

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

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

**ITA Nos.5761, 5762, 5764 & 5765/M/2019
Assessment Years: 2010-11, 2011-12, 2013-14 & 2014-15**

Amit H. Patel (HUF) 1/135, PrabhuNiwas, Opp. SIWS College, Wadala, ` Mumbai - 400031 PAN: AAEHA4171N	Vs.	DCIT-CC 3(4), Room No.1915, 19 th Floor, Air India Building, Mumbai - 400021
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Neelkanth Khandelwal, A.R.
Revenue by : Shri Rajeev Harith, D.R.

Date of Hearing : 09.06.2021

Date of Pronouncement : 15.07.2021

ORDER

Per Rajesh Kumar, Accountant Member:

The above titled appeals have been preferred by the same assessee against the orders even dated 29.12.2019 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment years 2010-11, 2011-12, 2013-14 & 2014-15. Since the issues involved are common in all the appeals, these being disposed off by this common order for the sake of brevity and convenience. First, we would like to take ITA No.5761/M/2019 A.Y. 2010-11.

2. The grounds taken by the assessee in AY 2010-11 are reproduced as under:

"1. On the facts and circumstances of the Appellant's case and in law the Ld. CIT(A) erred in confirming the action of Id. A.O. in making additions in the

appellant's case in the absence of any incriminating material found during the course of search action, as per the grounds stated in the order or otherwise.

2. On the facts and circumstances of the Appellant's case and in law the Ld. CIT(A) erred in confirming the action of Assessing officer in treating the long term capital gains earned by the appellant as non-genuine and bogus transaction, as per the grounds stated in the order or otherwise.

3. On the facts and circumstances and in law the Ld. CIT(A), erred in confirming the action of Assessing Officer in disallowing the claim u/s 10(38) of the Act being Long Term Capital Gain on sale of shares listed on stock exchange.

4. On the facts and circumstances of the Appellant's case and in law, Ld. CIT(A) erred in confirming the action of Assessing officer in making an addition of Rs.10,43,74,444/- by invoking provisions of Sec. 68 of the Income Tax Act, 1961, being the amount of sale value of shares without allowing the deduction in respect of the purchases cost amounting to Rs.77,34,330/-, as per the grounds stated in the order or otherwise.

5. On the facts and circumstances of the Appellant's case and in law, Ld. CIT(A) erred in confirming the action of Assessing officer in making an addition of Rs.62,62,467/- as alleged commission @ 6% paid on bogus share transaction, as per the grounds stated in the order or otherwise."

3. The issue raised in ground No.1 is against the jurisdiction of the AO to frame assessment under section 143(3) read with section 153A of the Act. The assessee has challenged by way of ground No.1 that the additions made in assessment framed are without jurisdiction as there is no incriminating material seized during search and therefore the order framed is bad in law.

4. The facts in brief are that the assessee filed return of income on 06.09.2010 declaring an income of Rs.24,09,303/-. Thereafter, a search action under section 132 of the Act was conducted on 09.04.2015 on the assessee and his HUF. During the course of search, the search team found evidences of accommodation entries in the form of bogus long term capital gain on penny stocks. Post search, notice under section 153A of the Act has been issued on 08.08.2016 which was duly served

upon the assessee and complied with by filing return of income on 31.08.2016 declaring total income at Rs.24,09,303/- the same income as was disclosed originally. Notice under section 143(2) was also issued on 24.01.2017 and duly served upon the assessee. The AO called for various details and explanation from the assessee qua the capital gain on sale of equity shares of Rs.9,66,21,425/- which was claimed as exempt under section 10(38) of the Act. The AO rejected the explanations and submissions of the assessee filed during the course of assessment and finally framed the assessment under section 143(3) read with section 153A of the Act assessing the total income at Rs. 11,30,46,210/- as against the return of income of Rs.24,09,303/- by making two additions on account of unexplained cash credits under section 68 of the Act of Rs.10,43,74,444 /- and unexplained cash credit under section 69C of the Act of Rs.62,62,467/-. The AO added the entire sales proceeds of sale of shares of Comfort Intech Ltd along with commissions @6% towards arranging bogus entries of long term capital gain.

5. The assessee challenged the jurisdictional issue before the Id. CIT(A) that there being no incriminating materials found during search and this being unabated assessment on the date of search , therefore no addition can be made with seized incriminating materials. However Id. CIT(A) dismissed the appeal of the assessee on this issue by holding and observing as under:

“5.3 The assessee was covered u/s. 132 on 09.04.2015 by the Investigation Wing, Mumbai, after being armed with such huge adverse evidences against the assessee. It is also relevant to note that the assessee was allotted preferential shares which is normally allotted only to friends, relatives and close associates. It would have been an altogether different matter if the assessee had purchased the shares from the

market and not through the preferential route. In view of such a factual scenario, the onus was very heavy on the assessee to explain its claim of LTCG in the said scrip of GIL. However, the assessee could not even explain the basis of having made the decision of investment in the shares of the said scrip where it has earned such improbable/unrealistic profits. It is relevant to mention that GIL and FFSL are promoted by one Shri Anil Agarwal. It is noted that SEBI had carried out detailed investigations on the allegation of market manipulation in the scrip of FFSL and found that Anil Agarwal and entities of his "Comfort Securities Group" including Comfort Securities Ltd. and M/s. CIL to be guilty of market manipulation. The SEBI vide its final order dated 02.04.2018 has restrained/prohibited FSSL, Anil Agarwal and entities of his "Comfort Securities Group" including M/s. Comfort Securities Ltd. and M/s. CIL from accessing the market or trading for a further period of 3 years from the date of the order.

