

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ, "बी" चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, 'B' CHANDIGARH

श्री संजय गर्ग, न्यायिक सदस्य एवं श्रीमती अन्नपूर्णा गुप्ता, लेखा सदस्य
BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER AND
Ms. ANNAPURNA GUPTA, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA Nos. 625 & 626/CHD/2019

निर्धारण वर्ष / Assessment Years : 2013-14 & 2014-15

Shri Tarun Jain, C/o M/s Royal Lifestyle Jewellers Pvt Limited, Bhatinda	बनाम	The DCIT, Central Circle-1, Chandigarh
स्थायी लेखा सं./PAN NO: AHWPJ2158H		
<i>Appeal against the order of CIT(A)-1, Ludhiana dated 11.3.2018</i>		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ ITA Nos. 627 & 628/CHD/2019

निर्धारण वर्ष / Assessment Years : 2013-14 & 2014-15

Smt. Rajni Jain, C/o M/s Royal Lifestyle Jewellers Pvt Limited, Bhatinda	बनाम	The DCIT, Central Circle-1, Chandigarh
स्थायी लेखा सं./PAN NO: AANPJ0005H		
<i>Appeal against the order of CIT(A)-1, Ludhiana dated 11.3.2018</i>		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ ITA Nos. 629 & 630/CHD/2019

निर्धारण वर्ष / Assessment Years : 2013-14 & 2015-16

Sanjay Jain & Sons, C/o M/s Royal Lifestyle Jewellers Pvt Limited, Bhatinda	बनाम	The DCIT, Central Circle-1, Chandigarh
स्थायी लेखा सं./PAN NO: AALHS3790N		
<i>Appeal against the order of CIT(A)-1, Ludhiana dated 11.3.2018</i>		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ ITA Nos. 707 to 708/CHD/2019

निर्धारण वर्ष / Assessment Years : 2011-12 & 2012-13

Shri Sanjay Jain, C/o M/s Royal Lifestyle Jewellers Pvt Limited, Bhatinda	बनाम	The DCIT, Central Circle-1, Chandigarh
स्थायी लेखा सं./PAN NO: ABJPJ5318E		
<i>Appeal against the order of CIT(A)-1, Ludhiana dated 12.3.2018</i>		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

&

आयकर अपील सं./ ITA Nos. 709 to 710/CHD/2019

निर्धारण वर्ष / Assessment Years : 2013-14 & 2014-15

Shri Sanjay Jain, C/o M/s Royal Lifestyle Jewellers Pvt Limited, Bhatinda	बनाम	The DCIT, Central Circle-1, Chandigarh
स्थायी लेखा सं./PAN NO: AHWPJ2158H		
<i>Appeal against the order of CIT(A)-1, Ludhiana dated 11.3.2018</i>		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri Sudhir Sehgal, Advocate
राजस्व की ओर से/ Revenue by : Smt. Mona Mohanti, CIT DR

सुनवाई की तारीख/Date of Hearing : 18.12.2019
उदघोषणा की तारीख/Date of Pronouncement : 27.01.2020

आदेश/Order

Per Bench:

The captioned appeals have been preferred by the different but related assesseees against the respective orders of the Commissioner of Income Tax (Appeals)-1, Ludhiana [hereinafter referred to as 'CIT(A)'].

2. Though numerous grounds have been taken by the assesseees in all the appeals, but the main issue being identical in all the appeals, therefore, these were heard together and are being disposed of by this common and consolidated order. **ITA No. 625/Chd/2019** is taken as lead case for narration of facts.

3. The grounds raised in this appeal by the assessee are reproduced as under:-

ITA No. 625/Chd/2019

1. *That the learned Commissioner of Income Tax (Appeals) has erred on facts and in law by upholding the addition on the ground that assessee appellant has surrendered the amount of capital gain during the search without properly appreciating the facts that surrender was a conditional i.e. subject to no penal action and with a right to contest the taxability thereof in view of any new development in the matter. As such, addition confirmed is unjustified. The same be deleted.*
2. *That the learned CIT(A) has erred on facts and in law by upholding the addition made in the assessment u/s 153A of the Income Tax Act without appreciating the facts that no incriminating material was found during the search in context with impugned addition especially when the assessment has already been completed u/s 143(1) of the Act. As such, addition confirmed is unjustified. The same be deleted.*
3. *That the learned CIT(A) has erred in not deciding the ground no. 2 of the appeal. The same is reproduced here as under:-*

"That the leaned AO has erred in law and on facts by disallowing the claim of the assessee appellant under section 10(38) of the Income Tax Act without appreciating the fact the in the original assessment which was made u/s 143(3) of the Income Tax Act, in

the case of Sh. Sanjay Jain and Smt. Rajni Jain i.e. father and mother of the assessee, similar transaction of long term capital gain earned in the shares of the same company was considered as genuine by the learned AO at that time. As such addition made is without any basis unjustified and uncalled for. The same be deleted."

4. *That the learned CIT(A) has erred on facts and in law by upholding the addition without appreciating the documentary evidences placed on record and case laws referred by the assessee appellant and rebutting the same especially when all the conditions of section 10(38) of the Income Tax Act are fulfilled. As such, addition confirmed is unjustified. The same be deleted.*
5. *That the learned CIT(A) has erred on facts and in law by upholding the addition by following the single member judgement of ITAT, Delhi Bench ignoring two member judgements of ITAT, Delhi Bench and judgements of jurisdictional High Court. As such, addition confirmed is unjustified. The same be deleted.*
6. *That the learned CIT(A) has erred on facts and in law by upholding the addition on the theory of human probability whereas as per facts of the case this theory is not applicable. As such, addition confirmed is unjustified. The same be deleted.*
7. *That the learned CIT(A), Ludhiana has erred on facts and in law by upholding the addition on the theory of preponderance of probability ignoring the explanations furnished and material placed on record especially when mere suspicion cannot take the character of evidence. As such, addition confirmed is unjustified. The same be deleted.*
8. *That the learned CIT(A) has erred on facts and in law by upholding the addition made u/s 68 of the Income Tax Act ignoring the facts that the AO has not examined the details of the buyers of shares especially when obligation of the*

assessee appellant in regards to initial explanation has been discharged. As such, addition confirmed u/s 68 of the Act is illegal and unjustified. The same be deleted.

9. That the learned CIT(A) has erred on facts and in law by upholding the addition on the ground that sale receipt of share was obtained after paying the money to broker ignoring the facts that the AO has not brought on record any evidence which may relate to the compensatory payments made by the assessee appellant to the buyer of the shares. As such, addition confirmed without any evidence is against the principle of natural justice. The same be deleted.

10. That the assessee appellant craves to add or amend the grounds of appeal.

4. The Ld. Counsel for the assessee has submitted that since ground No.2 is legal ground, the same should be adjudicated first. The Ld. DR has not objected to the same. Hence, we have heard on the legal issue raised vide ground No.2 of the appeal.

5. The brief facts of the case are that the assessee is an individual having salary income from M/s Royal Lifestyle Jewellers Pvt. Ltd. in the capacity of director. The assessee during the year earned long term capital gain by sale of shares of M/s Presha Metallurgical Ltd., company, amounting to Rs 26,68,215/- and the same had been claimed as exempt u/s 10(38) of the Act in the return of income filed on 24.06.2013. The return of the assessee had been processed u/s 143(1) of the Act. However, on 11.02.2016, a search action had been carried out at the premises of assessee and during the search proceedings, the

assessee was told that the share in which assessee had traded was a penny stock and as per report of Investigation Wing of Kolkata, price of the shares had been rigged manually to give bogus Long Term Capital Gains to the share holders. The assessee, under the above circumstances, agreed to surrender the LTCG claimed. The surrender was made with a condition that no penal action would be taken and right to contest the taxability of the surrendered income in view of any new development in the matter was reserved. Though the assessee agreed for taxation the surrendered income in the return of income, however, the assessee during the assessment proceedings claimed that the said additional income was not taxable. The assessee stated that during the search proceedings no incriminating evidence had been found to show that the claim made by the assessee was not correct. Therefore, the assessee contested the claim as genuine during the assessment proceedings u/s 153A of the Act.

