आयकर अपीलीय अधिकरण "ए" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI

माननीय श्री अमरजीत सिंह, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।

BEFORE HON'BLE SHRI AMARJIT SINGH, JM AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

(Hearing through Video Conferencing Mode)

आयकरअपील सं./ I.T.A. Nos.5512-5516/Mum/2019
(**निर्धारण वर्ष /** Assessment Years: 2010-11 to 2014-15)

Mr. Anil Agrawal (HUF) 2401-2402, Anmol Pride Off. Patel Auto, S.V. Road, Goregaon (W), Mumbai-400 062.	**बनाम**/ Vs.	**DCIT-Central Circle-3(4)** Room No.1915, 19th Floor Air India Building, Nariman Point Mumbai-400 021.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AACHA-9591-E**		
(अपीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Revenue by	:	Shri Rajeev Harit-Ld. CIT-DR
Assessee by	:	Shri Rajiv Khandelwal & Shri Aakash Kumar-Ld. ARs

सुनवाई की तारीख**/** **Date of Hearing**	:	12/01/2021
घोषणा की तारीख / **Date of Pronouncement**	:	05/04/2021

आदेश / O R D E R

Per Bench

1.1 Aforesaid appeals by assessee for Assessment Years (AY) 2010-11 to 2014-15 contest separate orders of learned first appellate authority. However, facts and issues are more or less similar. Therefore, the appeals were heard together and are now being disposed-off by way of this common order for the sake of convenience and brevity. It is admitted position that adjudication in any year would substantially apply to all the other years also.

1.2 In the above background, the appeal for AY 2010-11 assails the order of Ld. Commissioner of Income Tax (Appeals)-51, Mumbai [CIT(A)], Appeal No.CIT(A)-51/DCIT-CC 3(4)/IT-252/17-18 dated 15/07/2019 on following grounds of appeal: -

1. The Commissioner of Income-tax (Appeals) -51, Mumbai (hereinafter referred to as the CIT(A) erred in upholding the action of the Deputy Commissioner of Income-tax, Central Circle - 3(4), Mumbai (hereinafter referred to as the Assessing Officer) in issuing a notice under section 153A of the Act. The appellant contends that the notice issued under section 153A is *ab initio void* inasmuch as the jurisdictional conditions for the issue of the said notice have not been complied with and consequently, the assessment framed is bad in law and needs to be quashed. The appellant further, contends that the notice issued under section 153A is *ab initio void* inasmuch as no incriminating documents have been found during the course of search proceedings and consequently, the assessment framed is bad in law and needs to be quashed.
2. The Assessing Officer erred in not complying with the provisions of section 153D of the Act and, thereby rendering the entire assessment proceedings null and void. The appellant contends that on the facts and in the circumstances of the case and in law, the Assessing Officer ought to have complied with the provisions of section 153D of the Act and hence, the entire assessment proceedings is bad in law and thus, the assessment order needs to be quashed.
3. The CIT(A) erred in upholding the action of the Assessing Officer in addition of Rs.44,39,566 under section 68 of the Act, holding the sale proceeds of Splash Media & Infra Limited to be non genuine and thereby not allowing claim of short-term capital gains of Rs.25,59,895 on sale of such shares. The appellant contends that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in considering the transaction of sale of shares of Splash Media & Infra Limited to be non genuine inasmuch as the said shares have been purchased during an earlier year are investments; the same being sold shall necessarily give rise to capital gains and the impugned shares being short-term capital asset, the capital gains Rs.25,59,895 are short-term capital gains; accordingly, the impugned addition under section 68 of the Act is not justified. The appellant further, contends that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in considering the transaction of sale of shares of Splash Media & Infra Limited to be non genuine inasmuch as the Assessing Officer has relied on the statement on oath of Mr Anil Agrawal obtained on 12th April, 2015, which itself is retracted and filed with the DGIT (Inv) and the Additional DGIT (Inv) on 15th April, 2015. The appellant further, contends that the CIT(A) ought not to have upheld the action of the Assessing Officer in making the impugned addition inasmuch as the Assessing Officer has brought nothing on record to prove that cash has emanated from the coffers of the appellant. The appellant further, contends that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in making the impugned addition inasmuch as the same is not arising out of any incriminating documents found during the course of search and hence, the impugned addition is vitiated in law.
4. The CIT(A) erred in upholding the action of the Assessing Officer in making an addition of Rs.2,66,374 under section 69C of Act, being unexplained commission expenditure allegedly incurred for availing the alleged accommodation entries of bogus capital gains,

which has been worked out at 6% of Rs.44,39,566. The appellant contends that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in making the impugned addition inasmuch as there is no capital gains that is bogus in nature and hence, the impugned addition ought to be deleted. The appellant further, contends that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in making the impugned addition and the Assessing Officer has made the impugned addition only on the basis of surmises and conjectures and failed to bring any evidence on record to suggest that the appellant has incurred the impugned expenditure and hence, the impugned addition ought to be deleted. The appellant further, contends that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in making the impugned addition inasmuch as the same is not arising out of any incriminating documents found during the course of search and hence, the impugned addition is vitiated in law.

Upon perusal of grounds of appeal, it is evident that the assessee has challenged the validity of assessment framed u/s 153A on legal grounds inter-alia by pleading that no incriminating material was found during the course of search proceedings. The assessee has also assailed the quantum additions on merits.

1.3 We have carefully considered the rival submissions, oral as well as written, as made during the course of hearing before us. We have also perused relevant material on record including orders of lower authorities. The judicial pronouncements as cited during the course of hearing have duly been deliberated upon. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs. The Ld. AR has assailed the impugned additions, *inter-alia*, by pleading that the additions have been made merely on the basis of suspicion, conjectures & surmises and on the basis of third-party statements without there being any cogent / corroborative material on record to substantiate the additions. The Ld. CIT-DR Shri Rajiv Harit, on the other hand, submitted that the gains earned by the assessee were bogus in nature as per the findings of investigation wing and therefore, the same has rightly been

added to the income of the assessee. The Ld. CIT-DR also filed written submissions in support of the orders of lower authorities and relied upon various judicial pronouncements. The statement recorded by the department in case of various operators, stock-brokers, exit-providers has been placed by way of separate paper-book. However, Ld. AR contended that majority of these statements were never confronted to the assessee during proceedings before lower authorities and no opportunity of cross-examination, as demanded by the assessee, was ever provided and therefore, the same would not be relevant for adjudication since neither Ld. AO not Ld. CIT(A) has referred to these statements / documents. In turn, reliance has been similarly been placed on various judicial pronouncements to support the assessee's case. These arguments, written submissions as well as case laws have duly been considered by us while adjudicating the appeal

2. Assessment Proceedings

2.1 The material facts are that the assessee being resident HUF was assessed for the year under consideration u/s 143(3) r.w.s 153A of the Act in view of the fact that the assessee was subjected to search & seizure action u/s 132 on 09/04/2015. The original return of income was filed by the assessee on 28/07/2010 at Rs.43.97 Lacs. On the date of search, no assessment proceedings were pending against the assessee and accordingly, it was a case of non-abated assessment year. The main allegation of revenue was that the assessee introduced its own unaccounted money in the garb of bogus Long-Term / Short-term Capital Gains (LTCG / STCG). Accordingly, a search was carried out at premises of Shri Anil Agarwal, Karta of assessee-huf on 09/04/2015. His statement was recorded u/s 132(4) on 12/04/2015 during the course of

search proceedings. A copy of the same is on record and we have perused the same. Shri Anil Agarwal is stated to be director in an entity namely M/s Comfort Securities Ltd. (CSL). M/s CSL is stated to be a registered stock broker with various stock exchanges. On the basis of statement, it was alleged by Ld. AO that many of the paper / bogus entities were allowed to become clients of M/s CSL and also allowed to do trading in shares so as to provide accommodation entry of bogus capital gains. Shri Anil Agarwal is stated to have become director, in individual capacity, of an entity namely Splash Media & Infra Ltd. (SMIL) in June, 2015. This entity is now known as Luharuka Media and Infra Limited as is evident from orders of lower authorities.

2.2 In response to notice u/s 153A dated 08/08/2016, the assessee offered the same return of income as originally offered at Rs.43.97 Lacs. The statutory notices were issued in due course wherein the assessee was directed to file the requisite details and information. During assessment proceedings, it transpired that the assessee-HUF sold shares of two entities namely M/s First Financial Services Limited (FFSL) and M/s Splash Media & Infra Ltd. (SMIL) during various previous years relevant to AYs 2010-11 to 2015-16. The shares of SMIL have been sold during AYs 2010-11 to 2012-13 whereas the shares of M/s FFSL have been sold during AYs 2013-14 & 2014-15. The gains earned on sale of these scrips in the shape of Long-Term Capital Gains (LTCG) were claimed to be exempt u/s 10(38) whereas Short-Term Capital gains (STCG) earned on these shares were offered to tax at concessional rate of 15% u/s 111A. However, the gains so earned by the assessee in various years were treated as bogus and added to the income of the assessee. In other words, the exemption claimed u/s

10(38) on LTCG and benefit of concessional rate of tax on STCG as claimed was denied to the assessee. The stand of Ld. AO, upon confirmation by Ld. CIT(A), is under challenge before us.

2.3 In this Assessment Year, the assessee reflected Short-Term Capital Gain (STCG) of Rs.25.59 Lacs on sale of a scrip namely M/s Splash Media & Infra Limited (SMIL). The 22502 number of shares were stated to be purchased by the assessee on 27/03/2009 at aggregate cost of Rs.18.79 Lacs which were sold between 19/08/2009 to 23/09/2009 for aggregate consideration of Rs.44.39 Lacs, yielding STCG of Rs.25.59 Lacs which was offered at a concessional rate of 15%. In support of purchase transactions, the assessee placed on record purchase settlement bills issued by its broker M/s Comfort Securities Limited (CSL), ledger extracts, demat transaction statement evidencing delivery of shares in assessee's demat account and bank statement evidencing payment / settlement of funds through banking channels. Similarly, the assessee placed on record sales settlement bills, demat transaction statement evidencing outward delivery of shares from assessee's demat account, ledger extract of stock brokers and bank statements evidencing receipt of funds through banking channels. The transactions of sale as well as purchase were stated to be carried out through registered stock-broker namely M/s Comfort Securities Limited (CSL) on recognized stock exchange in online mechanism.