5.4 It is noted that in the statement recorded on oath, at the time of the search action of Shri Amit Patel, it was only vaguely informed that this investment decision was made by his late father as per the advice received from friends, brokers, etc. Similarly, no explanation could be given as to how the scrip-price rose to such high levels despite weak fundamentals and no positive corporate announcements. It is not always that a person gets implicated for being in possession of incriminating evidence. A person can also get implicated for not being in possession of a valid explanation or the requisite evidence. The statement given by Shri Amit Patel, at the time of the search action, wherein he could neither explain the basis for the investment in the said scrip nor explain the abnormal rise in the price of the said scrip despite weak fundamentals and no positive corporate announcements, is more than sufficient to implicate the assessee.

5.5 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 the Hon'ble Supreme Court in the case of P.R. Metrani v. CIT f20061 287 ITR 209/157 Taxman 325 (SO. 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. Sub-section (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 sub-section (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."

5.6 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.

5.7 In view of the aforesaid judicial decisions, the statement on oath recorded of Shri Amit Patel wherein he could neither explain the basis for the investment in the said scrip nor explain the abnormal rise in the price of the said scrip despite weak fundamentals and no positive corporate announcements, 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. In 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.

5.8 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 assessee 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 duly 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.

5.9 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 Amit Patel wherein he could neither explain the basis for the investment in the said scrip nor explain the abnormal rise in the price of the said scrip despite weak fundamentals and no positive corporate announcements. Accordingly, Ground No.1 of the appeal is dismissed.”

6. The Ld. A.R. vehemently submitted before us that the assessment in this case has attained finality on the date of search as the assessment related to A.Y. 2010-11 whereas the search was conducted on 09.04.2015 and therefore the assessment was unabated on the date of search. The Ld. A.R. submitted that in the case of unabated assessment on the date of search, addition can only be made in the assessment framed under section 143(3) read with section 153A of the Act , if there is an incriminating material found during the course of search and not otherwise. In the present case the Ld. A.R. submitted that during the course of search, no incriminating material was found with regard to the purchase and sale of shares made by the assessee and therefore addition made under section 68 & 69C are without jurisdiction and may kindly be deleted on the jurisdictional defect only. The Ld. A.R. while taking us through the provisions of section 153A of the Act submitted that the provisions as regards search proceedings are contained in section 153A and it is a complete code by itself as the provisions of section 153A provide that the powers of AO to frame assessment in the case of unabated assessment are very limited and any additions in the unabated assessment year can only be based upon the incriminating material found during the course of search. The Ld. A.R. submitted that in the present case the assessment had already attained finality on the date of search and therefore no addition could have been made in absence of any incriminating material. The Ld. A.R. in defence of his argument heavily relied on the decision in the case of Ms. Kalpana Ruia & ors. ITA No.6519/M/2019 & ors. in which an

identical issue has been decided by the coordinate bench in favour of the assessee.

7. The Ld. D.R., on the other hand, submitted that the assessee thus found to be engaged in the purchase and sale of penny stocks and have made bogus gain on the sale and purchase of the said shares. Therefore, the arguments of the Ld. A.R. are that such addition without seized materials is without jurisdiction is wrong and against the provisions of law. The ld DR referred to various documents seized during the search such as loose sheets and various other documents and submitted that all these documents proved that the gain was bogus and fictitious entries transacted in order to secure the accommodation of entries to introduce assessee's own money into books of accounts. The ld DR also referred to the statements recorded during the course of search and specifically stated that assessee could not answer the queries of the search team. The ld DR stressed that the search team found material during search which is incriminating and therefore the ground raised by the assessee that addition is not based upon the seized materials is devoid of any merit. The ld DR therefore prayed that the ground no. 1 deserved to be dismissed.

8. In the rejoinder ld AR submitted that the loose sheet found during the search only contained information/details as to the capital gain on sale of shares which has already been disclosed in the books of account of the assessee and in no way incriminating in nature.