However, the Ld. Assessing Officer relying upon the report of the Investigation Wing, Kolkata held that the patterns of investment of the assessee in the shares of M/s Kappac Pharma Ltd and M/s Presha Metallurgical Ltd. resemble the character of the penny stock done by the bogus companies based at Kolkata. He, further took note of the fact that during the search action, the assessee himself had surrendered the amount in respect of the income from capital gains which was claimed

as exempt. He, accordingly, made the additions in the assessment carried out u/s 153A of the Act.

6. Being aggrieved by the above order of the Assessing Officer, the assessee preferred appeal before the Ld. CIT(A) and pleaded that since no incriminating material was found during the search action, hence, no addition could have been made by the Assessing Officer to the income of the assessee in the already concluded assessment. The assessee in this respect relied upon the following decisions:-

- i) CIT (Central)-III vs Kabul Chawla [2015] 61 taxmann.com 412
- ii) Principal CIT-9 vs Ram Avtar Verma [2017] 88 taxmann.com 666
- iii) PCIT-1 v. Devangi [2-017] 88 taxmann.com 610
- iv) PCIT, Central IT New Delhi v Meeta Gutgutia [2018] 96 taxmann.com 468
- v) PCIT-V vs Vikas Gutgutia [2017] 88 taxmann.com 605

However, the Ld. CIT(A) did not agree with the above contention of the assessee and dismissed the appeal of the assessee by confirming the additions so made by the Assessing Officer; observing as under;-

“4.2 Grounds of Appeal Nos. 2 to 7 relate to disallowance of claim made by the assessee u/s 10(38) of the Act on Long Term Capital Gain shown to have been earned on the sale of shares and addition of Rs. 26,68,215/- u/s 68 of the Income Tax Act, 1961. The AO has mentioned that a search u/s 132 was conducted in the case of M/s. Royal Lifestyle Jewellers Group of Bathinda on

11.02.2016 and various incriminating documents were found and seized from the various residential and business premises of the group. The notice u/s 153A was issued on 16.05.2017 and the assessee filed return declaring an income of Rs. 14,94,580/- on 19.05.2017. The AO has further mentioned that the assessee is not maintaining books of accounts and during the year under consideration, declared Long Term Capital Gain of Rs. 26,68,215/- which was claimed exempt u/s 10(38) of Income Tax Act, 1961. As per the details furnished regarding the purchase and sales of shares, the assessee purchased 7500 shares of M/s. Presha Metallurgical Ltd. on 05.02.2011 @ 2.50/-per share for Rs. 18,750/- paid in cash and these shares were sold during the financial year 2012-13 relevant to assessment year 2013-14 for Rs. 27,19,500/-(4500 shares @ Rs. 371 & 3000 shares @ Rs. 350 on 02.01.2013 & 04.01.2013 respectively). As per the AO, to examine the genuineness of assessee's claim for exemption u/s 10(38), enquiries/investigations were conducted along with the examination of seized record and appraisal of documents furnished by the DDIT which led to the fact that the claim of the assessee was bogus. As per the AO, gist of enquiries were confronted to the assessee vide show cause notice dated 03.10.2017. The content of the show cause has been reproduced in the assessment order. It is mentioned that as per page no. 28, 31, 34, 37, 38, 39 & 40 of Annexure A-3 seized from House No. B-5, Civil Lines, Bathinda, it has been found that the assessee made certain investment and purchased/sold shares of M/s. Presha Metallurgical Ltd. and M/s. Kappac Pharma Ltd. in assessment year 2013-14 & 2014-15 respectively. It is also mentioned that the Directorate of Income Tax, Kolkata undertook detailed investigation on 'accommodation entries' of Long Term Capital Gain and identified various penny stocks i.e. stocks having very low price, closely held and privately placed through route of preferential allotment. After some time, the large scale manipulation in the price of these shares is done to artificially inflate their market price in order to provide entry of Long Term Capital Gain which is claimed exempt. As per the AO, the shares of M/s. Kappac Pharma Ltd. and M/s. Presha Metallurgical Ltd. resemble the character of penny stock. As per the AO, during the search proceedings these facts regarding bogus claim of Long Term Capital Gain via penny stock of the above two companies

were confronted and statement u/s 132(4) was recorded. The assessee has declared such Long Term Capital Gain in the returns for 2013-14 & 2014-15 and during the statement u/s 132(4), the assessee voluntarily surrendered the amount of capital gain of Rs. 26,68,215/- for assessment year 2013-14 and Rs. 18,78,643/- for assessment year 2014-15. It is also mentioned that the assessee revised return for assessment year 2014-15 (the original return was filed on 09.07.2014 at an income of Rs. 14,21,630/- which was revised on 28.03.2016) declaring an income of Rs. 33,00,280/-. In the revised return, the assessee paid tax on bogus Long Term Capital Gain of Rs. 18,78,643/- earned on trading of shares of M/s. Kappac Pharma Ltd. However, for assessment year 2013-14, the assessee has neither revised the return nor deposited the tax. The AO mentioned that the two concerns M/s. Presha Metallurgical Ltd. and M/s. Kappac Pharma Ltd. have similar financial facts and behavior as listed company at the time of trading. The AO reproduced the similarities in terms of financial statements, share price pattern, share volume pattern of the two companies to show the similarities. Both the concerns have Nil gross receipts, nil/very low expenses and are loss making for the financial year 2012-13 with Nil stock and very less share capital. The share price pattern was bell shaped for both the concern with similar pattern in share trading volume. The AO also referred to the modus operandi to generate bogus Long Term Capital Gain as per the report of the Investigation Wing, Kolkata. This modus operandi has been deduced by SEBI and other Government Agencies and the findings of the SEBI have also been reproduced by the AO. The AO has also referred to the report of the SIT of Hon'ble Supreme Court on 'black money' which has also mentioned the above modus operandi in its 'Third SIT Report' regarding misuse of exemption on Long Term Capital Gain tax for 'money laundering'. The AO mentioned about same modus operandi followed by the two concerns namely M/s. Presha Metallurgical Ltd. and M/s. Kappac Pharma Ltd. and concluded that both are penny stock concerns. The AO also mentioned about the penal action taken by Bombay Stock Exchange against these two concerns and their suspension due to Graded Surveillance Measure. The AO also reproduced the details of the enquiries carried out in the case of M/s. Presha Metallurgical Ltd. by DDIT (Inv.), Vadodara and DDIT, Ahmadabad which shows that it was

a penny stock entity. As per these enquiries M/s. Presha Metallurgical Ltd. did not have office at the given address and some other company was running and local enquiry also revealed that no such business entity in the name of M/s. Presha Metallurgical Ltd. was running from the addresses given in Income Tax and ROC records and no one was aware about any company by this name in that locality. The AO concluded that on the basis of facts and discussion, it was clear that M/s. Kappac Pharma Ltd. and M/s. Presha Metallurgical Ltd. are 'penny stock companies' whose identity and credential are suspicious in nature and the assessee was asked that when it has surrendered the Long Term Capital Gain in respect of M/s. Kappac Pharma Ltd. why the Capital Gain shown in respect of sale of stocks of M/s. Presha Metallurgical Ltd. should also not be treated as bogus and added u/s 68 of the Income Tax Act, 1961. The assessee submitted reply dated 10.10.2017 which was considered point-wise by the AO but not found tenable. The AO concluded that both M/s. Kappac Pharma Ltd. and M/s. Presha Metallurgical Ltd. were 'penny stock companies' as no genuine business activity was carried out by them, the shares of both the companies were shown purchased in cash, nature of transaction is suspicious and concluded that the Long Term Capital Gain claimed by the assessee was not genuine. The AO also referred to the statement of Sh. Sanjay Jain who admitted the fact that there was generation of unaccounted income on account of suppression of sale and he disclosed an amount of Rs. 2.83 crores on account of discrepancy in stocks in his statement recorded u/s 132(4) of the Act. The claim of the assessee for exemption u/s 10(38) with respect to Long Term Capital Gain on the sale of shares of M/s. Presha Metallurgical Ltd. was thus found bogus and the same was treated as unexplained credit u/s 68 of the Income Tax Act, 1961 and Rs. 26,68,215/- was added to the income of the assessee.