2.4 During the course of search proceedings, statement of Shri Anil Agarwal (Karta of assessee-HUF) was recorded on 12/04/2015 u/s 132(4), a copy of which is on record. Shri Anil Agarwal submitted that his concern M/s Comfort Securities Limited (CSL) had business nexus with various concerns. M/s CSL was, inter-alia, stated to have been rendering

brokerage and consultancy services to M/s First Financial Services Limited (FFSL) and M/s Splash Media & Infra Ltd. (SMIL). M/s CSL did trading of various scrips including FFSL on behalf of its clients. However, it was alleged by Ld. AO that the clients had booked heavy losses in the trading of these shares since shares were purchased at high prices but sold when the prices were extremely low. It was alleged that trading so done was not a normal trading pattern. As against this, Shri Anil Agarwal maintained that the clients willingly purchased the scrips and trading so done by them was a pattern of transactions through the stock exchange to obtain bogus Long-Term Capital Gain and Short-Term Capital Losses by the beneficiaries. In reply to question nos. 8 & 9, the modus-operandi adopted by entry operators to provide LTCG / STCL was enumerated. Shri Anil Agarwal made admissions to have earned unaccounted commission of Rs.20 Lacs and agreed to offer the same over and above regular source of income. No reply was given against question of capital gains earned from the scrip of FFSL by assessee-HUF. Subsequently, he was also confronted with the fact that Shri Anuj Agarwal of Korp Securities and Shri Pravin Agarwal of Gateway Financial Services Ltd. (share broking firms based at Kolkata) have confirmed on oath that the scrips of FFSL and SMIL were penny stock scrips. But no reply was furnished by the assessee against the same.

2.5 On the basis of statement given by Shri Anil Agarwal, Ld.AO concluded that Shri Anil Agarwal accepter his role as a facilitator of arranging accommodation entries. The observations of Ld.AO, in para 3.3 of the order, were as follows:-

> **3.3** In his statement recorded u/s.132(4) on 12.04.2015, Shri Anil Agarwal has accepted his role as a facilitator whereby he had admitted that he introduced the directors of First Financial Services Ltd. and Rutron International Ltd. to some

> persons who were into the business of arranging accommodation entries. This acceptance of his role is only partial as Shri Anil Agarwal has been identified as the operator of the scrips of First Financial Services Ltd, Splash Media & Infra Ltd, FACT Enterprise Ltd and Rutron International Ltd by Shri Raj kumar Kedia who is a Delhi based entry operator. He has also accepted that many of the paper/bogus entities were allowed to become clients of Comfort Securities Ltd and were allowed to do trading in shares so as to provide accommodation entry of bogus LTCG.

2.6 The Ld. AO further observed that since no reply was furnished by the assessee with respect to gains earned by assessee-huf on sale of scrip of FFSL and since the shares of FFSL were allegedly used for providing accommodation entry of bogus capital gains and therefore, a conclusion was to be drawn that the gain so earned by the assessee-HUF would also be accommodation entry in nature.

2.7 Post search proceedings, statement of Shri Anil Agarwal was again recorded u/s 131 on 27/08/2015, the relevant portion of which has been extracted in para 3.4 of the assessment order. Shri Anil Agarwal maintained that M/s CSL provided consultancy services to FFSL. He also denied having met Shri Chandrakant Mane (director of FFSL). It was noted by Ld. AO that Shri Anil Agarwal took over M/s SMIL and became director of that entity on 24/06/2015. The said entity was stated to have been engaged in real estate development having project at Charkop, Kandivali, Mumbai. Regarding question of manipulation in share prices of SMIL, Shri Anil Agarwal submitted that since he became director only on 24/06/2015, he had no idea about the same. Further, entire process of trading took place in online mechanism through the stock exchange platform. He also denied having carried out any accommodation entries.

2.8 In para 5.2, Ld. AO upon perusal of share prices of SMIL noted that there was sharp rise in the prices which was not correlated

and commensurate with the financials of the company. There was phenomenal increase in share prices which would defy any logic of shares trading pattern in primary or secondary capital market. In the said background, Ld. AO perused financial statements as well as returned income of SMIL for various years and tabulated the same in paras 6 to 6.4 of the assessment order.

2.9 It transpired that SMIL had allotted warrants to non-promoters on preferential basis. These warrants were later on converted into equity shares at Rs.83/- per share. These shares were listed on stock exchange on 29/10/2009 after which there was sharp rise in the prices. There was bonus issue in the ratio of 3:1 on 23/12/2009. Later on the shares were split in the ratio of 1:10 on 29/07/2010. Thereafter, there was phenomenal rise in share price up-to 25/01/2011 despite the fact that there was no corporate announcement to justify the sharp rise in the prices which would lead to a conclusion that the price-rise was achieved by manipulation and rigging through controlled trade in miniscule volume.

2.10 The exit providers of the scrip of SMIL was identified which are tabulated in para 7.4.1 of the order. The investigation report with respect to some of the exit providers alleged that these were bogus concerns being managed by various entry-provider groups. In assessee's case, notices u/s 133(6) was issued to some of the exit providers. However, no satisfactory reply was stated to be received against the same.

2.11 On the basis of aforesaid facts, following conclusions were drawn by Ld. AO in para-8 of the order:-

> **8.** The above discussion establishes the following points:

* The financials of Splash Media & Infra Ltd. was very poor during the period when the investment was made by the assessee.
* The business profile shows that the company was not engaged into any substantial business activity.
* The business profile shows that the company was not having any future plans which could attract investors to invest in the company.
* The funds that were raised through preferential allotment have not been used for any business expansion as indicated prior to preferential issues and have instead been further advanced as loans and investments.
* The whole process of preferential allotment was, apparently a prearranged and well managed process so as to allot preferential shares to beneficiaries of bogus LTCG which could later be sold by them for booking accommodation entry of bogus LTCG/STCG in the garb of sale proceeds on sale of shares.
* The share prices were manipulated on the stock exchange through artificial influences.
* Various share brokers whose statements have been recorded have been used for providing entry of bogus LTCG /STCG /loss.

Consequently, the claim so made by the assessee was to be rejected and sale proceeds of the shares were to be treated as undisclosed income of the assessee.

2.12 However, the assessee maintained that the short-term capital gains earned during the year were genuine and the same could not be treated as undisclosed income of the assessee. The assessee also controverted the conclusion of Ld. AO by submitting that SMIL had development rights in projects at Juhu and Kandivali in Mumbai and there was a bright chance for the company to increase profits.

The attention was drawn to the fact that shares were purchased through recognized stock broker from stock exchanges and there was no preferential allotment to the assessee in a pre-arranged process as alleged by Ld. AO. Further, no violation regarding price manipulation was found by any authority. The shares were listed and trading took place in online mechanism and therefore, the assessee would not know the identity of the exit providers. The assessee also demanded cross-examination of exit-providers as per allegations of Ld. AO. It was

submitted that the shares were received in demat account of the assessee and transactions of sale / purchase of the shares took place through banking channels. The assessee also demanded whether there was any mention in the report of the investigation wing that the assessee had given cash to anybody for getting such long term capital gains and if so, the opportunity to cross verify such person be provided to the assessee.

2.13 However, Ld. AO maintained the allegations that the assessee obtained accommodation entries in the form of bogus STCG and the entire transaction was a colorable device to route unaccounted income in the regular books of account. The assessee invested into share of unknown entity whose financials would not justify the investments. There was no reasonable justification of making the investment. The share prices rose astronomically defying all logic of stock market price movements. The accommodation entry providers confirmed the modus-operandi and admitted that the said entity was merely a paper-company used for the purpose of providing accommodation entries. The exit-providers also admitted to buying the shares at jacked up prices in lieu of cash payments. Though the existence of documentation in support of sale and purchases of shares was not under dispute, however, in the backdrop of various facts and applying the principle of preponderance of probability in terms of decision of Hon'ble Supreme Court in the case of **Durga Prasad More (82 ITR 540)** and **Sumati Dayal (214 ITR 801)**, it was to be concluded that the assessee indulged in taking accommodation entries in the nature of bogus STCG. In support, reliance was placed on various

judicial pronouncements which have already been enumerated in the assessment order.

2.14 Finally, the position with respect to M/s SMIL was summarized by Ld. AO in para 12.1 in the following manner: -

12.1 The following points summaries that Splash Media & Infra Ltd. is a bogus penny stock company:
The business profile and financials of Splash Media & Infra Ltd. show that the company was not engaged into any substantial activity, esp. when the preferential shares were allotted. It is also seen that the company was not having any future plans which could attract investors from all over India to invest in the company.
The whole process of preferential allotment was a prearranged and managed process so as to allot preferential shares to beneficiaries of bogus LTCG/STCG.
The reported profits were also not commensurate with the price rise. The shares were rigged on the Stock Exchange. The price of Splash Media & Infra Ltd. has moved in absolute disregard to the general market sentiments.
Various share brokers have confirmed the fact that the shares of Splash Media & Infra Ltd. have been used for providing entry of bogus LTCG/STCG.
During this period of price rigging, the volume of the shares traded on each trading day was very low and on each day just 1-2 trades have been done with a constant rise in the price of the shares which was kept just short of the circuit limit for price rise as per the exchange guidelines.
Various Exit Providers have confirmed that they have purchased the shares of Splash Media & Infra Ltd. to provide entries of bogus LTCG/STCG.
The Statements on oath of Exit Providers constitutes a strong testimony in order to establish the manipulation of the said scrip leading to conversion of unaccounted income into bogus LTCG/STCG through accommodation entries by various beneficiaries including the assessee group.
Shri Anil Agrawal has in response to Question No. 12 of his statement recorded on 12.04.2015 stated that apart from the brokerage income of M/s. Comfort Securities Ltd., he had earned cash commission of Rs.20,00,000/- from the business of providing accommodation entries of bogus capital gains in penny stock companies.

2.15 In the light of above conclusion, the assessee's claim of STCG was rejected and the entire sales proceeds of Rs.44.39 Lacs as received by the assessee on sale of shares was brought to tax as unexplained cash credit u/s 68. To procure these entries, the assessee must have paid some commission in cash which was estimated at 6%. Accordingly, estimated commission of Rs.2.66 Lacs was also added to the income of the assessee.

3. Appellate Proceedings

3.1 During appellate proceedings, the assessee, by way of additional ground, contested the validity of assessment made u/s 153A pursuant to search conducted u/s 132. It was submitted that undisclosed income was to be determined only on the basis of evidence, material or document found as a result of the search and since there was no incriminating material found during search, the additions could not be made. On the date of search on 09/04/2015, no assessment proceedings were pending against the assessee. The capital gain earned by the assessee was duly reflected in original return filed u/s 139(1) on 28/07/2010. Hence, this being non-abated assessment year, the returned income could not be disturbed in the absence of any incriminating material unearthed during the course of search action.

