the assessee. Ld. Counsel for the assessee submitted that the Assessing Officer never asked for explaining the source of investment in purchase of shares. Ld. Counsel for the assessee submitted that in all these cases the assessments were made only based on the statements recorded consequent to search and seizure in M/s. Mahasagar Securities Ltd.

11. Ld. Counsel for the assessee further submits that in the case of Smt Meenadevi Raimalani in ITA.No. 1163/Mum/2018, the Assessing Officer added ₹.15,16,274/- as unexplained cash credits stating that the assessee has entered into alleged bogus transaction for the purpose of money laundering. Ld. Counsel for the assessee submitted that the assessee never carried on any transaction of sale of shares other than speculation transactions on which the assessee has already offered the speculation income to tax. It is submitted that the assessee has not earned any short term capital gain as there was no transaction of

purchases and sale of share by the assessee during the Assessment Year 2009-10 in this case. He submitted that it is only a presumption of the Assessing Officer that assessee had entered into such transactions without there being any material on record, and ₹.15,16,274/- was brought to tax as unexplained cash credits when in fact no such transaction has taken place.

12. Ld. DR vehemently supported the orders of the authorities below.

13. Heard the rival submissions, perused the orders of the authorities below. It is not in dispute that the transaction of purchase and sale of shares was treated as non-genuine based on the statements of MMC and JKS, consequent to search and seizure operation in the case of M/s. Mahasagar Securities Ltd. It is not in dispute that the statements of MMC & JKS were not furnished to the assessee nor the request of the assessee for providing cross examination was adhered to. The question of as to whether the assessment order can be sustained in the absence of providing cross examination to the assessee especially when the additions / disallowance were made based on the statements recorded in the case of third parties and in the light of the judgment of the Andaman Timber Industries v. CCE (supra) has been considered on identical facts

by the Ahmadabad Bench in the case of Smt. Sunita Jain & Smt Rachna

Sachin Jain v. ITO (supra) and the Ahmadabad bench held as under: -

“11. For the sake of completeness of the adjudication, even on merits of the case, the additions do not survive. A perusal of the orders of the authorities below shows that the claim of capital gains was denied by the revenue authorities on the strength of the statement of Shri Mukesh M. Choksi and the materials found from the third party i.e. books etc. in the case of M/s. Mahasagar Securities group and Mukesh M. Choksi. The revenue authorities were of the strong belief Shri Mukesh M. Choksi was providing accommodations entries by issuing bogus bills of share purchases of companies which were not listed on the stock exchanges and, therefore, the capital gains discussed by the assessee are the outcome of fraudulent transactions and cannot be accepted as such. Accordingly, the gains were treated as undisclosed income of the assessee.

12. The Id. Counsel for the assessee(s) vehemently stated that denial of cross examination and relying on a third party's statement without affording any opportunity to the assessee(s) and also by not providing the copy of the statement has vitiated the entire assessment order. It is the say of the Counsel that denial of natural justice cannot be considered in framing the assessment order. The Counsel for the assessee continued by stating that the shares were purchased through brokers and the same were also sold through brokers. If the brokers turned out to be scamster, the assessee cannot be held responsible for the same.

13. Per contra, the DR strongly supported the findings of the Revenue Authorities. It is the say of the DR that the assessment is not merely based upon the statement of Shri Mukesh Choksi, but also on the fact that the entire transactions of the assessee were bogus.

14. The entire assessment is based upon the statement of Shri Mukesh Choksi. It is an undisputed fact that neither a copy of the statement was supplied to the assessee nor any opportunity of cross-examination was given by the Assessing Officer/CIT(A). The Hon'ble Supreme Court in the case of Andaman Timber Industries in Civil Appeal No. 4228 of 2006 was seized with the following action of the Tribunal:-

“6. The plea of no cross examination granted to the various dealers would not help the appellant case since the examination of the dealers would not bring out any material which would not be in the possession of the appellant themselves to explain as to why their ex factory prices remain static. Since we are not upholding and applying the ex factory prices, as we find them contravened and not normal price as envisaged under section 4(1), we find no reason to disturb the Commissioners orders.”