The facts of the case, basis of addition made by the AO and the arguments of the AR during the course of appellate proceedings have been considered. The AR has argued that the assessee earned Long Term Capital Gain on the sale of shares of M/s. Presha Metallurgical Ltd. which was claimed exempt u/s 10(38) of the Act. As per the submission, the assessee agreed to surrender the Long Term Capital Gain just to avoid litigation and

to buy peace of mind and the surrender was made with a condition that no penal action will be taken and right to contest the taxability in view of the new development in the matter. It is argued that all the prerequisite for claiming exemption u/s 10(38) are fulfilled in this case and no material has been brought by the AO to disprove the claim. It is also mentioned that name of the company M/s. Presha Metallurgical Ltd. is not mentioned in any report. As per the AR, the purchase & sale documents are genuine and the transactions cannot be held as bogus or suspicious. Here, it is relevant to mention the ratio laid down by the Hon'ble Supreme Court in the case of Durga Prasad More (1971) 82 ITR 540 Hedge J, is squarely applicable in this case. The part of the above judgment of Hon'ble Supreme Court, relevant to the matter in hand, is reproduced below: -

"It is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents. "

It may be true that the assessee has furnished the documents regarding the sale/purchase of the shares from the broker and paid STT. But the documents have to be seen critically and the story of the assessee is to be judged on the test of human probability. In fact, the story in the case of the assessee does not pass the test of human probability. It is a known fact in the market that these (Long Term Capital Gain) are fake entries and still the assessee takes such risk fully knowing that these are

not genuine transaction, because now-a-days only a small fraction of return is subject to scrutiny / investigation by the Department every year. Most of the assessee taking such entries go unnoticed since their cases do not get selected for scrutiny. This fact acts as incentive for the others who are allured to take these non-genuine entries.

It is an undisputed fact that at the time of search, the assessee surrendered the Long Term Capital Gain which was claimed exempt u/s 10(38) of the Income Tax Act, 1961. During the course of statement recorded u/s 132(4), the assessee had submitted that it had earned Long Term Capital Gain as the period of holding was more than 12 months and the sale have taken place in a recognized Stock Exchange viz. BSE and STT on the sale was duly paid, however after discussion with the counsel and to buy peace of mind, surrendered the amount of capital gain of Rs. 26,68,215/- in assessment year 2013-14 and Rs. 18,78,643/- in assessment year 2014-15 to Income Tax as 'income from other sources' for the relevant assessment years with a right to contest the taxability in view of any new development in the matter. It is however noted that all these facts have remained the same and there is no new development regarding the sales and purchase of shares, the income from which was surrendered and in fact for assessment year 2014-15, the assessee revised the return and paid the tax. Since, the facts for the two years are similar, there is no reason for not paying the tax for assessment year 2013-14. It is duly brought on record by the AO that M/s. Presha Metallurgical Ltd. is also a penny stock and its weak financial position, suspicious pattern of rigging of share price, very low creditworthiness etc. are similar to that of M/s. Kappac Pharma Ltd. in respect of which the assessee has paid the tax.

It is also relevant to mention that as per records, the other members of the assessee group have also taken such type of entries and during the search u/s 132 accepted generation of unaccounted income, the group members surrendered these amounts and paid tax on the same and also revised their returns for assessment year 2014-15. The amount surrendered by different family members were Rs. 42,76,242/- by Sh. Sanjay

Jain, Rs. 45,42,855/- by Smt. Rajni Jain, Rs. 18,78,643/- by Sh. Tarun Jain and Rs. 31,65,198 by Sanjay Jain & Sons (HUF) for assessment year 2014-15 and all of them revised their returns and paid tax on these amounts. This was in fact an unscrupulous method adopted by the assessee (group) to reintroduce the unaccounted income. The picture becomes clear when we see the whole arrangement as discussed by the AO in the assessment order while discussing modus operandi of misuse of Long Term Capital Gain for re-introducing the unaccounted income. The funds are been given to the operator who gives cheque which is deposited by the assessee in the bank and shown as 'Long Term Capital Gain' as in the present case. Had it been true that there was so much appreciation in the shares then question arises why the brokers themselves did not invest funds in these shares and earned the profit themselves? Also there are whole time brokers at Mumbai and other metros whose only job is to earn profit by ng in shares, then how these shares escaped their attention. There are Mutual d\Managers also whose whole time job is to invest in the shares where the returns are maximum and if the profit shown by the assessee was genuine then how this escaped the attention of these Mutual Fund Managers. On the above facts, it can be seen that the apparent is not real and the modus-operandi adopted to assessment order. Regarding the level of proof to substantiate the above modus-operandi, it is observed that in the criminal proceedings, the level of proof required is 'beyond reasonable doubts' whereas in the civil proceedings the level of proof required is 'preponderance of probability'. It has been held by the Higher Courts that during the Income Tax assessment proceedings, the level of proof required is that of 'preponderance of probability' and if the Assessing Officer is able to substantiate his action upto this level, then the addition is required to be upheld. In the present case, on the test of 'preponderance of probability', it is not believable that assessee would earn such a huge profit on the sales of these shares. It is also not understood how the assessee came to know about these shares which were traded at faraway place and the company is not a prominent one. The assessee has past experience of trading in shares but never had such profit in the past or in the future except these two years. It is highly improbable that such huge profit is earned on the shares of an unknown company making losses or having nominal

income. Such type of profit is unrealistic, is also supported by the fact that even the Government of India is advising the Citizens not to be allured by the promise of high returns. The Citizens are cautioned that such high returns are not possible and investment should not be made on the promise of such high returns. For this, an Investment Protection Program is run by the '*Investor Education and Protection Fund Authority*' (Ministry of Corporate Affairs, Government of India) and regular advertisement/advisories are given on the national channels of Doordarshan and other prominent channel for the benefit of the Citizens. If such type of incomes/returns, as declared by the assessee were possible, then why should the Government deprive its Citizens of such benefits? Further, the existence of paper companies which are used for the purpose of money laundering and providing accommodation entries, has been accepted by the Government of India and a number of such companies have been de-registered and deleted from the records of Registrar of Companies. In the present case, the action has been taken by the Bombay Stock Exchange against the companies from whose shares the assessee has shown profit. This amply proves that showing the receipts from the companies will not make the funds genuine when the source itself is non-genuine. In fact there are number of persons/brokers dealing in shares throughout the country and spent almost whole of their life in the business, still they could never lay hand on such huge profits in the share transactions and they only earn a nominal profit/loss. On the 'test of preponderance of probability', the earning of such huge profits as shown by the assessee is found as non-genuine. It is in fact, assessee's own unaccounted funds which were given to the brokers who issued cheque in favor of the assessee, which have been shown as receipts on sale of shares. The operator has charged a commission and arranged the various documents to give the whole transaction a color of genuinity, when in fact no such high profit is possible in such a short period of time. The shares were purchased off-line and there was no contract note regarding the purchase/sale of shares. It is relevant to mention that for one assessment year, the assessee has surrendered the amount and paid tax on such type of transaction. All these things point to a make belief story because such thing does not happen in real world. Infact this did not happen with the assessee also