3.2 The Ld. CIT(A) noted that search action on Shri R.K.Kedia & others on 13/06/2014 by investigation wing of Delhi exposed major scam of providing accommodation entries of bogus LTCG to the beneficiaries in a number of scrip including FFSL. The same led Kolkata investigation wing to carry out detailed investigation of large number of stock-brokers and entry operators wherein 84 scrips were identified as penny stocks. During the search action on R.K.Kedia & group, the scrips of FFSL & SMIL were identified as penny stocks wherein the prices were manipulated to provide bogus LTCG to various beneficiaries. It was alleged that the scrip of FFSL and SMIL were being controlled by Shri Anil Agarwal which led to survey action on Shri Anil Agarwal. It was admitted that as per the instructions of Shri R.K.Kedia, the scrip of FFSL was being manipulated so as to provide bogus LTCG to the beneficiaries. Moreover, share brokers namely Shri Anuj Agarwal of Korp

Securities and Shri Pravin Agarwal of Gateway Financial Services Ltd. admitted that the scrips of FFSL and SMIL were penny stock scrips. Therefore, heavy onus was on assessee to substantiate the genuineness of gain earned on these scrips. The allegation of price rigging would draw support from the fact that SEBI, in its final order dated 02/04/2018, found FFSL, assessee, its Karta-Shri Anil Agarwal and certain entities of the assessee group including M/s CSL to be guilty of rigging the share prices and restrained / prohibited them from accessing the market or trading for a further period of 3 years.

3.3 The admission made by the assessee in terms of decision of Hon'ble Apex Court in **P. R. Metrani V/s CIT 2006 287 ITR 209** wherein it was explained that books of account, documents, money, bullion, jewelery or other valuable article thing or any statement recorded of the persons searched may be used as evidence for any proceedings under the act, would constitute incriminating material. Further, the statement given on oath u/s 132(4) would have evidentiary value as held by Hon'ble Allahabad High Court in **Gargi Devi Jwala Prasad V/s CIT (1974 96 ITR 97)** and Delhi High Court in **Dhingra Metal Works (328 ITR 384).**

3.4 In view of admission made by Shri Anil Agarwal that the scrip of FFSL was being manipulated and keeping in view his role in LTCG scam as well as the role of certain exit-providers who were the clients of M/s CSL for which mandatory physical verifications were never carried out, has to be considered as incriminating evidence to implicate the assessee. Finally, legal arguments raised by the assessee, in this regard, were dismissed with following observations: -

5.7 As noted earlier, in course of the search action on 09.04.2015, Shri Anil Agarwal admitted that the scrips of FFSL etc are being manipulated and also explained his role in the LTCG/STCG scam as well as the role of certain exit providers, who were clients of M/s. Comfort Securities Ltd. for which mandatory physical verifications were never carried out. As per the records of the assessee it was confirmed that the said exit providers are bogus clients of M/s. Comfort Securities Ltd., who were introduced by the Directors of the said Penny Stock companies. Further, it is also relevant to note that in the course of the survey carried out on the assessee group along with the search action in the case of R K Kedia, the statement of R K Kedia that Shri Anil Agarwal is the Scrip Operator for the scrips of FFSL, SMIL, etc was confronted to Shri Anil Agarwal. The said statement of R.K. Kedia was not a bland statement but was on the basis of incriminating material found from the premises of R K Kedia, like parallel ledger accounts of the unaccounted transactions with various business associates including Shri Anil Agarwal. On the issue as to whether an incriminating statement can be considered to be an incriminating evidence for the purpose of search assessment, it will be relevant to consider the decision of the Hon'ble Supreme Court in the case of *P.R. Metrani v. CIT* [2006] 287 ITR 209/157 Taxman 325 (SC). It has been explained by the Hon'ble Supreme Court that the books of accounts, documents, money, bullion, jewellery or other valuable article or thing and **any statements recorded of the persons searched may be used as evidence for any proceedings under the** Act. The relevant portion of the order of the Hon'ble Supreme Court is reproduced as under:

> *"18. Section 132 is* a Code *in itself. It provides for the conditions upon which and the circumstances in which the warrants of authorization can be issued. Subsection (2) authorizes the authorized officer to requisition the services of any police officer or of any officer of the Central Government or of both to assist him for all or any of the purposes for which the search is conducted. Under subsection (4) the authorized officer can during the course of 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 persons during such examination may thereafter be used in evidence in any proceeding under the Act."*

5.8 Further, proceedings before the Income-tax authorities, as explained by the Allahabad High Court in ***Gargi* Devi *Jwala Prasad* v. *CIT* [1974] 96 ITR 97,** are considered to be of judicial nature where the issues are decided on the basis of evidences which can be oral or documentary. Oral evidences, *inter alia,* include statements which are made before the income-tax authority in relation to matter of inquiry and may include examination of the assessee itself. Also, the statement on oath recorded in course of the search action u/s 132(4) has been held to be of evidentiary value by the Hon'ble Delhi High Court in the case of **Dhingra Metal Works (328 ITR 384)** and the Hon'ble Kerala High Court in the case of **Paul Mathews (263 ITR 101) as** against statement on oath recorded u/s 133A.

5.9 In view of the aforesaid judicial decisions, the statement on oath recorded of Shri Anil Agarwal wherein he admitted that the scrips of FFSL etc are being manipulated and also explained his role in the LTCG scam as well as the role of certain exit providers, who were the clients of M/s. Comfort Securities P. Ltd, for which mandatory physical verifications were never carried out, has to be considered as incriminating evidence to implicate the assessee. This is all the more essential considering that there were a number of developments prior to the search action in the case of the assessee including various searches carried out by the Department exposing the scam of bogus LTCG, the in-depth investigation carried out by the SEBI to ascertain price rigging in the scrip of FFSL etc. !n

view of these developments, which were very much in the knowledge of the assessee, it is but natural to assume that the assessee would have ensured that the incriminating material to the extent, possible is either hidden or destroyed.

5.10 Further, earlier the search assessments used to be finalized u/s 158BC/BD which was commonly called as Block Assessments. In the Block Assessments, additions could only be made in respect to issues wherein undisclosed income was detected in course of the search action on the basis of incriminating documents. The issues arising from the regular returns of income were to be examined only during the regular assessment proceedings. Now, it is more or less settled by the Hon'ble Courts that the same principles are also applicable in respect of the search assessments finalised u/s 153A/C. It has been held by the Hon'ble Courts that the non-abated assessments can be disturbed only if there is incriminating material unearthed during the search action. Earlier in the Block Assessments, the assessees used to challenge the additions made related to the transactions for which entries had been duly made in the regular books of accounts on the ground that the transactions have been duty recorded in the regular books and therefore cannot be treated as undisclosed transactions. Such an issue came up before the Hon'ble ITAT Ahmedabad in the case **of N K Proteins** Ltd (83 **TTJ Ahd** 904).The Hon'ble ITAT Ahmedabad held that it cannot be said that even if the material found during the course of search exposes the falsity of the entries made in the regular books of accounts, the consequent concealed income cannot be assessed as undisclosed income in Block Assessment. This decision of the Hon'ble ITAT Ahmedabad has also been approved by the Hon'ble Gujarat High Court. In the instant case, the falsity of the claim of LTCG was exposed in the search action and therefore, in principle the action of the AO of making the said additions while completing the assessment u/s 153A rws 143(3), cannot be faulted.

5.11 In view of the above detailed discussion, no infirmity is found in the action of the AO in undertaking said action u/s 153A rws 143(3) since there was sufficient evidence to incriminate the assessee in the form of statements recorded of Shri Anil Agarwal wherein he admitted that the scrips of FFSL, Rutron International Ltd., etc. were manipulated and also explained his role in the LTCG scam as well as the role of certain exit providers who were the clients of M/s. Comfort Securities P. Ltd. for which the mandatory physical verifications were never carried out. Further, a parallel ledger account of the unaccounted transactions of the Assessee Group with R.K. Kedia were found from the premises of R K Kedia in course of his search action. Moreover, in the statement given by R K Kedia in his search, Shri Anil Agarwal was identified as a Scrip Operator for the scrips of SMIL, FFSL, etc and which was also accepted by Shri Anil Agarwal in the statement recorded in his simultaneous survey action. Accordingly, the additional Grounds of Appeal being Ground Nos. 6 to 9 are dismissed.

4. Assessee's Submissions to Ld. CIT(A) on merits

4.1 During appellate proceedings, the assessee drew attention to the documentary evidences which were in the shape of purchase / sale contract notes, copy of demat statement evidencing movement of shares, copies of broker ledger showing purchase and sale transactions, bank statements evidencing movement of funds through banking

channels, evidence in support of payment of securities transactions tax (STT) etc. It was submitted that the transactions of shares took place through registered broker on the stock exchange and therefore, there would be no privity of contract between the assessee and the other party. The assessee would not know the identity of the seller or purchaser. The evidences and documents furnished by the assessee were neither found to be false nor fabricated by Ld.AO. The Ld. AO doubted the genuineness of sale transactions merely on the basis of statement of various person recorded by the investigation wing. The claim was rejected merely on suspicion and presumption. The Ld. AO did not bring any material or evidence on record to falsify the claim of the assessee or to hold that the transactions were bogus.

4.2 The assessee controverted the findings of Ld. AO by submitting that in statement given u/s 132(4), it was stated that the assessee had business nexus with various entities and provided consultancy services to SMIL but did not said anything about bogus gains in respect of shares of SMIL. He was not the director of SMIL at the time of transaction under consideration. He merely explained the modus operandi of providing bogus capital gains but in assessee's case, the shares were directly transacted in stock exchange through registered broker at prevailing market prices. The attention was also drawn to the fact that the statement so made by the assessee was already retracted which has grossly been ignored while making the assessment order and the retracted statement could not be the basis of the assessment.

4.3 The action of Ld. AO was further assailed by submitting that Ld. AO wrongly drew inference against the assessee on the basis of enquiry made by investigation wing in respect of some of the buyers who

ultimately bought the shares sold by the assessee. The report of investigation wing was specifically demanded by the assessee for further comments and Ld. AO was requested to provide the list of beneficiaries to whom the accommodation entries were provided but the same was not done. Therefore, no adverse inference could be drawn against the assessee on the basis of these statements.

4.4 It was submitted that in assessee's case, the transactions were done though online trading platform through recognized stock broker and therefore, it could not be presumed that there could be any transfer of cash between the buyer and seller. Reliance was placed on the decision of Hon'ble Bombay High Court in **CIT V/s Lavanya Land Private Limited (83 Taxmann.com 161)** which held that in the absence of any material to show exchange of cash, no addition could be made. The conclusions drawn by Ld. AO were based merely on suspicion, surmises and hearsay. The suspicion howsoever strong could not partake the character of legal evidence as per ratio of Hon'ble Supreme Court in **Lalchand Bhagat Ambica Ram V/s CIT (1959 37 ITR 288).** The entire case of the revenue rested on the presumption that the assessee ploughed back its own unaccounted money in the form of bogus capital gains. However, this suspicion needs to be corroborated with cogent evidences which was not done and therefore, the action of Ld. AO could not be sustained under law.