15. The Hon'ble Apex Court held as under:-

“According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely

affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

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

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

We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal.”

16. *On the strength of the aforementioned decision of the Hon'ble Supreme Court, the assessment order has to be quashed.”*

14. Even on merits the Coordinate Bench of the Ahmadabad ITAT held that, when the transactions are routed through Demat account and the Demat account is in the name of the assessee and the shares were sold from such Demat account and the shares were listed in the BSE / NSE no

adverse inference can be drawn as to the genuineness of the transactions, observing as under: -

“17. Even on facts of the case, the orders of the authorities below cannot be accepted. There is no denying that consideration was paid when the shares were purchased. The shares were thereafter sent to the company for the transfer of name. The company transferred the shares in the name of the assessee. There is nothing on record which could suggest that the shares were never transferred in the name of the assessee. There is also nothing on record to suggest that the shares were never with the assessee. On the contrary, the shares were thereafter transferred to demat account. The demat account was in the name of the assessee, from where the shares were sold. In our understanding of the facts, if the shares were of some fictitious company which was not listed in the Bombay Stock Exchange/National Stock Exchange, the shares could never have been transferred to demat account. Shri Mukesh Choksi may have been providing accommodation entries to various persons but so far as the facts of the case in hand suggest that the transactions were genuine and therefore, no adverse inference should be drawn.

18. In the light of the decisions of the Hon'ble Supreme Court in the case of Andaman Timber Industries (supra) and considering the facts in totality, the claim of the assessee cannot be denied on the basis of presumption and surmises in respect of penny stock by disregarding the direct evidences on record relating to the sale/purchase transactions in shares supported by broker's contract notes, confirmation of receipt of sale proceeds through regular banking channels and the demat account.

19. Accordingly, we direct the A.O. to treat the gains arising out of the sale of shares under the head capital gains- "Short Term" or "Long Term" as the case may be. The other grievance of the assessee becomes infructuous.”

15. The Coordinate Bench of Mumbai Tribunal in the case of ITO v. M/s. Arvind Kumar Jain HUF in ITA.No. 4862/Mum/2014 dated 18.09.2017 considered a situation, as to whether the purchase and sale of share transaction is genuine or not and it was held that the purchase and sale of shares are genuine as the shares have been Demat and sold, necessary bills have been furnished, shares have been routed through Demat, purchase and sale was made through account payee cheques,

they were sold through recognized stock exchange and hence the transaction is genuine. While holding so, it has been observed as under:

“7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below:

Exactly a similar issue arose before the ITAT 'I' Bench, Mumbai in the case of M/s Indravadan Jain HUF (supra). In that case also the assessee had shown sale proceeds of shares in the scrip 'Ramkrishna Fincap Ltd.' as LTCG and claimed exemption under the Act. Further the assessee had claimed to have purchased the scrip at Rs.3.12 per share in the year 2003 and sold the same in the year 2005 for Rs.155.04 per share. Also the AO held that these scrips were found to be penny stock and the capital gains declared was held to be only accommodation entries. Further, the broker M/s Basant Periwal and Co. through whom the transactions were effected had appeared as "DRI probing evasion by firms via jama kharchi" who indulged in price manipulation through synchronized and cross deal in scrip of 'Ramkrishna Fincap P. Ltd.' Furthermore, it was also communicated that SEBI had passed an order dated 09.07.2009 regarding the irregularities and synchronized trades carried out in scrip of 'Ramkrishna Fincap Ltd.' by the broker M/s Basant Periwal & Co. The AO did not accept the assessee's claim of LTCG and made an addition of it as unexplained cash credit u/s 68. In appeal, the Ld. CIT(A) deleted the addition and allowed the appeal of the assessee. The Revenue filed appeal against the order of the Ld. CIT(A) before the ITAT. The Tribunal held as under:

“8. We have considered rival contentions and carefully gone through the orders of authorities below and found from the record that the AO has treated the share transaction as bogus on the plea that SEBI has initiated investigation in respect of Ramkrishna Fincap Pvt. Ltd. The AO further stated that investigation revealed that transaction through M/s Periwal and Co. on the floor of stock exchange was more than 83%. We found that as far as initiation of investigation of broker is concerned, the assessee is no way concerned with the activity of the broker. Detailed finding has been recorded by CIT(A) to the effect that assessee has made investment in shares which was purchased on the floor of stock exchange and not from M/s Basant Periwal and Co. Against purchases payment has been made by account payee cheque, delivery of shares were taken, contract of sale was also complete as per the Contract Act, therefore, the assessee is not concerned with any way of the broker. Nowhere the AO has alleged that the transaction by the assessee with these particular broker or share was bogus, 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. We found that M/s Basant Periwal and Co. never stated any of the authority that transaction in M/s Ramkrishna Fincap Pvt. Ltd. on the floor of the stock exchange are ingenuine or mere accommodation entries. The CIT(A) after relying on the various decision of the coordinate bench, wherein on similar facts and circumstances, issue was decided in favour of the assessee, came to the conclusion that transaction entered by the assessee was

genuine. Detailed finding recorded by CIT(A) at para 3 to 5 has not been controverted by the department by bringing any positive material on record. Accordingly, we do not find any reason to interfere in the findings of CIT(A). Moreover, issue is also covered by the decision of jurisdictional High Court in the case of Shyam R. Pawar (supra), wherein under similar facts and circumstances, transactions in shares were held to be genuine and addition made by AO was deleted. Respectfully following the same vis-à-vis findings recorded by CIT(A) which are as per material on record, we do not find any reason to interfere in the order of CIT(A)."

In Shyam R. Pawar (supra), it has been held by the Hon'ble Bombay High Court that where DMAT account and contract note showed details of share transaction, and Assessing Officer had not proved said transaction as bogus, capital gain earned on said transaction could not be treated as unaccounted income u/s 68.

In the case of Arun Kumar Agarwal (HUF) (supra), the Hon'ble Jharkhand High Court has held that where assessee's broker share transaction was bone fide in all respect, merely because share broker was tainted violating SEBI regulations, would not make assessee's share transactions bogus.

The ratio of the above decisions is applicable to the instant case."

16. Further, the Coordinate Bench of Mumbai Tribunal in the case of Ms. Farrah Marker v. ITO in ITA.No. 3801/Mum/2011 dated 27.04.2016 held as under: -

"3.4.7 In the decision of the Coordinate Bench of this Tribunal in the case of Harkchand K. Gada (HUF) & Others in ITA Nos. 1772 to 1775, 1788 & 1789/Mum/2010 dated 08.08.2012 relied on by the assessee, on similar facts, the Coordinate Bench, following the judgements of the Hon'ble Bombay High Court in the case of Mukesh R. Manolia in ITA No. 456 of 2007 dated 07.07.2011 and of the Coordinate Bench in the case of Sharda Credit Pvt. Ltd. (ITA No. 3415/Mum/2007 dated 09.02.2009) held that shares purchased/sold off market cannot be considered illegal transactions. It was also found that the assessee was not provided the opportunity to cross-examine a witness whose statement was relied upon to form the basis for taking an adverse view in that case, overlooking the direct documentary evidence placed on record of the sale/purchase transaction in shares such as brokers contract notes, confirmation of receipt of sale proceeds through regular banking channels, reflection of these transactions in the assessee's audited financial statements and relevant returns of income and it was held by the Bench that in these circumstances, the sale of shares could not be held to be non-genuine.