and the cheque shown as 'sale receipt of shares' was obtained after paying the money to the broker who arranged the transaction. Such types of method are in fact colorable device to launder the unaccounted fund of the assessee. The appellate authorities can also not turn a blind eye to realities around and the reality is that nobody can earn such huge profit as claimed by the assessee. In fact, it is assessee's own unaccounted money which has been reintroduced as capital gains claimed as exempt income. If what has been claimed by the assessee was a reality, then what the broker, who arranged the transactions, waiting for? He should also have earned such profit instead of charging nominal commission. The story of the assessee is not found acceptable on the test of human probability. The matter gains further strength from the order of Bombay Stock Exchange order referred by the AO in the assessment order. It has been held by the Hon'ble Supreme Court that *"Tax planning may be legitimate provided it is within the framework of law. Colorable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honorable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges "*.

The AO drew adverse inference based upon the investigation carried out by DIT, Investigation, Kolkata. The large increase in the value of shares in short time led the AO to draw adverse inference in this case and in fact the assessee has also accepted this position and surrendered the amount at the time of search and then -revised the return and paid the tax for assessment year 2014-15. The AR relied upon case laws and argued that no such inference was called for. A perusal of the reply shows that the purchases have not been made in cash and this fact creates doubt about the genuineness of the transactions and supports the conclusion that it was merely an arrangement to reintroduce the unaccounted funds of the assessee in the bank account. In the recent judgment, the Hon'ble ITAT has held, vide its order dated 08.01.2019 regarding the misuse of Long Term Capital Gain in the case of Anip Rastogi vs. ITO in ITA No. 3809/Del/2018 and Anju Rastogi vs. ITO in ITA No. 3810/Del/2018 for the assessment year 2015-16, as under:-

"3. I will first take up the appeal in the case of Anip Rastogi, being ITA No. 3809/Del/2018 (AY 2015-16) and my finding given therein will apply mutatis mutandis in other appeal, since similar facts and findings are permeating in other appeal also. The assessee is aggrieved by addition of Rs. 22,28,172/- made u/s. 68 of the I. T. Act, 1961 on account of credits of sale of penny stock.

Brief facts of the case are that assessee is an individual earning rental income, income from medical profession and interests on deposits with banks, during the relevant year. The assessee filed his ITR for the relevant year on 22.09.2015, declaring a total income of Rs. 9,39,250/-. The return filed him was selected for scrutiny assessment which were completed vide order dated 18.12.2017, passed u/s. 143(3) of the Income Tax Act, 1961 (in short Act")making an addition of Rs. 22,28,172/-, holding that the exempt long term capital gain earned by the assessee on sale of shares of M/s CCL International Ltd., was not genuine and the same was bogus. Against the assessment order, the Assessee appealed before the Ld. CIT(A) vide his impugned order dated 20.4.2018 has dismissed the appeal of the assessee. Aggrieved with the order of the id. CIT(A), assessee appealed before the Tribunal.

5. During the hearing, Ld. counsel for the assessee has submitted that the addition in dispute was made and confirmed purely on presumptions, conjecture and surmises and therefore, deserve to be deleted. He further submitted that the authorities below have failed in disallowing deduction claimed by the assessee u/s. 10(38) of the Act for Rs. 22,28,172/-. It was further submitted that lower authorities failed to appreciate that the amount of L TCG earned by the assessee on STT paid sales of listed equity shares of M/s CCL International Ltd., ignoring the evidences, documents and case laws relied upon by the assessee. It was further submitted that the nothing has been brought on record to show any linking between the alleged entry operators whose statements have been relied upon and the assessee. The evidences and

arguments used by the authorities below are generic in nature and can in no sense be related to the assessee. He further submitted that the addition made was without any basis and without bringing on record any corroborative material found during the course of assessment proceedings and also by completely ignoring the well-established law that no addition can be made solely on the basis of statements recorded on oath during the course of survey conducted by the Investigation Wing of Income Tax, Kolkata and departmental¹ communicated to the A.O., without making his own independent enquiry and efforts. Hence, he requested to cancel the orders of the authorities below and allow the appeal of the assessee. In support of his contention, he filed a Paper Book containing pages 1 to 55 in which he has attached the copy of written submissions dated 20.4.2018 as filed before the Ld. CIT(A), Meerut; photocopy of sale note and confirmation from M/s Sai Securities for purchase of shares of M/s CCL International Ltd. as filed before the Ld. CIT(A), Meerut; photocopy of the relevant bank statement of the assessee showing payment for purchase of shares as filed before the CIT(A); photocopy of statement of D-MAT account of the assessee, as maintained by him with Mansukh Securities and Finance Ltd. as filed before the CIT(A), Meerut; photocopy of the sale note of the shares sold as filed before the CIT(A), Meerut; Photocopy of the stock trading details as downloaded from website of BSE India as filed before the CIT(A); Financial details of M/s CCL International Ltd. for FY's 2012-13 to 16017 as downloaded from the website of money control.com as filed before the Ld. CIT(A); photocopy of submissions dated 4.10.2017 & 28.11.2017 as filed before the AO during the assessment proceedings; copy of judgment of Hon'ble 9 Delhi High Court in the case of PCIT & Ors. vs. Best Infrastructure India Pvt. Ltd. (2017) 397ITR 0082; copy of Hon'ble Delhi High Court in the case of CIT vs. Ashwani Gupta (2010) 322 ITR 0396; judgment of Hon'ble High Court of Madhya Pradesh in the case of Prakash Chand Nahata vs. CIT (2008) 301 ITR 134 and copy of judgment of Hon'ble

High Court of Bombay in the case of CIT vs. M/s Ashish International (2011) ITA no. 4299 of 2009; ITAT, Delhi 'SMC Bench decision dated 25.9.2018 in ITA Nos. 20121/Del/2018 to 2028/Del/2018 in the case of Shoubit Goel (HUF) & Ors. vs. ITO; ITAT, Delhi SMC decision dated 24.10.2018 in the case of Amit Rastogi (HUF) & Ors. vs. ITO in ITA No. 2128, 2129, 2131 & 2132/Del/2018 (AY 2015-16) and SMC, ITAT, Delhi Decision dated 5.11.2018 in the case of Arun Kumar & Ors. vs. ACIT in ITA No. 457, 2825 & 2826/Del/2018).

6. On the other hand, Ld. DR relied upon the orders of the authorities below. He further stated that assessee has not substantiated his claim before the revenue authorities. He stated that assessee hasd generated bogus entries of long term capital gains on sale of penny stocks and claimed the same to be exempted under section 10(38) of the Act. In this case the Investigation Wing at Kolkata had carried out country wise investigation to unearth the organized racket of generating bogus entries of long term capital 10 gains which is exempt from tax. It was further submitted that the assessee had purchased 5000 equity shares of M/s CCL International Ltd. for Rs. 2,00,000/- on 15.4.2013 in off market transaction @ Rs. 40.00 per share from Sai Securities. These shares were sold by the assessee through stock broker M/s Mansukh Securities and Finance Ltd. ranging from Rs. 492.50 to 481.20 per share. He further submitted that the payment for purchase of shares has been debited from assessee account through cheque for a sum of Rs. 2,00,000/- was debited whereas the sale note was dated 15.4.2013, which proves that the transaction was an afterthought and the buyer has back dated the transaction. The shares were purchased through off market deals of unknown company. In view of the above assessee failed to prove the genuineness of the alleged long term capital gain claimed to have been earned by the assessee. He further stated that the case laws relied upon by the AO as well as Ld. CIT(A) may be read as his arguments including the decision of the Hon'ble Supreme Court of India In the case of Sumati

Dayal vs. CIT and in the case of Mc Dowell and Company Limited, 154 ITR 148.