4.5 Finally, it was submitted that since the assessee discharged the primary onus of substantiating the transactions, the onus to disprove the same would rest on revenue as held by Hon'ble Supreme Court in **Krishanand V/s State of MP (1 SCC 816 SC).** No such onus was discharged by Ld. AO while making additions in the hands of the

assessee. The assessee also assailed the application of provision of Section 68 by submitting that sale proceeds were received through banking channels on sale of shares on stock exchange though stock brokers and therefore, the same could not be treated as unexplained cash credit in terms of Section 68.

Findings of Ld. CIT(A) on merits

5.1 The Ld. CIT(A), in the background of factual matrix and findings of investigation wing, concurred with AO's finding that the scrip prices were rigged by way of synchronized trading so as to provide exit to the beneficiaries at the desired higher prices for claiming probable / unrealistic gains. The sharp rise in the prices of the scrip had no basis of strong financials or any positive corporate announcement.

5.2 The investigation wing, on sample basis, carried out enquiries in respect of six exit providers (para 6.14 of the impugned order) of SMIL scrip wherein these entities were found to be controlled by various entry providers. During appellate proceedings, information was sought from BSE of the counter parties / exit providers to the assessee for the year in SMIL scrip. The same has been tabulated in para 6.16 of the impugned order. It was alleged that these exit providers were dummy exit providers.

However, upon careful consideration of the same, we find that the persons who purchased SMIL shares from assessee during the year are all individual whereas enquires as stated to be carried out by investigation wing on six entities are corporate entities. Only one party i.e. Shri Rakesh Bansal who has purchased 1000 shares has been tainted by the investigation wing.

5.3 Proceeding further, the contents of statement given by Shri R.K.Kedia during search operations on 13/06/2014 were noted in para 6.20 of the order. In the said statement, Shri R.K.Kedia, inter-alia, admitted that FFSL and SMIL were paper companies being controlled and managed by Shri Anil Agarwal. Thereafter during survey on assessee group, statement of Shri Anil Agarwal was recorded. In reply to question No.25, Shri Anil Agarwal denied having done business of providing accommodation entries. However, he admitted to have helped Shri Raj Kumar Kedia in getting capital gain accommodation entries by purchase of shares of 3 entities viz. M/s Fact Enterprises Pvt. Ltd., M/s First Financial Services Ltd and M/s Rutron International Ltd.

5.4 In para 6.25, the fact of SEBI investigation on unusual price fluctuations in scrip of FFSL was noted. On the basis of the same, it was opined by Ld. CIT(A) that the assessee, its Karta and various entities of the assessee group including M/s Comfort Securities Ltd, and M/s Comfort Intech Ltd, were all involved in the LTCG scam where they manipulated the prices of the various penny stock scrips. The assessee carried out all the transactions though M/s Comfort Securities Ltd. which was also found to be involved in LTCG scam in the final report of SEBI in the case of the scrip of FFSL. It was also a fact that the assessee group has subsequently officially acquired substantial stake in SMIL. Thus it was held that the assessee knowingly brought and sold shares of SMIL, a penny stock company, solely for the purpose of claiming bogus LTCG/STCG.

5.5 Therefore, the documentary evidences, in the opinion of Ld. CIT(A), as furnished by the assessee were to be rejected applying the test of human probabilities. It was also noted that the said statement

given by Shri Anil Agarwal was retracted immediately by filing an affidavit on 14/04/2015. However, the same was to be ignored in the light of enough material on record to negate the claim of the genuineness of the transactions. Further, the statement given during the survey operation was not retracted. For retraction to be valid the threat or coercion has to be proved by the assessee and the onus was on assessee to prove that the declaration was made under misconception of facts. The statement made by Shri Anil Agarwal was not a bland statement but was on the basis of parallel ledger account of the undisclosed cash transactions undertaken as seized from the premises of Shri R.K.Kedia, The parallel ledger account also included ledger account of Shri Anil Agarwal, Karta of assessee, The subsequent retraction made was general in nature and does not explain as to why the admission made in the earlier statement was on account of misconception of facts.

5.6 Regarding the plea of cross-verifications of persons making adverse statements as relied upon by Ld. AO, the same was to be rejected in view of the fact that there were evidences indicating that the transactions of capital gain were accommodation transactions through a web of stock market and multiple dubious entities involved in a financial crime of tax evasion. Since the gains were abnormal and the exemption was claimed by the assessee, onus to prove the genuineness of the same was on the assessee and the assessee was free to produce the said persons as part of his defense. The fact that the appellant has failed to produce any such person involved in the transaction clearly shows that it has no bona-fide case in the matter. The persons whose statements were relied upon by Ld. AO were examined by the Investigation Wing and there were very elaborate and detailed

statements in that regard and the assessee was not able to rebut a single affirmation. Therefore, to ask for a physical presence of the persons is only to delay the matter and no basis to justify the same could be brought out by the assessee and therefore, the said request was rightly not been accorded to by Ld.AO. Further, large number of people have been involved in this dubious activity and for the department to be expected to make all the persons to be present in each and every case and at multiple locations all over the country is virtually impossible and the department could not be expected to do an impossible act.

5.7 The assessee's plea that the trades took place on screen based system and therefore, it would be wrong to presume that the assessee was provided a profitable exit by the exit providers, was also rejected by observing that online trading by itself could not be sacrosanct, if the cumulative facts of the case points towards large scale manipulation of the same as observed by Hon'ble Supreme Court in **SEBI V/s Kishore R. Ajmera (2016 6 SCC 368)** and again reiterated in **SEBI V/s Rakhi Trading Pvt. Ltd. [2018] 207 Com Cases 443 (SC).**

5.8 Proceeding further, Ld. CIT(A) observed that the assessee has also not been able to explain the unusual increase in the prices of the scrip of SMIL and also could not justify investment decision in the scrip and therefore, the claim was rightly rejected as held in various judicial pronouncements and in the background of SEBI order dated 02/04/2018 which found the assessee, its Karta, M/s Comfort Securities Limited and other entities of assessee group guilty of manipulating the scrip of FFSL and restrained/debarred them from accessing the market or trading for a period of 3 years. Finally, the additions were upheld with following observations: -

> 6.43 In view of the aforesaid discussion, the assessee's claim of having received consideration of Rs. 44.39.566/- on alleged sale of 22,502 shares of SMIL is found to be dubious. As noted earlier, the counter parties of sale of shares by the assessee have been found to be dummy entities with hardly any worth and therefore, the same have rightly been added by the AO as unexplained cash credit u/s.68 of the I-T Act. It is a settled position of law that in respect of a credit entry, the onus is on the assessee to establish (i) identity of the investors, (ii) their creditworthiness and (iii) genuineness of the transactions. In the instant case, the assessee has not been able to explain the credits arising from alleged sale of shares of FFSL. Therefore, the same is liable for addition u/s.68. Similarly, the action of the AO of making addition u/s. 69C of Rs. 2,66,374/- on account of the unexplained commission expenditure incurred @6% for availing the accommodation entries of STCG also cannot be faulted and is confirmed. Accordingly, Ground Nos. 1 to 4 of the appeal are dismissed.

Aggrieved as aforesaid, the assessee is in further appeal before us.

6. Our findings and Adjudication

6.1 So far as the material facts are concerned, we find that the assessee has sold 22502 shares of a scrip namely SMIL during the year. The shares were purchased on 27/03/2009 at cost of Rs.18.79 Lacs and sold during the period 19/08/2009 to 23/09/2009 for aggregate consideration of Rs.44.39 Lacs, thereby yielding short-term capital gain of Rs.25.59 Lacs in the hands of the assessee. The aforesaid gain has duly been reflected by the assessee in its original return of income. During the year, the assessee has disclosed short-term gain of Rs.43.02 Lacs on various scrips including gain on this scrip. Similarly, net Long-Term Capital gains have been reflected on other scrips also. The Balance Sheet of the assessee reveals that it has year-end investment in shares for Rs.93.44 Lacs and another investment of Rs.103.50 Lacs in share warrants. The perusal of the Balance Sheet would show that a substantial portion of assessee’s capital has been ploughed back by way of investments. On the basis of all these facts, it could very well be concluded that the impugned transactions are not isolated transactions

carried out by the assessee rather the assessee is a habitual investor and earn major part of its income from investment activities.

6.2 Undisputedly, the purchase transactions as well as sale transactions have taken place through online platform of stock exchanges through registered stock broker. These transactions have been subjected to Securities Transaction Tax (STT). The transactions are duly evidenced by contract notes issued by assessee's share-broker M/s CSL, demat statement evidencing movement of shares, bank statements evidencing movement of funds through banking channels. The sale transactions are evidenced by sale contract notes. The sale consideration has duly been received through banking channels and the shares have moved out of assessee's demat account. All these documents have duly been furnished by the assessee before Ld. AO. The same has also been placed before us in the paper-book (Page nos. 63 to 93 of assessee's paper-book). No defect or discrepancy has been pointed out by any of the lower authorities in assessee's documentation. All these evidences as well as documentary evidences remain uncontroverted before us also and no defect has been pointed out in the same. The Ld. AO has also accepted this fact in the assessment order. Upon perusal of all these documents, it is quite discernible that the assessee had furnished all the requisite documentary evidences to substantiate the transactions and discharged the primary onus as required under law to establish the genuineness of the gains so earned during the year. Therefore, the onus had, thus, shifted on revenue to disprove assessee's claim and establish with cogent evidences that the transactions were non-genuine transactions through which assessee's unaccounted money has flown back to assessee in the garb of bogus

capital gains. However, we find that except for third-party statements, there is nothing in the kitty of the revenue to dislodge assessee's claim. No exchange of cash between the assessee and the various exit providers could be proved. In the absence of such a fact, additions could not be sustained as held by Hon'ble Bombay High Court in **CIT V/s Lavanya Land Private Limited (83 Taxmann.com 161).** Further, no link between the assessee and alleged exit-providers could be established by Ld. AO. In fact, during appellate proceedings, the details of persons who bought assessee's shares was obtained form stock exchange. All these persons were individuals and not corporate entities as alleged by Ld.AO and identified by investigation wing as entities belonging to various entry providers. Therefore, the allegation that the shares were purchased by paper entities could also not be sustained.

6.3 So far as the observations of Ld. AO as to financial and profitability of SMIL is concerned, we find that the sales transactions have taken place in online mechanism through recognized stock exchange wherein the identity of the buyer would not be known and there would be no privity of contract between the assessee and prospective buyers of shares. In online mode of trade, the prices would be guided by the buyer willing to buy the shares at certain prices and the seller willing to sell the shares at certain prices. The prices would be guided more by the market forces rather than the financials or other parameters. There would be buyers and sellers lining up on either side of a potential trade; one party willing to part with ownership and other party willing to acquire the ownership. When both the parties would agree upon a price, the trade is matched and that price would become new market quotation. Therefore, the financials of underlying entities, in such

cases, would lose much relevance in so far as the price movement of scrip is concerned. Nothing adverse could be drawn against the assessee on the basis of the same. In fact, Shri Anil Agarwal has become director of this entity on 24/06/2015 and this entity is said to be engaged in real estate development having projects at Mumbai. Hence, this entity could not be said to be merely a dummy entity. Further, the impugned transactions have taken place much before the period when Shri Anil Agarwal has become director of SMIL. Hence, the aforesaid observations as well as conclusion of Ld. AO would not be much germane as to the adjudication of the issue.