3.4.8 From the appreciation of the facts of the case, the material evidence placed on record by the assessee and in the light of the discussion of the factual and legal matrix of the case as discussed from para 3.1 to 3.4.7 of this order (supra), we are of the considered opinion that the authorities below, i.e. AO/CIT(A) have made the

addition under section 68 of the Act merely on presumptions, suspicions and surmises in respect of penny stocks; disregarding the direct evidences placed on record and furnished by the assessee in the form of brokers contract notes for purchases and sales of the 'said shares' of M/s. Shukun Constructions Ltd., copies of the physical share certificates and her D-MAT account statement establishing the holding of the shares in her name prior to the sale thereof; confirmation of the transactions of buying and selling of the 'said shares' by the respective stock brokers, receipt of sale proceeds through banking channels, etc. As observed earlier in this order, we are of the view that the statement recorded from Shri Niraj Sanghvi on 31.12.2007, the day the order of assessment was passed, would have no evidentiary or corroborative value to be the basis for coming to an adverse view in the case on hand, since it was recorded behind the assessee's back, from a person who was not involved in the purchase of the said shares and also since the assessee was not afforded opportunity for rebuttal of the same and to cross-examine the said person. We are also of the view that the ratio and the factual matrix of the decisions in the cited case, i.e. Jatin Chhadwa (supra), Harkhchand K. Gada (HUF) & others (supra) and Andaman Timber Industries (supra) would be applicable and support the case of the assessee since no adverse finding has been rendered in respect of the direct material evidence placed on record in respect of her transactions of purchase and sale of the 'said shares' of M/s. Shukun Constructions Ltd. which stand duly disclosed in her audited Balance Sheets filed with the return of income of assessment years 2004-05 and the current year under consideration. In this factual and legal matrix of the case, as discussed above, we find that the addition of `95,12,812/- under section 68 of the Act made and confirmed by the authorities below to be unsustainable and therefore direct the AO to delete the said addition and accept the LTCG income of `93,00,012/- shown as exempt under section 10(38) of the Act. Consequently, ground No. 1 of the assessee's appeal is allowed."

17. We further find that almost on identical facts the Coordinate Bench in the case of Shri Sunil Prakash (supra) deleted the addition made by the Assessing Officer in respect of the purchase and sale of shares affected through AINPL which was again added by the Assessing Officer based on the statements of MMC and JKS while deleting the addition / disallowance, the Coordinate Bench followed its earlier decision in the case of Smt Ananya Singh in ITA.No. 6493/Mum/2014 dated 11.03.2015 where the facts were identical, observing as under:

"6. We have heard the rival submissions and perused the material before us. We find that the assessee had purchased 1.74 lakhs shares of KCL for

Rs.26.29 lakhs through Alliance, that he sold those shares for Rs.32.34 lakhs - through another broker, that he had shown profit of Rs.6.05 lakhs under the head capital gains, that transaction was through D mat account, that payment for purchasing the shares and the sales proceeds were made through banking channels, that the AO had treated the transaction as business income as against STCG, claimed by the assessee, that during the appellate proceedings, the FAA made enhanced the income of the assessee,. We find that notice u/s. 148, in the matter was issued after four year and in the reasons recorded the AO has not mentioned as to how the failure on part of the assessee to disclose fully and truly the material facts led to under assessment and resultant escapement of income. Only on this ground the appeal filed by the assessee can be allowed.

But, we would like to discuss the merits of the case also. The AO had relied upon the statement of MMC to make the addition. Thus, we had witness of the AO. It was his duty to provide the copy of the statement of MMC to the assessee and to afford the opportunity to cross examine him. The AO on request of the assessee had issued a summon to MMC, but he did not appear. Therefore, we do not understand how the FAA has observed that the assessee did not make any specific request for cross examination of MMC. It is also very strange that the FAA, being a judicial authority, has held that non providing opportunity of cross examination would not vitiate the assessment proceedings. If the AO/assessee wants to rely upon the statements of someone it is their duty to prove the truthfulness of such statements. Filing of affidavits/cross examination of the person making assertion can be means of verifying the genuineness of the statements. There can be other means also. But, the basic principles remain the same-person relying upon statement of someone has to prove it and especially when it is challenged by another party. We have not come across the statement of MMC where he has included the name of the assessee to whom he or the group concerns had issue fictitious bills or bills for claiming non-genuine profit/ loss. MMC has given a general statement disclosing broader outline of the transactions entered into by him and the group entities. He had never stated that all the transactions entered into by group were non genuine. His statement was a good lead to take the investigation further and make specific queries. But it was not done. Now, we are left with the general statement of MMC on side and on the other side are the facts like payment/receipt of share transaction value through banking channels, transfer of shares in and from the D-mat account, FAA's finding that the sale was not in doubt, non observation of principle of natural justice by not providing cross examination of MMC. If all these facts and circumstances are weighed in the scale of reasoning, it would tilt in favour of the assessee. We are of the opinion that there was no justification on part of the FAA to direct the AO to tax the entire sale proceed of shares in the hands of the assessee during the year under consideration. Similarly, the AO was not justified to hold the STCG as business transaction. The assessee was not dealing in the shares and securities and the shares of KCL were held by him as investment and not as stock in trade. Here, we would like to refer to the case of Smt. Ananya Singh (supra). We find that the facts of that case are identical to the facts of the case under consideration. The order of Ananya Singh (supra), reads as under :