7. I have heard both the parties and perused the records especially the impugned order. I note that the assessee has shown Long Term Capital Gain amounting to Rs. 22,28,172/- earned during 11 the FY 2014-15 and exempt u/s. 10(38) of the I.T. Act, 1961. The assessee was asked to explain the source of aforesaid Long Term Capital Gain during the course of scrutiny proceedings. The explanation offered that it is sale proceeds of shares are found to be unsatisfactory. The explanation of the assessee is general in nature that as the transaction is through Stock Exchange and the payment is by cheque, the transactions should be treated as genuine. Further, regarding the statement of Sh. Jai Kishan Poddar the assessee has only stated that in the statement there is no specific link with the claim of exemption in respect of Long Term Capital Gain of Rs. 22,78,172/- u/s. 10(38) by him. He has not stated a thing with respect to the statement of Sh. Jai Kishan Poddar in which he has accepted that facilitation of accommodation entries of long term capital gain I long term capital loss through his share banking firm has been done to few beneficiaries with the help of different accommodation entry operators, promoters of the scripts of various penny stocks other brokers etc. Sh. Jai Kishan Poddar also gave details of different bogus scripts/ penny stocks which have been used for providing the accommodation entries of LTCG and LTCL to different beneficiaries using his brokerage company Consortium Capital Pvt. Ltd. and the name of CCL International Limited having scrip name CCL Inter appears in the list whose 12 shares were sold by the assessee and exemption on LTCG amounting to Rs. 22,28,172/- claimed u/s. 10(38) of the Act. After perusing the records, I find that in the instant case the investment in shares made by the assessee reveals that he has not been dealing in shares on a regular basis and the entries of LTCG have also been taken by other members of the assessee company and the purchase of these shares were

claimed to be through off market deals and not through Stock Exchange. The financials of penny stock company M/s CCL International Ltd. and movement of its price are abrupt, unrealistic and based upon any realistic parameters. From the perusal of financial statements of the aforesaid company M/s CCL International Ltd. from the Ministry of Corporate Affairs website (MCA) examining the information available in the public domain from where it was observed that there is no extraordinary increase in the profits of the company to justify the increase in value of the shares. I further note that Investigation Wing had recorded the statement of Sh. Jai Kishan Poddar who is one of the Director of M/s Consortium Capital Pvt. Ltd. which is one of the entities utilised for providing entry of bogus long term capital gain of M/s CCL International Ltd. who had admitted that he was involved in scam of providing bogus long term capital gains through shares of M/s CCL International Ltd. had also admitted that they were also 13 involved in trading of these Jamakharchi Companies through which manipulative transactions in securities to either artificially raise or lower the market rate of the shares are being done. I also note that the independent findings of the AO, which are corroborated by the information given by the Investigation Wing, the assessee has failed to substantiate the genuineness of alleged share transactions in respect of long term capital gain u/s. 10(38) of the Act. In view of above discussions, the landmark decision of the Hon'ble Supreme Court in the case of McDowell and Company Limited, 154 ITR 148 are squarely applicable in this case wherein it has been held that tax planning may be legitimate provided it is within the framework of the law and any colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by dubious methods. However, the case laws cited by the Ld. counsel for the assessee are on distinguished facts, hence, not applicable in the instant case. The assessee has not argued any other ground mentioned in the grounds of appeal, but only argued on

merit for which assessee has failed to substantiate his claim before the lower revenue authorities as well as before this Bench. In view of above discussions, I am of the considered opinion that Ld. CIT(A) has rightly confirmed the addition in dispute, which does not need any interference on my 14 part, therefore, I uphold the action of the Ld. CIT(A) on the issue in dispute and reject the grounds raised by the Assessee. In the result, the appeal of the assessee is dismissed.

8. Since in other appeal i.e. in the case of Anju Rastogi, ITA No. 3810/Del/2018 (AY 2015-16), similar facts are permeating and same finding has been given, therefore, my finding given above will apply mutatis mutandis in this also, because the nature of transactions, evidences and documents are exactly the same. Thus, both the appeals are treated as dismissed."

It is relevant to mention here that in the case of Smt. Harjit Kaur Vs. ACIT; the Hon'ble Punjab & Haryana High Court in ITA No.280 of 2013 upheld the decision of the Hon'ble ITAT Chandigarh holding that the department cannot bake or accept 'make believe transactions' as held by the Hon'ble ITAT Chandigarh Bench. The Tribunal in that case relied upon the decision of the Hon'ble Supreme Court in the case of Durga Parsad More, 82 ITR 540 and McDowell & Company Ltd., 154 ITR 148 also. The Hon'ble ITAT, Chandigarh held that it is essential on the part of the revenue authority, to look into the real nature of the transaction and what happens in the real word and contextualize the same to such transactions in the real market situation. The following observations of the Hon'ble ITAT are worth mentioning here:-

"It is essential on the part of revenue authority, to look into the real nature of transaction and what happens in the real word and contextualize the same to such transaction in the real market situation. It is pertinent to state here, the judicial wisdom of Hon 'ble Supreme Court in CITvs. Arvinds Raju (TN) 120 ITR 46 (SC) wherein it was held that "one day in our welfare state geared to social justice,

this clever concept of avoidance as against evasion may have to be exposed. In the present case, there is an obvious and plain transaction of tax evasion which has been clothed with the smoke screen of subterfuges, by the assessee appellants. "

The Relevant observations and findings of Hon'ble Supreme Court, in the matter of discharge of onus of proof and the relevance of surrounding circumstances of the case are that though an appellant's statement must be considered real until it was shown that there were reasons to believe that the apparent was not the real, in a case where the party relied on self-serving recitals, the taxing authorities were entitled to look into the surrounding circumstances to find out the reality of such recitals. In view of the facts of the case, the decision of the Supreme Court in the case of CIT Vs. Durga Parsad More is applicable that the Income Tax Authorities are entitled to look into surrounding circumstances to find out the reality. The decision of the Supreme Court in the case of Sumati Dyal Vs. CIT 214 ITR 801 is also relevant where it has been held that matter has to be considered in the light of human probability. Merely because the payments were made by cheques and received by cheque does not render the transaction genuine. Given the circumstances, it is quite apparent that the paper documents filed by the appellant are sham and the paper evidence has been created although these are not genuine because once, during the course of investigation by the Investigation Wing of the Department at Kolkata and the investigation by the SEBI/BSE, the transactions in shares have been proved to be not genuine, then how the funds received from such source can be genuine in the hands of the assessee. The genuine funds could come from a genuine source only and the funds received from a non-genuine source cannot be genuine.

Further, according to Section 68, the primary burden is on the assessee to satisfactorily explain the credit entries in the accounts of the previous year. If the explanation given by the assessee is not satisfactory or the source offered by the assessee is not genuine, the amount is to be taken as the income of the assessee. The explanation regarding the nature and source of credit should be satisfactory in the opinion of the assessing

authority and Section 68 sets up a presumption against the assessee whenever unexplained credits are found in the accounts of the assessee. The initial burden is on the assessee to refute the presumption raised and the burden shifts only when the assessee establishes the authenticity of the transactions. Section 68 applies equally to money received by the assessee shown as sale of shares and the burden is on the assessee to prove the nature and source thereof to the satisfaction of the Assessing Officer regarding the three ingredients i.e. proof regarding identity of the purchaser, the creditworthiness to purchase the shares and the genuineness of the transaction as a whole. The burden of proving the source of a cash credit is on the assessee and the Assessing Officer is not required to prove the source. Mere furnishing of particulars is not enough, mere payment by account payee by cheque is not sacrosanct as held in *Hindustan Tea Trading Co. Ltd. vs CIT 2003 [263 ITR 289, 297 (Cal)]*. Where there is unexplained credit, it is open to the Assessing Officer to hold that it is income of the assessee and no further burden lies on the Assessing Officer to show that the income is from any particular source as held in *CIT vs. Devi Prasad Viswanath Prasad 1969 72 ITR 194 (SC)*.