6.4 Proceeding further, it could be observed that the primary reason to doubt the genuineness of assessee's transactions is search action findings of the investigation wing, Delhi in the case of Shri R.K.Kedia & group. A copy of statement given by Shri R.K.Kedia is available in the department's paper-book. In the statement on oath made by Shri R.K.Kedia between 13/06/2014 to 16/06/2014, an admission was made that FFSL and SMIL was being managed and controlled by entry provider Shri Anil Agarwal. It has also been alleged by the revenue that incriminating material was found from the premises of Shri R. K. Kedia which was in the shape of parallel ledger accounts of the unaccounted transactions with various business associates including Shri Anil Agarwal. However, the aforesaid statement / incriminating material, which form the very basis to deny assessee's claim, was never confronted to the assessee, as demanded by it. No opportunity to cross-examine the persons making adverse statement was ever provided to the assessee. The failure to do so would make the additions unsustainable as per settled legal position.

Upon perusal of statement of Shri R.K.Kedia, it could also be noted that assessee-huf has nowhere been mentioned as an entity which has derived bogus capital gains. We find that Ld. AO, referring to the search proceedings in the case of Shri R.K.Kedia, had issued show-cause notice to assessee on 23/11/2017 which was duly responded to by the assessee through its Chartered Accountant on 30/11/2017. The assessee replied to each and every query raised by Ld. AO. At the same time, the assessee demanded details of brokers who gave the statement that the assessee has taken accommodation entries and requested Ld.AO to provide cross-examination. Similar request was made to cross-examine the alleged exit providers. Vide para-6 of the reply, the assessee also demanded a copy of investigation wing, Kolkata which has allegedly mentioned that the assessee had given cash to anyone for getting capital gains with a request of cross-examination of those persons. It was specifically asked whether the assessee was named by any broker and operator and if so, the assessee be allowed cross-examination such persons. However, the aforesaid document as well as cross-examination was never provided by Ld. AO despite the fact that the said material / statement formed the very basis of Ld. AO's allegation / conclusion that the gains earned by the assessee were bogus in nature.

6.5 Evidently, the whole basis of disregarding assessee's transactions is the findings rendered by investigation wing in the case of Shri R.K.Kedia and various operators, entry providers and stock brokers. However, there is nothing in the orders of lower authorities which would prove the fact that the assessee-huf was so mentioned in the statements made by any of these persons; rather the basis of additions is the

general observation / conclusion that the scrip of SMIL was penny stock entity. However, these statements are not backed by any cogent corroborative material on record to establish the assessee's involvement in price rigging of shares of SMIL. No collusion between the assessee and alleged entry providers or operators or exit providers is shown to have existed. Another noteworthy point is that no opportunity to cross-examine the persons making adverse statement was provided to the assessee despite being specifically pointed out before lower authorities. There is no admission or evidence based finding that any cash got exchanged between the assessee and any of the alleged bogus entities. It is trite law that no additions could be made merely on the basis of suspicion, conjectures or surmise. The addition thus made purely on the basis of third-party statement recorded at the back of the assessee could not be sustained in the eyes of law unless the same are confronted to the assessee and the same are backed by any corroborative material. No effective investigation is shown to have been carried out by Ld. AO to dislodge the assessee's claim by bringing on record cogent evidences as well as confronting the same. However, except for general allegations as narrated in the investigation wing report, there is no evidence which would link assessee's involvement in jacking up the prices of the shares with a view to earn artificial gains.

6.6 The failure to confront adverse material and provide cross-examination of persons making adverse statement would grossly breach the principles of natural justice which would make the additions fatal in the eyes of law as per the decision of Hon'ble Apex Court in **Kishanchand Chellaram V/s CIT (125 ITR 713)** and also in **M/s Andaman Timber Industries V/s CCE (CA No.4228 of 2006 dated**

02/09/2015) wherein it has been held that not allowing the assessee to cross-examine the witnesses by the adjudicating authority though the statement of those witnesses were made the basis of the impugned order, is a serious flaw which makes the order nullity in as much as it amounts to violation of principal of natural justice because of which the assessee was adversely affected. Similar is the ratio of decision of Hon'ble Bombay High Court in **H.R.Mehta V/s ACIT (387 ITR 561).** As a matter of fact, the decision of Hon'ble Allahabad High Court in **Gargi Devi Jwala Prasad V/s CIT (1974 96 ITR 97)** as referred to by Ld. CIT(A), also support the proposition that the principles of natural justice are applicable to assessment proceedings. The elementary principle of natural justice is that the assessee should have knowledge of the material that is going to be used against him so that he may be able to meet it.

6.7 The Ld. CIT-DR has submitted that the statement of Shri Chandrakant Mane & Shri Nirmal Singh Mertia (directors of FFSL) was confronted to the assessee by way of question nos. 11 & 12 in statement recorded from Shri Anil Agarwal on 27/08/2015. However, we find that the assessee, in reply, has denied having known these persons. Moreover, no opportunity to cross-examine these persons has ever been provided to the assessee. The statement of Shri Vicky Agarwal & Shri Hitesh J. Kanjar of M/s CSL, as placed in the paper-book by Ld. CIT-DR, is statement made during survey operations, which on standalone basis would not hold much evidentiary value. Moreover, upon perusal of the same, we find that none of these statements implicate assessee as the beneficiary of bogus capital gains. Similarly, the statement of Shri Anuj Agarwal of Korp Securities Ltd. recorded on 30/03/2015 and statement

of Shri Pravin Kumar Agarwal of M/s Gateway Financial Services Ltd. recorded on 10/02/2015 are statements made during survey operations and the same do not name the assessee-huf to be the beneficiary of bogus capital gains. The statement of remaining share-brokers / exit providers as placed by Ld. CIT-DR in the paper-book was neither confronted to the assessee nor an opportunity of cross-examination have ever been provided to the assessee and therefore, these are to be disregarded. Further, these statements have not been substantially referred to by Ld. AO or Ld. CIT(A) in their respective orders while adjudicating the issue and therefore, would not carry much weight at this stage of appellate proceedings. In our considered opinion, merely because the scrip of SMIL has been alleged as a penny stock, the same alone would not be sufficient to taint the gains earned by the assessee-huf unless a link or assessee's collusion with the entry / exit providers was established by the revenue. The conclusions drawn by Ld. AO are merely on the basis of statement taken at the back of the assessee. Further, the statement made during survey operations, unless backed by corroborative material, would not hold much evidentiary value. The copy of report of investigation wing, Kolkata, as demanded by the assessee, was also never provided. Therefore, reference to all these statements by Ld. CIT-DR, in our considered opinion, would fail to bolster the case of the revenue.

6.8 Another argument raised by Ld. CIT-DR is that the assessee has carried out all the trading transactions through its own group concern M/s CSL which is controlled and managed by Karta of assessee-huf and therefore, the demand of cross-examination defy any reasoning. However, as noted by us, the primary reason to trigger addition in the

hands of the assessee is search findings in the case of Shri R.K.Kedia Group wherein it has been submitted that SMIL and FFSL were penny stock. However, it was nowhere admitted that the gains earned by the assessee-huf were also tainted. The Karta of assessee-huf also did not admit the same. Therefore, this plea is misplaced. Similarly, the plea that certain additions of unaccounted commission has been made in the hands of M/s CSL which has been accepted, would also not carry much weight to decide the genuineness of gains earned by assessee-huf. The Ld. CIT-DR also advanced argument to submit that the report of investigation wing, Kolkata was uploaded on the internet and hence, there could be no grievance to the assessee by non-furnishing of the same. However, the said plea would not meet our approval in view of the fact that the adverse material as well as cross-examination was specifically demanded by the assessee and Ld. AO was under an obligation to do so to sustain additions in the hands of the assessee.

6.9 The proposition that that additions made purely on the basis of suspicious, conjectures or surmises could not be sustained in the eyes of law stem from the decision of Hon'ble Supreme Court in **Omar Salay Mohamed Sait V/s CIT (1959 37 ITR 151)** wherein it was held that the suspicion however strong could not partake the character of legal evidence as held by Hon'ble Supreme Court in **Umacharan Shaw & Bros. V/s CIT (1959 37 ITR 271)**. The additions made on mere presumptions could not be sustained and there must be something more than mere suspicion to support the assessment as per the decision of Hon'ble Apex Court in **Dhakeshwari Cotton Mills Ltd. V/s CIT (26 ITR 775).** The assessment should not be based merely on suspicion or

guess work but on legitimate material from which reasonable inference of income could have been drawn.

6.10 So far as alleged admission by Shri Anil Agarwal is concerned, we find that the search action on Shri R.K.Kedia group triggered survey action on M/s CSL on 10/04/2015 wherein statement of Shri Anil Agarwal was recorded. In the statement, It was submitted that M/s CSL was acting as stock-broker in various stock exchanges and stated to have provided brokerage and consultancy services to many entities including FFSL and SMIL. In reply to question No.21, it was submitted that KYC of the customers is regularly verified. Nothing adverse is admitted so far as the gains earned by assessee-huf is concerned. Subsequently, a search action was carried out by department in the case of the assessee-huf on 09/04/2015 wherein statement on oath of Shri Anil Agarwal was recorded u/s 132(4) on 12/04/2015. A copy of the same is on record. In the statement, it was reiterated that M/s CSL provided brokerage and consultancy services to many entities including FFSL and SMIL. Shri Anil Agarwal admitted to have known directors of these two entities. Regarding losses suffered by clients of M/s CSL in trading of various scrips including FFSL and SML, it was submitted that the transactions was a pattern of transaction through stock exchange to obtain bogus LTCG and Short Term capital losses by the beneficiaries. In reply to question No.8, the modus-operandi of bogus LCTG / STCL entry obtained by the beneficiary was explained. However, the same is general elaboration and do not taint the transactions carried out by the assessee-huf. Regarding role of Shri Anil Agarwal, it was submitted that he introduced the directors of FFSL and Rutron International Ltd. to three individual namely Shri Paras Chaplot, Shri

Pankaj Shah and Shri Vinay Jain who were primarily engaged in providing entry of LTCG. Some clients contacted Shri Anil Agarwal to obtain bogus LTCG, who were then introduced to the three entry providers. The clients introduced by the three entry providers became clients of M/s CSL and KYC documents were obtained. However, no physical verification of the premises was stated to have been done. The prices were rigged to provide entry of LTCG / STCL to the beneficiaries. However, there is no admission as to the fact that assessee's gains were also obtained in such a manner. In reply to question No.12, Shri Anil Agarwal has offered an additional brokerage income of Rs.20 Lacs on account of cash commissions. No reply to question No.13 has been given wherein a question was put as to LTCG earned on sale of scrip of FFSL. Upon perusal of the same, it could be gathered that Shri Anil Agarwal has not made any admission that the gains earned by the assessee-huf on sale of shares of SMIL and FFSL were bogus in nature. Proceeding further, it is to be noted that this statement also has been retracted immediately by way of an affidavit under the cover of letter dated 14/04/2015 by assessee to DGIT(Inv.), Mumbai, inter-alia, on account of the fact that the earlier statement was given under threat and undue influence by pressure. The retraction within such short span of time would drastically reduce evidentiary value of the statement particularly in view of the fact that the statement made on 12/04/2015 is not backed up by any corroborative incriminating material as found during the course of search operations. Therefore, firstly it could not be said that there was admission as to bogus nature of the transactions carried out by the assessee-huf and secondly, the statement made by

the assessee, unless backed up by corroborative material, could not form the sole basis of making additions in the hands of the assessee.