"2. Rival contentions have been heard and perused material on record. The facts in brief are that a search and seizure action u/s.132 of the I.T. Act 1961 was conducted by the investigation wing of the income tax department, in the case of M/s. Mahasagar Securities Pvt. Ltd. on 25.11.2009. Shri Mukesh M. Choksi and Shri Jayesh K. Sampat were the director of M/s. Mahasagar securities Pvt. Ltd and its related group of 34 odd companies out of which the prominent are being M/s. Alliance intermediaries and net work Pvt. Ltd, M/s. Mihir Agencies Pvt. Ltd, M/s. Gold Star finvest Pvt. Ltd, M/s. Richmond Securities Pvt. Ltd. etc all run by Shri. Mukesh M Chokshi, were found to be engaged in bogus billing activities and in the business of providing bogus

speculation profit/loss, commodities, Profit/loss on commodity trading (Through MCX) and had been continuing this business for many years. The list of clients who have taken entries from these companies was extracted from the computer data seized from M/s. Mahasagar Securities Pvt. Ltd office and has been found to consist of many beneficiaries have taken bogus capital gain/ speculative profit/ bogus capital loss accommodation entries/bills in F. Y. 2003-04 and 2004-05. The AO observed that after going through the information, it was found that assessee Smt. Ananya Singh has entered into transactions to the extent of Rs.10,16,166/- with M/s. Alliance intermediaries and Net work Pvt. Ltd during the F.Y.2004-05 relevant to A.Y. 2005-06. The assessee had purchased shares of Karuna Cable Ltd.

3. Search action u/s 132 of the Income-tax, 1961 was also carried on Mukesh Chokhi, Director of M/s Alliacne Intermediary Pvt. Ltd, wherein he has accepted that he was indulged in profiting bogus billing and bogus gain and loss through stock exchange and commodity exchange. In the ledger account of M/s. Alliance Intermediary Pvt. Ltd, assessee's name was reflected, this was also informed to the assessee in the reasons of re-opening. The assessee has submitted that assessee had paid/received money through Bank account, the shares were transferred through de-mate account and assessee had sold the shares through stock exchange the transitions entered by assessee was genuine.

4. In view of the above discussion the AO brought to tax the short term capital gain of Rs.2,08,693/- earned by the assessee and which had been brought in the books of the assessee. Accordingly the AO made an addition of Rs.2,08,693/- u/s.68 of the I.T. Act.

5. By the impugned order, the Ld. CIT(A) held that the sale proceeds of shares received by the assessee amounting to Rs.12,27,623/- was unexplained cash credit. The CIT(A), therefore, directed the AO to assess Rs.12,27,623/- as income from other sources from the bogus shares transaction. The income assessed by AO was accordingly enhanced.