The case laws quoted by the AR are not applicable to the facts of the present case as in the present case the genuineness of the transaction has not been established because on investigation, the existence of the company M/s. Presha Metallurgical Ltd. has not been established and it was revealed that the company was not carrying out any business activities and nobody knew about the existence of the company at the given address. From the facts, it is clear that the assessee has infact re-introduced its unaccounted income in the shape of Long Term Capital Gain by routing it through paper companies who have no real business or activities and are created on papers for such type of sham transactions. The persons operating such paper companies complete the paper formalities but no real business/ activities are carried out by these companies. The bank accounts are opened and operated only to launder money and provide accommodation entries. It is an accepted principle of jurisprudence that in certain exceptional cases the court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal

facade. The court has power to disregard the corporate entity if it used for tax evasion or to circumvent tax obligation or to perpetrate s held in *Juggilal Kamlapat v. CIT*, (1969) 73 ITR 702 (SC); *Union of India v. Playworld Electronics Pvt. Ltd.* (1990) 184 ITR 308, 317 (SC); *CIT v. Sri Meenakshi Mills Ltd.*, (1967) 63 ITR 609, 616 (SC) etc. Further the legislature can forge a sledge- hammer capable of cracking open the corporate shell; and it can, if it chooses, demand that the courts ignore all the conceptions and principles which are at the root of company law [*Bank Voor Handel enScheepvaart N.V. v. Slatford*, (1953) 1QB 248].

The facts and circumstances of the case, as mentioned above, clearly suggest that the revenue cannot take or accept such 'make believe transaction', as presented by the appellants. Truth or genuineness of such transactions must prevail over the smoke screen, created by way of premeditated series of steps taken by the appellants, with a view to imparting a colour of genuineness and character of real receipt as sale of shares. Needless to say that one has to look at the whole transactions and a series of steps taken to accomplish such share transactions, in an integrated manner, with a view to ascertaining the true nature and character of the money received. The assessee has not been able to identify the purchaser of the shares (sold by the assessee) and their creditworthiness to substantiate the genuineness of the transactions. The plea that the sale proceeds have come through account payee cheques loses all force in the light of the material gathered by the Investigation Wing about the modus operandi followed by the operators. In view of the said facts and circumstances, the Assessing Officer was justified in making the addition u/s 68 after granting adequate opportunity to the appellant and after duly rebutting the submissions of the appellant. Moreover the amount himself surrendered by the assessee in the statement u/s 132(4) during the course of search and in fact paid tax and revised return for assessment year 2014-15. Therefore, under the facts and circumstances of the case, the arguments of the AR are not found acceptable and the action of the AO in making the addition of Rs. 26,68,215/- u/s 68 of the Income Tax Act, 1961 is found sustainable. The AO has duly

mentioned the facts and the legal position in support of the addition made on the issue and hence the addition is confirmed.

Accordingly, these grounds of appeal are dismissed.

4.3 Ground of Appeal No. 8 is of general in nature and it has been contended that the reversal of surrender was on account of fulfillment of other conditions and it cannot be made a ground for making the addition. It is however a fact accepted by the appellant that a surrender u/s 132(4) was made during the search which was however not honored later on for the year under consideration. The AO has relied upon the statement recorded during the search as per the provisions of section 132(4) of the Income Tax Act, 1961, which mandates that statements made may be used as evidence in any proceedings under the Income Tax Act, 1961. For clarity, the provision of section 132(4) is reproduced below:-

"132

4) The authorized officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income-Tax Act, 1922 (11 of 1922), or under this Act.

[Explanation- for the removal of doubts, it is hereby declared that the examination of any person under this sub-section may not be merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the purpose of any investigation connected with any proceeding under the Indian Income-Tax Act, 1922 (11 of 1922), or under this Act.]"

In view of the above position that the statement recorded u/s 132(4) can be used as an evidence in any proceedings under Income Tax Act, 1961 this ground of appeal is found without merits and hence dismissed

7. Being aggrieved by the order of the CIT(A), the assessee has come in appeal before us.

8. We have heard the rival contentions of the Ld. Authorized Representatives of both the parties and have also gone through the record. After going through the impugned order of the Assessing Officer and of the CIT(A), we find that no incriminating material was found during the course of search action at the premises of the assessee. What was found was the information / documents relating to the aforesaid share transactions by the assessee. It is pertinent to mention here that assessee had already declared Long Term Capital Gains in respect of the aforesaid share transactions in the shares of M/s Kappac Pharma Ltd and M/s Presha Metallurgical Ltd. It is also pertinent to mention here that the assessee had also shown / returned capital gains earned from the aforesaid share transactions. The information discovered by the search party was already furnished by the assessee in the return of income, which was processed u/s 143(3) of the Act. The time period for issuing notice u/s 143(2) had already expired and the return filed by the assessee had attained finality or to say that assessment for the year under consideration had already been concluded and not abated as on the date of search. The Ld. Assessing Officer has relied upon the report of the Investigation Wing of Kolkata and the addition has been made on the basis of the preponderance of

probabilities. No incriminating documents directly reflecting the entries of the bogus share transactions were either found during search action or otherwise during the post search assessment proceedings. The assessee in this case has relied upon the various judicial decisions including the decision of the Hon'ble Bombay High Court in the case of 'CIT Vs. Murli Agro Products Pvt Ltd', (2014) 49 taxman.com 172 (Bom.), ITA No.36 of 2009 and in the case of 'CIT Vs. Continental Warehousing Corporation' ITA No. 523 of 2013 reported in (2015) 279 CTR 0389 (Bombay) and of the Hon'ble Delhi High Court in the case of 'CIT Vs. Kabul Chawla' 234 Taxman 300 (Delhi) and subsequent decision of the Delhi High Court in the case of 'Principal CIT Vs. Meeta Gutgutia Prop M/s Ferns 'N' Petals', ITA 306/2017 and others decided vide order dated 25.5.2017, wherein, the Hon'ble High Courts have been unanimous to hold that It has been time and again held that if no incriminating material is found during the search action, the addition in the case of already concluded assessment cannot be made while framing assessment u/s 153A of the Act.

9. So far as the reliance of the Assessing Officer on the statement made by the assessee during the search action u/s 132(4) of the Act is concerned, it has been held time and again by various Courts of law that such a statement recorded u/s 132(4) of the Act on a stand-alone basis without reference to any other incriminating material found during search operation will not have an evidentiary value and the same cannot

be made the sole basis for making the addition in to the income of the assessee.

10. The assessee in this respect has relied upon the following decisions:-

1. Pr. CIT V/s Best Infrastructure (India) Pvt. Ltd 397 ITR 82 DEL-HC
2. Deputy Commissioner of Income Tax V/s A M Exports
69 ITR (Trib) 16 JAIPUR-TRIB
3. Commissioner of Income Tax V/s Harjeev Aggarwal
290 CTR 263 DEL-HC
4. Brahmaputra Finlease (P) Ltd. V/s Deputy Commissioner of Income Tax
51 CCH 796 DEL-TRIB
5. Rathi Steel Ltd. V/s Assistant Commissioner of Income Tax
56 CH 102 DEL-TRIB
- 6 Naresh Kumar Agarwal [2015] 53 taxmann.com 306 (A.P.)
- 7 CIT vs Sunil Agarwal [2015] 64 taxman.com 107 (Delhi High Court)
- 8 Basant Bansal vs ACIT [2015] 63 taxmann.com 199 (Jaipur Trib.)