It transpires that another statement was recorded from Shri Anil Agarwal on 27/08/2015 during the course of assessment proceedings. In reply to question No.21, the assessee denied having indulged in providing accommodation entries. Shri Anil Agarwal maintained that M/s CSL provided consultancy services to FFSL. He also denied having met Shri Chandrakant Mane (director of FFSL). He also denied having manipulated share prices of SMIL. It was further submitted that entire process of trading took place in online mechanism through the stock exchange platform. He also denied having carried out any accommodation entries. Therefore, there is no admission by Shri Anil Agarwal in this statement also which is related to gains earned by assessee-huf.

6.11 So far as the SEBI report dated 02/04/2018 is concerned, the same is not in respect of scrip of SMIL. In fact SEBI, vide its letters dated 31/10/2017 & 11/10/2017 as written to the department has clearly mentioned that there was no violation of SEBI Act or regulation in case of SMIL. Therefore, the same would not be of much relevance for this year.

6.12 Another important aspect to be noted is that the assessee was subjected to search action on 09/04/2015. The return for AY 2010-11 was already filed by the assessee on 28/07/2010 wherein capital gains earned during the year were duly disclosed. The case was not picked up for scrutiny. The time limit to issue notice u/s 143(2) for the year had already expired on 30/09/2011. No proceedings were pending against the assessee for this year on the date of search. Hence, it was

non-abated year. Therefore, the addition, which could have been made, was to be only with respect to any incriminating material found during the course of search. We find that there is nothing on record which would show that any such material was found from the possession of the assessee during search. In fact, Ld. CIT(A) has rejected this plea by observing that the statement made by the assessee during search proceedings, in the backdrop of findings of investigation wing and the statements made by Shri R.K.Kedia and certain share-brokers of Kolkata (Shri Anuj Agarwal during survey on Korp Securities on 31/03/2015 and Shri Praveen Kumar Aggarwal during survey on Gateway Financial Services Ltd. on 11/02/2015), would constitute incriminating material. However, it is to be noted that all these statements were recorded well before the date of search on assessee and for assessee's case, these statements could not be said to be incriminating material found during the course of search. The report of investigation wing, Kolkata identifying 32 stockbrokers with respect to 84 scrips, as referred to by the lower authorities, was received on 27/04/2015 i.e. much after the date of search on assessee and therefore, the same would also could not be said to be incriminating material found during the course of search on assessee. The Ld. CIT-DR has pointed out that a survey action was conducted u/s 133A on FFSL and many incriminating material was found therein which would constitute incriminating material to implicate assessee. However, we are unable to accede to this plea since this material could not be said to have been found during search on assessee-huf. Secondly, this material has been referred to in the statement of Shri Chandrakant Mane. The Karta of assessee-huf has all along denied having ever met Shri Chandrakant Mane. Therefore, this

plea would not hold much water. The Ld. CIT-DR has also pleaded that the issue of incriminating material was raised for the first time before Ld. CIT(A) and Ld. AO had no occasion to deal with this issue during the assessment proceedings. We find that additional ground, being legal ground, could be taken-up by the assessee for the first time before appellate authorities. The ground was validly admitted and delved into by Ld. CIT(A). No infirmity could be found in the action of Ld. CIT(A) in adjudicating the same.

So far as the incriminating material in the form of assessee's own statement is concerned, we find that firstly no admission as alleged by lower authorities was made and secondly, the said statement stood retracted immediately on 14/04/2015. Therefore, since the statement stood rejected immediately after making thereof, the same would lose substantial evidentiary value. In such a case, the onus would be on revenue to establish that the earlier admission made was backed up by some cogent / corroborative material on record and the retraction was not valid one. However, we find that there is no such material with the revenue which would corroborate assessee's statement that the gains were bogus in nature. Any statement on oath, to be valid, has to be supported by corroborative evidences. Thus, the statement made by the assessee, in our considered opinion, could not be considered as incriminating material which would justify additions in the hands of the assessee.

The proposition that no addition could be made in the case of non-abated assessment except with reference to incriminating material found during search action has been expounded by Hon'ble Bombay High Court in **CIT V/s Continental Warehousing Corporation (Nhava**

Sheva) Ltd. 374 ITR 645. The ratio of this decision has recently been applied by coordinate bench, on similar facts and circumstances, in the group case of **Smt. Kalpana Mukesh Ruia V/s DCIT & ors. (ITA No.6519/Mum/2019 & ors) order dated 31/12/2020**. In this decision, the coordinate bench, referring to another decision of Tribunal in **Shri Vijayrattan Balkrishan Mittal Vs. DCIT & ors. (ITA no. 3427 to 3429/Mum/2019 dated 01/10/2019**, held as under: -

> 39. We have carefully considered the submissions and perused the records. Firstly issue in appeal is that in assessment framed under section 153(A) in case of the unabated assessment addition without reference to incriminating material is not sustainable. This issue has been clearly spelt out and affirmed by honourable jurisdictional High Court in the Catena of case laws including that of continental warehousing (supra).
> 40. The learned departmental representative and the learned CIT appeals have tried to distinguish this decision from Hon'ble Bombay High Court by referring to Hon'ble Delhi High Court decision in the case of Kabul Chawla (supra).
> 41. In this regard we are of the considered opinion that the decision from honourable jurisdictional High Court in Continental Warehousing (supra) is clear and unambiguous. It was clearly held in that case that assessments which are not pending and which have attained finality, addition under section 153(A) cannot be done without reference to incriminating seized material. We may gainfully refer to the relevant order of the honourable High Court as under:
>
> > "On a plain reading of section 153A, it becomes clear that on initiation of the proceedings under section 153A, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under section 132 or making requisition under section 132(4) stand abated and not the assessments/reassessments already finalised for those assessment years covered under section 153A. By a Circular No. 8 of 2003, dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment/reassessment shall not abate. It is only because, the finalised assessments/reassessments do not abate, the appeal revision or rectification pending against finalised assessment/ reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under section 153A, the assessments/reassessments finalised for the assessment years covered under section 153A stand abated cannot be accepted. Similarly on annulment of assessment made under section 153A(1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1)."
> >
> > "Once it is held that the assessment has attained finality, then the Assessing Officer while passing the independent assessment order under section 153A read with section 143(3) could not have disturbed the assessment/reassessment order which has attained finality, unless the

> materials gathered in the course of the proceedings under section 153A establish that the reliefs granted under the finalised assessment/reassessment were contrary to the facts unearthed during the course of 153A proceedings. If there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings, the Assessing Officer while passing order under section 153A read with section 143(3) cannot disturb the assessment order."

42. A reading of the above makes it clear that it was expounded that in case of assessments which have attained finality no addition under section 153(A) can be done without seized incrementing material. In this regard, the learned departmental representative and learned CIT appeals have tried to make out a case that in the present cases before us the earlier assessments were not under section 143 (3). Hence the ratio from honourable jurisdictional High Court decision will not apply here. The learned departmental representative has mentioned that honourable High Court has referred about assessments which have been finalized.

43. In our considered opinion, the honourable jurisdictional High Court has never mentioned that it is only assessment which has been completed under section 143(3) that addition under section 153(A) cannot be done without reference to incriminating seized material. Honourable jurisdictional High Court has clearly mentioned that it is those assessments which are unabated, that is not pending, to which the above said ratio will apply. Assessments which are not pending are not only those which have been completed under section 143(3) but also those for which the time for issuing notice under section 143(2) have already elapsed. In other words the references is to those assessments in whose case assessment under section 143 (3) cannot now be done. It is not at all the case of the revenue that in the appeals which have been claimed as unabated here there was time for assessment under section 143(3). In this view of the matter, in our considered opinion, the submission of the learned counsel of the assessee succeeds that addition in the case of unabated assessment without reference to incriminating seized material for assessment u/s.153(A) is not sustainable on the touchstone of above said honourable jurisdictional High Court decision. Therefore, the learned CIT appeals and the learned departmental representative plea in trying to distinguish the same by reference to Hon'ble Delhi High Court decision and honourable Supreme Court decision in the case of Rajesh Jhaveri (supra) doesn't succeed.

44. It may not be out of place here to mention that it is specifically provided in section 153A "that assessment or reassessment if any relating to any relevant assessment year or years referred to in this subsection pending on the date of initiation of search under section 132 or making of requisition under section 132A as the case may be shall abate." This makes it further abundantly clear that only those assessments which are pending abate. Hence sanguine provisions of the act read with honourable jurisdictional High Court decision as above make it abundantly clear that the assessments which do not abate and assessment and addition under section 153 A without reference to incriminating seized material is not sustainable.

45. The jurisprudence regarding jurisdictional defect in assessment under section 153A /153C without reference to incriminating seized material has also been expounded by honourable Supreme Court in the case of Commissioner of Income Tax vs. Singhad technical education Society in civil appeal No. 11080 of 2017 and others. In this regard the honourable Supreme Court in paragraph 18 of the said order observed that :-

> In this behalf it was noted by the ITAT that as per provisions of section 153C of the act,, incriminating material which was seized had to pertains to assessment years in question and it is an undisputed fact that the documents which were seized did not establish any correlation, document –wise, with these for assessment years since this requirement under section 153C of the act is essential for assessment under the provision it becomes a jurisdictional defect. We find this reasoning to be logical and valid having regard to the provisions of section 153C of the Act."