6. Against above order of Ld. CIT(A), assessee is in further appeal before us.

7. The Ld. AR submitted that assessee genuinely purchase the shares, our attention was invited to the copies of purchase bills and contract notes of Karuna Cables Ltd. places at pages 8-17 of the paper book. Our attention was also invited to the copy of ledger account for the period from 1/4/2004 to 31/3/2005 and 1/4/2005 to 31/3/2006 in the books of the assessee and confirmation of broker Alliance Intermediaries and Network Pvt. Ltd., as placed at pages 18-20 of the paper book. The Ld. AR also highlighted copy of demat statement of ICICI bank and copies of Sale Bills and Contract Notes for sale of shares of Karuna Cables Ltd. to substantiate its claim for genuine purchase and sale. Assessee invited our attention to the ledger account copy of the broker Ramjidas Nagarmal Cons. P. Ltd. in the books of the assessee for the period from 1/4/2004 to 31/3/2005. Copy of the Bank Statement of ICICI Bank showing payment and receipt in respect of purchase and sale of shares.

8. In view of the above documentary evidences, it was contended by Ld. AR that the assessee purchased 67,200 shares of Karuna Cables Limited from M/s. Alliance Intermediaries & Network Ltd. (Alliance) for Rs.10,15,405/-. The said shares were sold through stock exchange platform where by transaction was subjected to STT and the assessee earned a profit of Rs.2,08,693/- from these transactions. The assessee claimed such profit as Short Term Capital Gain (STCG) taxable @10% u/s.11A of the Income Tax Act,1961.

9. As per the Ld. AR there is not even single evidence with the AO which points out that transaction in question is not genuine. The Ld. AO made its own presumption and held that transaction apparent is not real without any basis.

10. On the other hand, Ld. DR relied on the facts recorded by the Lower Authorities in their respective order.

11. We have considered rival contentions and carefully gone through the orders of Authorities below and also perused the details of purchase and sales filed by the assessee with regard shares of Karuna Cables Ltd.. We found that during the year assessee has purchased 67,200 shares of Karuna Cables Ltd. from Alliance at market rate for Rs.10,15,405/-. Copies of contract notes and bills issued by Alliance towards purchase of shares were placed on page 12-17 of compilation. Copy of ledger account for the broker M/s. Alliance Intermediaries & Network Ltd. in the books of the appellant for the period from 01.04.2004 to 31.03.2005 and 01.04.2005 to 31.03.2006 alongwith its confirmation of accounts was also placed at pages 18- 20 of compilation. Bank statement of the assessee whereby the payments made to the broker have duly been reflected, were also enclosed in the paper book.

12. We also found that the above share were credited in the demat Account of the assessee held with ICICI Bank, copy of demat statement was placed on page 21-22 of compilation. A reference to the same would show that the shares of Karuna Cables were received in the demat Account of the assessee on purchase and then transferred to the DP account of the assessee maintained with the broker Rajidas Nagarmal Consultants Pvt. Ltd. through whom sales have been effected on the stock exchange platform. We also found that in the instant case, only purchase has been effected from Alliance, whereas sale has been effected through another broker i.e. M/s. Ramjidas Nagarmal Consultants Pvt. Ltd. who has no connection with Mr. Mukesh Chokshi and there is nothing on record which suggests that M/s. Ramjidas Nagarmal Consultants Pvt. Ltd. has issued bogus bills to the assessee or above sale transaction is not genuine. With regard to the statement of Mr. Mukesh Chokshi recorded, it was contended by Ld. AR that in the statement of Mr. Mukesh Chokshi, the assessee was not named. Further, during the course of assessment proceedings, the assessee had requested the Id. AO to allow an opportunity to cross examine Mr. Mukesh Chokshi. However the Ld. AO could not make available Mr. Mukesh Chokshi for cross examination.

13. Ld. AR brought our attention to the decision of coordinate bench of the Tribunal in the cases of Mrs.Rasila N. Gada & ors. decided in ITA No.1773/Mum/2010 & other connected appeals, vide consolidated order dated 8-8-2012, wherein in almost identical facts and in relation to the additions made on the basis of the statement of said Mr. Mukesh Choksi, the Tribunal has the action of the CIT(A) in deleting the additions by observing as under :-