11. We have gone through the above decisions as also the other decisions relied upon by the Ld. Counsel for the assessee.

The Hon'ble Delhi High Court in the case of 'Pr. CIT vs Best Infrastructure (India) Pvt. Ltd' has observed that the statement recorded u/s 132(4) of the Act do not themselves constitute incriminating material. The Hon'ble Delhi High Court in this respect had also distinguished the decision of the Delhi High Court in the case of 'Smt. Dayawanti Gupta vs CIT' [2016] 390 ITR 496. The relevant part of the observations made are reproduced as under;-

*“38. Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in **Commissioner of Income Tax v. Harjeev Aggarwal** (supra). Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts in **Smt. Dayawanti Gupta v. CIT** (supra) where the admission by the Assessee themselves on critical aspects, of failure to maintain accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases, is non-existent in the present case. In the said case, there was a factual finding to the effect that the Assessee were habitual offenders, indulging in clandestine operations whereas there is nothing in the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any such admission.*

39. For all the aforementioned reasons, the Court is of the view that the ITAT was fully justified in concluding that the assumption of jurisdiction under Section 153A of the Act qua the Assessee herein was not justified in law.”

Further, The Hon’ble A.P. High Court in the case of “Naresh Kumar Agarwal” (2015) 53 taxmann.com 306 (Andhra Pradesh) has observed that where, in the absence of any incriminating material etc. found from the premises of the assessee during the course of search, statement of assessee recorded under section 132(4) would not have any evidentiary value. Similar view has been adopted by the Jaipur bench of the Tribunal in the case of “Shree Chand Soni vs. DCIT” (2006) 101 TTJ 1028 (Jodhpur).

The Hon’ble Delhi High Court in the case of “CIT vs. Harjeev Agarwal” in ITA No.8/2004 vide order dated 10.03.16 has observed that

a statement made under section 132(4) of the Act on a stand-alone basis, without reference to any other material discovered during search and seizure operation, would not empower the AO to make a block assessment merely because any admission was made by the assessee during search operation.

In the case of “Commissioner of Income Tax vs. Sunil Agarwal” (2015) 64 taxman.com 107 (Delhi-HC), the assessee therein, during the course of search, made a categorical admission under section 132(4) of the Act that the cash amount seized belonged to him and it represented undisclosed income not recorded in the books of accounts. The assessee did not immediately retract from the above admission but only during the assessment proceedings at a belated stage. In his retraction, the assessee stated that the surrender was made under a mistaken belief and without looking into books of account and without understanding law and that he had been compelled and perturbed by events of search and that the pressure of search was built so much that he had to make the surrender without having actual possession of the assets or unexplained investments or expenses incurred and that there was no such income as undisclosed. The Hon’ble Delhi High Court, after considering the fact and circumstances of the case, while dismissing the appeal of the revenue, observed that though the fact that the assessee may have retracted his statement belatedly, yet, it did not relieve the AO from examining the explanation offered by the assessee with reference to the

books of account produced before him. Although, a statement under section 132(4) of the Act carries much greater weight than the statement made under section 133A of the Act, but a retracted statement even under section 132(4) of the Act would require some corroborative material for the AO to proceed to make additions on the basis of such statement.

In the case of “Basant Bansal vs. ACIT” reported in (2015)63 taxmann.com 199 (Jaipur Trib.), having somewhat similar facts, the assessee therein, during the search and seizure action u/s 132 of the Act, offered a summary disclosure of income as undisclosed and the department accepted the summary surrender of income and thereafter advance tax for the said surrendered of income was also deposited, but thereafter it was contended by the assessee that the surrender was made under threat or coercion and that no incriminating material was found during the search action. The stand of the department was that the admission was voluntary and was not under a mistaken belief of fact or law and that the assistance had enough time to go through the facts of their case, law applicable in their case and take advice from their counsels and advisors before filing the letter of surrender of undisclosed/unaccounted income and that the admission by them was final and binding on them; The co-ordinate Jaipur Bench of the Tribunal, after overall appreciation of the fact and evidences before it, observed that the assessee’s surrender was not based on any

incriminating material and that the discloser being not voluntary and extracted by the department in creating a coercive situation cannot be relied solely to be basis of addition as undisclosed income. The co-ordinate bench of the Tribunal while relying upon various case laws of the higher authorities observed that it is well settled legal position that merely on the basis of a statement which is not supported by the department with cogent corroborative material cannot be a valid basis for sustaining such ad-hoc addition. The co-ordinate Jaipur Bench of the Tribunal (supra) further observed that the issue of existence of pressure, threat, coercion during search proceedings is to be judged by reference to the existing facts and circumstances, human conduct and preponderance of possibilities. During the search proceedings, record relating thereto being in exclusive custody of the searching officers, it is their wish and will which prevails during the fateful period. That it is almost impossible for the assessee to adduce demonstrative evidence of exerting such pressure. The co-ordinate bench of the Tribunal (supra) while holding so, apart from relying upon various decisions of the higher courts has also relied upon the decision of the Tribunal in the case of “Dy CIT vs. Pramukh Builders” (2008) 112 ITD 179 (Ahd.) wherein it has been held that even in the absence of proof of coercion or pressure, the statement by itself cannot be taken as conclusive. Therefore, merely in the absence of proof of pressure, threat, coercion

or inducement the statement cannot be held as conclusive and additions cannot be made by solely relying on a statement or a letter.

12. Even the CBDT Letter No.286/2/2003-IT(Inv) dated Oct 3, 2003 in this respect read as under:

“To

The Chief Commissioners of Income Tax, (Cadre Contra)&All Directors General of Income Tax Inv.

Sir,

Subject: Confession of additional Income during the course of search & seizure and survey operation – regarding

Instances have come to the notice of the Board where assesseees have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assesseees while filing returns of income. In these circumstances, on confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Departments. Similarly, while recording statement during the course of search it seizures and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.

Further, in respect of pending assessment proceedings also, assessing officers should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders

Yours faithfully,”

13. A perusal of the above circular also shows that it is in the notice of the statutory controlling body of the Income Tax Authorities that the revenue officials are used to take confessional statements from the person searched under force, pressure or threat and that is why they have made it mandatory that additions solely on the basis on such statements should not be made and that corroborative evidences should be collected or obtained before making such additions. The circular of the CBDT is binding on the revenue officials. In the facts and circumstances of this case, when seen in the light of above case laws and CBDT circular, additions in this case cannot be said to be justifiably made.

14. So far as the legal question raised by way of additional ground regarding contesting of the impugned addition made / despite the income being offered in the return of income is concerned, the issue is squarely covered by the decision of the Coordinate Mumbai Bench of the Tribunal in ‘Shri Pandoo P. Naig, vs ACIT’ ITA No. 7089/Mum/2011 & Others vide order dated 24.6.2016. The relevant part of the findings of the order of the Tribunal are reproduced as under:-

“14. Now coming to the point, whether, the claim put by the assessee Shri Pandoo P. Naig by way of additional ground before the Ld. CIT(A) regarding the deletion of addition of Rs.4 crore offered during the

survey action and thereby offered in the return of income can be allowed at this stage?