46. We also note that the co-ordinate bench of ITAT in the case of Shri Vijayrattan Balkrishan Mittal (supra) in similar situation held that, dehorse incriminating Material assessment u/s.153A is not sustainable in the case of unabated assessment. We may gainfully refer to the said decision as under:

> 44. After hearing both the parties and perusing the facts on record, we observed that undisputably the assessment in the instant year has not abated on the date of search. We further find that the evidences were gathered after issuing notice under section 133(6) that assessee has carried out synchronized trades for obtaining bogus LTCG. In our opinion, the said information/data is collected after the date of search and does not constitute incriminating material found and seized during the course of search. Keeping in view the said facts and circumstances, we are of the considered view that addition to the income of the assessee can only be made on the basis of incriminating record found during the course of search. In the present case, there is no such incriminating material and therefore, the AO has no jurisdiction to make addition in the unabated assessment. The case of the assessee is squarely covered by the decision of Hon'ble Bombay High Court decision in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra), wherein the Hon'ble Bombay High Court held as under: -
>
> "a) Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) was justified in deleting the addition of ₹ 3,91,55,000/- under section 68 of the Act in respect of share application money and addition of ₹ 11,24,964/- under section 14A made by the Assessing Officer, as it was not based on incriminating material found during the course of search.
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> d) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of ₹ 3,91,55,000/- under section 68 of the Act in respect of share application money and addition of ₹ 11,24,964/- under section 14A made by the assessing officer without appreciating the fact that the decision of continental warehousing corporation & the decision in the case of All Cargo Global Logistics have not been accepted by the department and an SLP has been filed in the Supreme Court in both the cases decided by the High court i.e. Continental Warehousing Corporation as well as all Cargo Global Logistics vide appeal civil 8546 of 2015 and SLP civil 5254-5265 of 2016 respectively."
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> 45. Since, there is no incriminating material found during the course of search, we therefore respectfully following the ratio laid down by the Hon'ble Bombay High Court in the above decision, set aside the order of the CIT(A) and direct the AO to delete the addition. Resultantly, the appeal of the assessee on jurisdictional issue is allowed.

47. As regards the issue of seized material it is clear that in the appeals which have remained unabated the addition is without reference to any seized material. The materials referred are only the statement obtained of the assessee under section

132 (4). These have been duly retracted. Hence without corroborative material addition only based upon the retracted statement is not sustainable. For this proposition following case laws are germane:
• CIT Vs. Sunil Agarwal (379 ITR 367)
• CIT Vs. Naresh Kumar Agarwal (369 ITR 171)
• DCIT Vs. Narendra Garg & Ashok Garg (AOP) (ITA No. 1531 & 1532 of 2007 dated 28.7.2016)
• DCIT Vs. Marathon Fiscal Pvt. Ltd. (ITA no. 5783 & 5784/Mum/2017 dated 28.8.2019)
• Tribhuvandas Bhimji Zaveri (ITA 2250 & 2251/Mum/2013 dt. 4.11.2015)
48. It may also be pertinent to note here that no seized material said to be incriminating was produced before us. In light of above said case laws the observation of learned CIT(A) that incriminating material need not be specific has no legs to stand. This very observation by the learned CIT(A) itself is an admission that no specific incriminating material has been seized and referred in the assessment order Hence, in all cases of unabated assessment the assessment fails on jurisdictional defect. Thus, ITA No. 6519/MUM/2019, 6520/MUM/2019, 6515/MUM/2019, 6516/MUM/2019, 6513/MUM/2019 & 6514/Mum/2019 are dismissed on account of jurisdictional defect.

It could be noted that in the above matter also, except for statement u/s 132(4), there was no incriminating material. The statement was retracted by the assessee. Therefore, the bench held that addition on the basis of retracted statement, without there being corroborative material would not be sustainable as held in various decisions. Similar are the facts before us. Therefore, applying the ratio of aforesaid decisions, since the additions are not with reference to any incriminating material, the same would not be sustainable in the eyes of law.

The Ld. CIT-DR has referred to the decision of Hon'ble Delhi High Court in the case **of Smt. Dayawanti v. CIT [2017] 390 ITR 496** to counter assessee’s submissions. Upon perusal of the same, we find that this case law is factually distinguishable since in that case incriminating material was found by the department along with confessional statements.

The case law of Mumbai Tribunal in **Hiralal Maganlal & Co. V/s DCIT 96 ITD 113,** as cited by Ld.CIT-DR deals with an assessment framed u/s 158BC which is not the case here.

In the case law of Hon'ble Kerala High Court in **CIT V/s O.Abdul Razak (350 ITR 71),** there was clear admission by the assessee which was duly supported by the documents. The Hon'ble High Court held that in view of clear admission of the assessee corroborated by the documents, the burden on the department ceases to exist. On the retraction being filed by the assessee, there is a burden cast on the assessee to prove the detraction or rather disprove the admissions made. It is not a shifting of the onus but a new burden cast on the assessee to disprove the earlier admissions having evidentiary value. As noticed earlier, retraction made by the assessee can only be considered as a self serving afterthought and no reliance can be placed on the same to disbelieve the clear admissions made in the statement recorded under Section 132(4). Therefore, this case law is factually distinguishable since firstly there is no confessional statement by the assessee and secondly, the confession is not backed by any incriminating material.

Another case law as referred to by Ld. CIT-DR is of Hon'ble Rajasthan High Court in **Bannalal Jat Constructions P. Ltd. V/s ACIT (106 Taxmann.com 127).** However, the same is also distinguishable on fact since confessional statements were backed up by seizure of cash from assessee's premises. The same is not the case here. Similar is the position with other case laws cited by Ld. CIT-DR which are not specifically dealt with keeping in view the ratio of Hon'ble Jurisdictional High Court in **CIT V/s Continental Warehousing Corporation (Nhava Sheva) Ltd. 374 ITR 645.**

On the basis of aforesaid facts, we are inclined to hold that additions made by Ld. AO were not valid in the eyes of law.

6.13 The last aspect of the matter is that the additions have been made by Ld. AO invoking the provisions of Section 68. The addition u/s 68, in our considered opinion, was not sustainable in view of the fact that credit in assessee's bank account represents sale proceeds of shares sold in recognized stock exchange through registered stock broker. The sale transactions have taken place through recognized stock exchange and the money was received in settlement through banking channels. The assessee had delivered the shares from his demat account to the broker, who, in turn, paid sale consideration to the assessee. In such a case, there could be no doubt as to fulfillment of primary ingredients of Sec.68 viz. identity of the payer, their creditworthiness and the genuineness of the transactions. The source of credit received in the bank account could not be held to be unexplained unless it was established that assessee's own money was routed in his bank account in the garb of Capital gains.

6.14 We find that on identical set of facts, similar addition made by revenue was deleted by coordinate bench of this Tribunal in the case of **Dipesh Ramesh Vardhan & ors. V/s DCIT (ITA Nos.7648/Mum/2019 & ors. dated 11/08/2020; authored by one of us)** by observing as under:-

> 6. We have carefully heard the rival submissions and perused relevant material on record. So far as the factual matrix is concerned, there is no substantial dispute regarding the same. The perusal of record would reveal that the assessee purchased certain shares of an entity namely M/s STL as early as September, 2011. The shares were converted into demat form in assessee's account during the month of March, 2012. The transactions took place through banking channels. The investments were duly reflected by the assessee in financial statements of respective years. The copies of financial statements of M/s STL for FYs 2009-10 & 2010-11 which led to investment by the assessee in that entity was also furnished during the course of assessment proceedings. Subsequently, M/s STL got merged with another entity viz. M/s SAL pursuant to scheme of amalgamation u/s 391 to 394

of The Companies Act, 1956. The Scheme was duly approved by Hon'ble Bombay High Court vide order dated 22/03/2013, a copy of which is on record. Consequently, the shares of M/s STL held by the assessee got swapped with the shares of M/s SAL and new shares were allotted to the assessee during June, 2013 pursuant to the approved scheme of amalgamation. M/s SAL is stated to be listed public company Group 'A' shares signifying high trades with high liquidity. The assessee has sold these shares through its stock broker namely *M/s Unique Stockbro Private Limited* in online platform of the recognised stock exchange during the month of March, 2014. The selling price was in the range of Rs.489/- to Rs.491/- per share. The transactions took place through online mechanism after complying with all the formalities and procedure including payment of STT. The delivery of the shares was through clearing mechanism of the stock exchange and sale consideration was received through banking channels. The transactions are duly evidenced by contract notes, demat statements, bank statements and other documentary evidences. The key person of assessee group, in his statement, maintained the position that trading transactions were genuine transactions carried out through stock exchange following all process and legal procedures. The assessee also filed trading volume data and price range of the scrip for a period of more than 2 years i.e. from Jan, 2013 to July, 2015. The shares reflected healthy trading volume and the price range reflected therein was in the range of Rs.360/- to Rs.600/- per share. The price range was stated to be in the same range for 15 months after the period of sale of shares by the assessee, which has not been disputed by the revenue. On the basis of all these facts, it could be gathered that the assessee had duly discharged the onus casted upon him to prove the genuineness of the stated transactions and the onus had shifted on revenue to rebut the same.

7. As against the assessee's position, the primary material to make additions in the hands of assessee is the statement of Shri Vipul Bhat and the outcome of search proceedings on his associated entities including M/s SAL. However, there is nothing on record to establish vital link between the assessee group and Shri Vipul Bhat or any of his group entities. The assessee, all along, denied having known Shri Vipul Bhat or any of his group entities. However, nothing has been brought on record to controvert the same and establish the link between Shri Vipul Bhat and the assessee. The opportunity to cross-examine Shri Vipul Bhat was never provided to the assessee which is contrary to the decision of Hon'ble Supreme Court in **M/s Andaman Timber Industries V/s CCE (CA No.4228 of 2006)** wherein it was held that not allowing the assessee to cross-examine the witnesses by the adjudicating authority though the statement of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity in as much as it amounts to violation of principal of natural justice because of which the assessee was adversely affected. The whole basis of making the addition is third party statement without there being any tangible material. It is trite law that additions merely on the basis of suspicious, conjectures or surmises could not be sustained in the eyes of law as held by Hon'ble Supreme Court in **Omar Salay Mohamed Sait V/s CIT (1959 37 ITR 151).** The suspicion however strong could not partake the character of legal evidence as held by Hon'ble Supreme Court in **Umacharan Shaw & Bros. V/s CIT (1959 37 ITR 271)**. Therefore, we find that onus as caster upon revenue to corroborate the impugned additions by controverting the documentary evidences furnished by the assessee and by bringing on record, any cogent material to sustain those additions, could not be discharged by the revenue. The allegation of price rigging / manipulation has been levied without establishing the vital link

between the assessee and various entities of Shri Vipul Bhat. We find that the whole basis of making additions is third party statement and no opportunity of cross-examination has been provided to the assessee to confront the said party. As against this, the assessee's position that that the transactions were genuine and duly supported by various documentary evidences, could not be disturbed by the revenue.