"5.1. After perusing the material available we are of the opinion that considering the facts and circumstances of the case, the order passed by the FAA does not suffer from any legal infirmity. Hon'ble Bombay High Court in the case of Sharada Credit and Mukesh R Marolia has upheld the orders of the ITAT, Mumbai. In those cases it has been held that shares purchased/sold in the off market cannot be considered illegal transactions. We find that the AO had not afforded opportunity of cross-examination of Shri Mukesh Choksi to the assessee. It is noteworthy that Sh. Choksi had not named the assessee in his statements as the beneficiary who had availed bogus entries. We have noticed that the assessee had shown the investment in shares in the balancesheet of the earlier assessment year and her return of income was accepted by the Department. We are. of the

opinion that once sales/purchase of shares is accompanied by this kind of evidences the genuineness of the said transactions cannot be doubted. Nonpayment of SIT cannot be and should not be basis for making addition of the section 68 of the Act. FAA has categorically held that all the necessary details about purchase and sale of shares were made available to the AO during assessment proceedings. We have perused the case laws relied upon by the AR. In the case of Mukesh R Marolia (supra) Hon'ble jurisdictional High Court has held as under: "

".... On further Appeal, the ITAT by the impugned order allowed the claim of the Assessee by recording that the purchase of shares during the year 1999-2000 and 2000- 2001 were duly recorded in the books maintained by the Assessee. The ITAT has recorded a finding that the source of funds for acquisition of the shares was the agricultural income which was duly offered and assessed to tax in those Assessment Years. The Assessee has produced certificates from the aforesaid four companies to the effect that the shares were in-fact transferred to the name of the Assessee. In these circumstances, the decision of the ITAT in holding that the Assessee had purchased shares out of the funds duly disclosed by the Assessee cannot be faulted. Similarly, the sale of the said shares for Rs.1,41,08,484/- through two Brokers namely, M/s Richmond Securities Pvt. Ltd. and M/s. Scorpio Management Consultants Pvt. Ltd. cannot be disputed, because the fact that the Assessee has received the said amount is not in dispute. It is neither the case of the Revenue that the shares in question are still lying with the Assessee nor it is the case of the Revenue that the amounts received by the Assessee on sale of the shares is more than what is declared by the Assessee. Though there is some discrepancy in the statement of the Director of M/s. Richmand Securities Pvt. Ltd. regarding the sale transaction, the Tribunal relying on the statement of the employee of M/s. Richmand Securities Pvt. Ltd. held that the sale transaction was genuine. In these circumstances, the decision of the ITAT in holding that the purchase and sale of shares are genuine and therefore, the Assessing Officer was not justified in holding that the amount of Rs. 1, 41, 08, 484/-represented unexplained investment under Section 69 of the Income Tax Act, 1961 cannot be faulted."

We are of the opinion that the facts of the case of Mukesh R Marolia are similar to the facts of the cases under consideration. Respectfully following the orders of the Hon'ble High Court and the coordinating benches of the Tribunal we hold that purchase and sale of shares by the assessee was a genuine transaction, and hence, addition made by the AO cannot be endorsed. Upholding the orders of the FAA , we dismiss the appeals filed by the AO. " Facts of the present case are being identical to the above case and also in view of our observations made above, the impugned additions in this case are not called for and the same are accordingly ordered to be deleted. "

Considering the above and reversing the order of the FAA, we decide the effective ground of appeal in favour of the assessee, as his order cannot be endorsed legally or factually."

18. Facts and circumstances being identical respectfully following the decision of the Hon'ble Supreme Court we hold that the re-assessment order passed by the Assessing Officer has to be quashed as the Assessing Officer has failed to provide the copies of statements on which he relied on for making assessment and also for not providing cross examination of those persons inspite of specific request made by the assessee. Thus, we quash the re-assessment orders on this ground. Even on merits in view of the decision of the Coordinate Bench where facts and circumstances being identical respectfully following the same we reverse the findings of the lower authorities.

19. In the result, appeals of the assesseees are allowed.

Order pronounced in the open court on the 30th January, 2019

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER
Mumbai / Dated 30/01/2019
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file. //True Copy//

BY ORDER

(Asstt. Registrar) **ITAT, Mum**