The Ld. Counsel for the assessee in this respect has placed reliance on the decision of the Hon'ble Supreme Court in the case of "National Thermal Power Co. Ltd." vs. CIT" 229 ITR 383. The facts before the Hon'ble Supreme Court were that the assessee in that case offered the interest amount for taxation and the assessment was completed on that basis. Before the Ld. CIT(A), the assessee though had taken a number of grounds of appeal, however, the inclusion of the said amount of interest was not challenged. The inclusion of the said amount of interest was not objected to even in the grounds of appeal as originally filed before the Tribunal. However, the assessee by way of subsequent letter raised the additional ground in relation to the said inclusion of interest into the income of the assessee. In the above circumstances, the question before the Hon'ble Supreme Court was "Where on the facts found by the authorities below a question of law arises (though not raised before the authorities) which bears on the tax liability of the assessee, whether the Tribunal has jurisdiction to examine the same?" The Hon'ble Supreme Court while answering the said question observed that under section 254 of the Income Tax Act, the power of the Tribunal in dealing with the appeals is expressed in the widest possible terms; the power of the Tribunal under section 254 is not restricted only to decide the grounds which arise from the order of the Commissioner of Income Tax (Appeals); that both the assessee as well as the department have a right to file an appeal/cross objection before the Tribunal and the Tribunal is not prevented from considering questions of law arising in assessment proceedings although not raised earlier. While answering the question in affirmative, the Hon'ble Supreme Court concluded that the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the

authorities below and having a bearing on the tax liability of the assessee.

15. The facts of the case in hand are on better footing. In the case in hand, though under consistent pressure, the assessee offered the additional income for taxation in the assessment proceedings but when he was burdened with many more additions, he at the first instance during the appeal before the Ld. CIT(A), challenged the offer of additional income on the basis of statement recorded under section 133A. Even the said ground was also admitted by the Ld. CIT(A) for adjudication though finally decided against the assessee. The full bench of the Hon'ble Bombay High Court in the cases of "Ahmedabad Electricity Company Ltd. vs. CIT" and "Godavari Sugar Mills Ltd. vs. CIT" by way of a common order dated 30.04.1992 (1993) 199 ITR 351 has observed that the basic purpose of an appeal procedure in an income tax matter is to ascertain the correct tax liability of the assessee in accordance with law. Therefore, at both the stages, either by the Appellate Assistant Commissioner or before the Appellate Tribunal, the appellate authority can consider the proceedings before it and the material on record before it for the purpose of determining the correct tax liability of the assessee. The appellate authorities, of course, cannot travel beyond the proceedings and examine new source of income, for that purpose other separate remedies are provided to the department under the Income Tax Act. The Hon'ble full bench of the Bombay High Court observed that apart from the above, there was nothing in section 254 or section 251 which would indicate that the appellate authorities are confined to considering only the objections raised before them or allowed to be raised before them either by the assessee or by the department, as the case may be. They can consider the entire proceedings to determine the tax liability of the assessee.

The Hon'ble Bombay High Court in the case of "CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd." (2012) 349 ITR 336 (Bom.) has observed that the assessee is entitled to raise not merely additional legal submissions before the appellate authorities, but is also entitled to raise additional claims before them. The appellate authorities have jurisdiction to deal not merely with additional grounds, which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed. The words 'could not have been raised' must be construed liberally and not strictly. There may be several factors justifying the raising of a new plea in an appeal and each case must be considered on its own facts. The co-ordinate bench of the Tribunal in the case of "Shri Chandrashekhar Bahirwani" ITA No.7810/M/2010 and 6599/M/2011 vide order dated 17.06.2015 while deciding the question as to whether the income cannot be assessed less than the returned income has observed as under:

"5. Now coming to the finding of the Ld. CIT(A), that income cannot be assessed less than the returned income, the Ld. A.R. of the assessee has submitted before us that the action of the Ld. CIT(A) in rejecting the claim of the assessee on this ground was not justified. He has further relied upon the decision of the Hon'ble Gujarat High Court in the case of "Gujarat Gas Ltd. vs. JCIT" (2000) 245 ITR 84. In the said case, the words of the Circular No.549, para 5.12, dt. 31st October, 1989, providing that the assessed income under section 143(3) shall not be less than the returned income was considered by the Hon'ble High Court and it was held that as per proviso to section 119 of the Act, the Board cannot issue instructions to the Income Tax Authority to make a particular assessment or to dispose of a particular case in a particular manner as well as not to interfere with the discretion of the Commissioner

in exercise of his appellate functions. It was further held that the AO, while exercising his quasi judicial powers, was not bound by the said circular and should have exercised his powers independently. The Hon'ble High Court, therefore, directed the AO to make the assessment without keeping in mind the said circular. It may be further observed that the Hon'ble Bombay High Court in the case of 'Pruthvi Brokers & Shareholders Pvt. Ltd.' ITA No.3908 of 2010 decided on 21.06.12, while relying upon the various decisions of the Hon'ble Supreme Court and other Hon'ble High Courts has held that even if a claim is not made before the AO, it can be made before the appellate authorities. The jurisdiction of the appellate authorities to entertain such a claim is not barred. The Hon'ble High Court has further observed that the decision of the Hon'ble Supreme Court in the case of 'Goetze (India) Limited v. CIT' (2006) 157 Taxman 1, relating to the restriction of making the claim through a revised return was limited to the powers of the Assessing Authority and the said judgment does not impinge on the power or negate the powers of the appellate authorities to entertain such claim by way of additional ground. Even otherwise, the Ld. CIT(A) ought to have considered the claim of the assessee in exercise of his appellate jurisdiction under section 250 of the Act. Moreover, if the assessee is, otherwise, entitled to a claim of deduction but due to his ignorance or for some other reason could not claim the same in the return of income, but has raised his claim before the appellate authority, the appellate authority should have looked into the same. The assessee cannot be burdened with the taxes which he otherwise is not liable to pay under the law. Even a duty has also been cast upon the Income Tax Authorities to charge the legitimate tax from the tax payers. They are not

there to punish the tax payers for their bonafide mistakes. In view of our above observations, it is held that the assessee is not liable to pay Capital Gains Tax, though originally he had subjected himself to the said tax as per his return of income. The AO is directed to process the claim of refund in this respect as per provisions of the law.”

16. In view of the above observation, we hold that the Ld. CIT(A) though, rightly admitted the question of law as to whether the income offered by the assessee in the return of income consequent to offer made in his statement recorded during the survey action can be challenged before the appellate authority, but wrongly decided the same in favour of revenue. In view of our findings given above and in view of the various case laws as discussed above, we have no hesitation to hold that the additional income was returned by the assessee perhaps under force, pressure, threat or coercion and under the mistaken belief. The assessee, in our view, was not liable to pay tax on the said additional income returned. We, accordingly direct the Department to refund the taxes, if any, paid by the assessee in respect of additional income offered during the survey action.”

The issue is accordingly decided in favour of the assessee.

In view of our observations made above, the appeal of the assessee is hereby allowed and the impugned addition made by the Assessing Officer are ordered to be deleted and if the assessee has already paid any taxes in respect of the impugned addition, the same be refunded to the assessee.

Since the facts in all the captioned appeals are identical and the identical legal issue has been raised in all the appeals either through the

main grounds or through additional ground of appeal, hence, in view of our findings given above on the legal issue, all the aforesaid captioned appeals of the assessee stand allowed.

Order pronounced in the Open Court on 27.01.2020

Sd/-

(अन्नपूर्णा गुप्ता / ANNAPURNA GUPTA)

लेखा सदस्य/ Accountant Member

Dated : 27.01.2020

“आर.के.”

Sd/-

(संजय गर्ग / SANJAY GARG)

न्यायिक सदस्य/ Judicial Member

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,

सहायक पंजीकार/ Assistant Registrar