8. The allegations of Ld.AO that the assessee was part of the group which indulged in rigging or manipulation of prices of shares in connivance with Shri Vipul Bhat is not backed by any independent material. Firstly, there is nothing on record which establishes the fact that the assessee was acquainted with Shri Vipul Bhat or any of his entities and secondly, the onus casted upon assessee to prove the genuineness of the transactions was already discharged by the assessee. Shri Vipul Bhat, in his statement, stated that one Shri Sandeep Maroo acted as intermediary who introduced Vardhan family to him. However, no further investigations have been carried out to establish this vital link between the assessee and Shri Vipul Bhat. We do not find any independent investigations by Ld. AO to bring on record any tangible material to corroborate the same. There are no evident or even allegation of any cash exchange between the assessee and group entities of Shri Vipul Bhat. This is further evidenced by the fact that no substantial incriminating material / wealth of that magnitude has been found during the course of search operations on assessee which would corroborate such presumption and prove that the transactions were sham transactions, in any manner.

9. The fact that the assessee could not produce the concerned person of M/s SAL was rightly controverted by submitting that the aforesaid entity was not under the control of the assessee and the assessee was under no obligation to do so. The existence of M/s SAL is beyond doubt since it was a listed corporate entity and secondly, it was subject matter of scheme of amalgamation u/s 391 to 394. The scheme of amalgamation was duly been approved by Hon'ble Bombay High Court. Therefore, the existence of the said entity could not be doubted, in any manner.

10. The above conclusion is further fortified by the fact that in share sale transactions through online mode, the identity of the buyer of the shares would not be known to the assessee. Therefore, the adverse conclusion drawn by Ld. AO merely on the basis of the fact that the buyer of the shares were group entities of Shri Vipul Bhat, could not be sustained. The fact that there were independent buyers also would rebut the same and weaken the conclusion drawn by Ld. AO.

11. The Ld. AR has relied on plethora of judicial pronouncements in support of various submissions, which we have duly considered. These decisions would only support the conclusions drawn by us that once the assessee has discharged the onus of proving the genuineness of the transactions, the onus would shift on the revenue to dislodge assessee's claim and bring on record contrary evidences to rebut the same. Until and unless this exercise is carried out, the additions could not be sustained in the eyes of law.

12. To enumerate the few, the Hon'ble Bombay High Court in **CIT V/s Shyam S.Pawar (54 Taxmann.com 108 10/12/2014)** declined to admit revenue's appeal since the revenue failed to carry forward the inquiry to discharge this basic onus. The co-ordinate bench of this Tribunal in **Mukesh R.Marolia V/s Addl. CIT (6 SOT 247 15/12/2005)** held that personal knowledge and excitement on events should not lead the Assessing Officer to a state of affairs where salient evidences are over-looked. When every transaction has been accounted, documented and supported, it would be very difficult to brush aside the contentions of the assessee that he had

purchased shares and had sold shares and ultimately purchased a flat utilizing the sale proceeds of those shares and therefore, the co-ordinate bench chose to delete the impugned additions. We find that this decision was firstly been approved by Hon'ble Bombay High Court vide ITA No. 456 of 2007 on 07/09/2011 and thereafter, special leave petition against the said decision has been dismissed by Hon'ble Supreme Court vide SLP No. 20146 of 2012 dated 27/01/2014 which is reported as 88 CCH 0027 SCC.

The SMC Bench of Tribunal in **Anraj Hiralal Shah (HUF) V/s ITO (ITA No. 4514/Mum/2018 dated 16/07/2019)** held that in the absence of any evidence to implicate the assessee or to prove that the transactions were bogus, the Long-Term Capital Gains declared by the assessee could not be doubted with. This case was dealing with gains earned by the assessee on sale of same scrip i.e. M/s Sunrise Asian Ltd.

13. Therefore, considering the entirety of facts and circumstances, we are not inclined to accept the stand of Ld.CIT(A) in sustaining the impugned additions in the hands of the assessee. Resultantly, the addition on account of alleged *Long-Term Capital Gains* as well as estimated commission against the same, stands deleted. The grounds of appeal, to that extent, stand allowed.

Similar is the decision of Hon'ble Rajasthan High court in the case of **CIT V/s Pooja Agarwal (ITA No. 385/2011 dated 11/09/2017)** and the decision of Hon'ble Delhi High Court in **Pr.CIT V/s Smt. Krishna Devi & ors. (ITA Nos. 125/2020 & ors. dated 15/01/2021).** We find that the ratio of aforesaid decisions is equally applicable to the fact of the present case before us.

Conclusion

6.15 Finally, keeping in the facts and circumstances of the case, we are inclined to hold that impugned additions are not sustainable in the eyes of law. The assessee had discharged the primary onus of establishing the genuineness of the transactions whereas the onus as casted upon revenue to corroborate the impugned additions by controverting the documentary evidences furnished by the assessee and by bringing on record, any cogent material to sustain those additions, could not be discharged by the revenue. The whole basis of making additions is third-party statement and no opportunity of cross-

examination has been provided to the assessee to confront these parties. As against this, the assessee's position that that the transactions were genuine and duly supported by various documentary evidences, could not be disturbed by the revenue. Hence, going by the factual matrix and respectfully following the binding judicial precedents as enumerated in the order, the additions made by Ld. AO and confirmed by Ld. CIT(A), are not sustainable in the eyes of law. Therefore, we are inclined to delete the same. We order so. Consequentially, the addition of estimated commission also stands deleted. Ground Nos. 1, 3 & 4 stands allowed. No argument has been urged with respect to Ground No.2 which is related with fulfillment of requirement of provisions of Sec.153D and therefore, this ground stand dismissed. The appeal stand partly allowed.

ITA Nos. 5513 & 5514/Mum/2019, AYs 2011-12 & 2012-13

7.1 The facts in both these years are pari-materia the same. The assessment for both the year has similarly been framed u/s 143(3) r.w.s. 153A on 29/12/2017. The Long-term gains earned by the assessee on sale of scrip of SMIL have been treated as undisclosed income and added u/s 68. The Ld. AO has estimated commission of 6% in similar manner. The impugned order has confirmed the order of Ld. AO on similar logic and reasoning. Aggrieved, the assessee is in further appeal before us with identical grounds of appeal.

7.2 Facts being pari-materia the same including the fact that assessment for both the year is unabated assessment, our findings as well as adjudication as for AY 2010-11 shall *mutatis-mutandis* apply to both these year. Resultantly, the appeals for both the year stands partly allowed.

8. ITA Nos. 5515 & 5516/Mum/2019, AYs 2013-14 & 2014-15

8.1 The facts in both these year are pari-materia the same as in AY 2010-11 except for the fact that the assessee has sold scrip of FFSL during these two year. Another differentiating fact in AY 2014-15 is that this year is the case of abated assessment since search took place on the assessee on 09/04/2015 and the limitation for issue of notice u/s 143(2) was 30/09/2015.

The assessment for both the year has similarly been framed u/s 143(3) r.w.s. 153A on 29/12/2017. The Long-term gains earned by the assessee have been treated as undisclosed income and added u/s 68. The Ld. AO has estimated commission of 6% in similar manner. The impugned order has confirmed the order of Ld. AO on similar logic and reasoning. Aggrieved, the assessee is in further appeal before us with identical grounds of appeal.

8.2 An additional point that arises for consideration in both these year is the fact that impugned order refers to the order of SEBI dated 02/04/2018 wherein SEBI has found FFSL, assessee, its Karta-Shri Anil Agarwal and certain entities of the assessee group including M/s CSL to be guilty of rigging the share prices and restrained / prohibited them from accessing the market or trading for a further period of 3 years. However, as brought on record by Ld. AR, the aforesaid order of SEBI was under further challenge by the aggrieved parties before Securities Appellate Tribunal (SAT) wherein by order dated 27/09/2019 Hon'ble SAT has held as under: -

> 5. We have heard the learned counsels for the parties. The contentions of the appellants are that the WTM committed a manifest error in holding that the appellants were guilty in manipulating the prices of the scrips pursuant to the preferential allotment.

6. Without going into the merits as to whether the appellants were involved in the abnormal and huge rise in the price of the scrips by treating all entities connected to the company pursuant to the issuance of preferential allotment of shares, we are of the opinion that the appeals can be disposed of without going into the merits.

7. We find that the order of debarment as per the impugned order is of three years. These three years have already been undergone by the appellant pursuant to the impugned ex parte order dated December 19, 2014 restraining them from accessing the securities market, etc. As on date four years and ten months have elapsed and the appellants are still debarred from accessing the security markets etc. We find that the WTM has not considered the period of debarment already spent from the date of the ex parte interim order till the date of passing of the order while considering the quantum of penalty. We are, thus, of the opinion that the debarment period spent by the appellants from the date of the ex parte impugned order till today is sufficient.

Thus, without going into the merits of the case and without considering the submissions of the counsels for the parties on merits, we dispose of all the appeals holding that the restraint order restraining the appellants from buying, selling or otherwise dealing in securities, directly or indirectly, or being associated with the securities market in any manner, whatsoever will come to an end from today.

9. It was stated by the learned counsel that, for the same offence, adjudication proceedings have been initiated by the Adjudicating Officer of SEBI and submitted that the findings given in the impugned order of the WTM would be relied upon by the AO. It was urged that the findings given in the impugned order should not come in the way while considering the matter on merits by the Adjudicating Officer of SEBI.

10. We make it clear that the Adjudicating Officer of SEBI will consider the matter on merits without being influenced by the findings given by the WTM of SEBI.

Upon perusal of the Hon'ble SAT order, it could be observed that the restraint order passed by WTM of SEBI has not been decided on merits rather the appeals have been allowed summarily in view of the fact that the debarment period of 3 years, as counted from ex-parte restraint order dated 19/12/2014, was already over. Therefore, the restraint order was revoked by Hon'ble SAT. It was also held that the findings given in impugned order would not come in the way of adjudicating officer of SEBI while deciding on merits. Therefore, it could be seen that the order, as referred to by Ld. CIT(A), has not been tested by higher authority on merits. Further, the adjudication proceedings as initiated by adjudicating officer on merits have also not attained finality. Therefore, this order as

relied upon by learned first appellate authority would not materially alter our view as taken in AY 2010-11.

8.3 Another distinguishing feature in AY 2014-15, as noted earlier, is the fact that this year is the case of abated assessment and therefore, our adjudication as in AY 2010-11, to that extent, would not apply to this year. In other words, our observations / adjudication as to requirement of incriminating materials as enumerated in preceding para 6.12, would not apply to AY 2014-15. Accordingly, ground No. 1 stand dismissed.

8.4 Subject to above, our adjudication for AY 2010-11 shall *mutatis-mutandis,* apply to both these years also. Accordingly, both the appeals stand partly allowed.

Conclusion

9. All the appeals stands partly allowed.

Order pronounced on 05th April, 2021.

Sd/-	**Sd/-**
(Amarjit Singh)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य **/ Judicial Member**	लेखा सदस्य **/ Accountant Member**

मुंबई Mumbai; दिनांक Dated : 05/04/2021
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई **/ ITAT, Mumbai.**