9. We have heard the rival submissions of both the parties and perused the material on record. The undisputed facts are that the return of income was filed by the assessee for the instant year on 06.09.2010 declaring an income of Rs.24,09,303/-. Search and seizure action was conducted on 09.04.2015 and thus on the date of search, the assessment has attained finality and is an unabated assessment on the date of search. We find merit in the arguments of the Ld. A.R. that in the case of unabated assessment year, addition can only be made on the basis of incriminating material found during the course of search and not otherwise. In the present case, we have noted that no incriminating material was found during the course of search in relation to the purchase and sale of penny stocks and the authorities below have relied on the general investigation that assessee has made purchase and sale in penny stocks on the basis of documents which are already on records and made huge addition of bogus long term capital gain. The AO had discussed the modus operandi of the penny stock companies and operators involved in carrying out the purchase and sale of shares. However, nowhere the AO has referred to incriminating material found during the course of search in relation to purchase and sale of shares. We have also examined the documents found during the course of search by the search team as furnished by the ld DR in the form of paper book but find that these documents only contained the details of sale of shares only. The case of the assessee is squarely covered by the decision of the co-ordinate bench of the Tribunal Smt. Kalpana Mukesh Ruia vs. DCIT ITA No.6519/M/2019 A.Y. 2012-13 & ors. order dated 31.12.2020 wherein an identical issue has been

decided by the co-ordinate bench of the Tribunal in favour of the assessee. The operative part is reproduced as under:

"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 reference 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 132 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 pertain 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 IT AT 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 earned 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 Id. CIT(A) was justified in deleting the addition of Rs.3,91,55,000/-under section 68 of the Act in respect of share application money and addition of Rs. 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.

d) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs.3,91,55,000/- under section 68 of the Act in respect of share application money and addition of Rs. 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."

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 Bhiinji 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.

49. As regards the issue of additions on merits for the bogus long-term capital gain, we note that the same is based upon the modus operandi of earning bogus long-term capital gain in general mentioned by the assessing officer. It is further more based upon the statements obtained upon survey. Furthermore it is based upon Assessing Officer's analysis of the impugned companies financials wherein the assessing officer is of the opinion that the increase in value is unjustified. Furthermore assessing officer has referred to general SEBI action in case of bogus long-term entry operators. However none of the brokers or the persons or the companies dealt in these appeals have been referred in the above said SEBI enquiry noted by the AO in his order. As regards the merits of additions based upon the statement obtained from Survey from 3rd parties the same is not at all sustainable without any corroborative material. This position was expounded by the honourable Supreme Court in the case of S. Kader Khan (supra). That there is no material incrementing available in this regard is clearly evident from the observation of the assessing officer in the order itself. The assessing officer mentions that what is real was not recorded in the books of accounts at any place. He mentions in the assessment order that no book entries to the real transactions either in the books of assessee or in the books of this entry operators are there. This clearly signifies that assessing officer is not referring to any incriminating material seized. As regards the observation of the assessing officer that the share broker has accepted that he was acting on the advice of Shri Prakash Modi on behalf of the assessee, again there is no incriminating seized record in this regard. The same remains solely statement upon survey which is not a conclusive evidence of addition of undisclosed income without corroborative material."

10. We, therefore, respectfully following the decision of the co-ordinate bench of the Tribunal which has been passed after

following the decision of the jurisdictional High Court in the case of CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. (2015) 374 ITR 645 (Bom) and various other decisions, hold that the addition made by the AO under section 68 & 69 are without jurisdiction and are directed to be deleted on the jurisdictional issue.

11. The issues raised in ground No.2 ,3 and 4 are on merit challenging the order of Ld. CIT(A) confirming the addition of Rs. 10,43,74,444/- by Ld. CIT(A) as made by the AO under section 68 of the Act as unexplained cash credit by treating the sale proceeds yielding long term capital gain on sale of shares as non genuine.

12. The facts in brief are that the assessee has claimed the long term capital gain arising from sale of shares of Comfort Intech Ltd and Splash Media & Infra Ltd. as exempt under section 10(38) of the Act, the details whereof is given as under:

Name of Script	No. of equity Shares	Date of Acquisition	Cost of Acquisition	Year of sale	Sale Consideration	Gain/Loss
Comfort Intech Ltd.	4,77,000	20.05.2008	8,20,670	FY 2009-10	1,42,62,739	1,34,42,069
M/s Splash Media & Infra Ltd.	11,59,500	17.04.2009	22,71,817	FY 2010-11	6,34,71,700	6,11,99,883

The assessee was allotted warrants on preferential basis from M/S Comfort Intech Ltd. on 20.05.2008 for Rs. 4,77,000/- .Shares were issued in lieu of warrants which were listed on 21.11.2008 and listed on the exchange same date. Thereafter

the shares were split in the ratio of 1:10 on 14.10.2009. Similarly the assessee was allotted warrants on preferential basis by M/s Splash Media & Infra Ltd. and were converted into shares and listed on the stock exchange on 29.10.2009. thereafter there was a bonus issue in the ratio of 3:1 followed by shares split in the ratio of 1:10 on 27.07.2010. Both these shares went up spirally over a short period of time According to the Revenue the said transactions are suspicious and bogus which was revealed during the course of search and seizure action on the assessee. The search team found that these two companies M/s. Comfort Intech Ltd. and M/s. Splash Media & Infra Ltd. which are listed on Bombay Stock Exchange were used for providing accommodation entries of long term capital gain/ short term capital gain. The AO discussed the modus operandi of these companies in great detail in the assessment order and required the assessee to show cause as to why the said short term capital gain should not be added to the income of the assessee which was duly replied by the assessee vide written submission. The assessee also filed the proof of purchase and sale of shares including the D-mat account, contract notes etc. and also the details of brokers through whom these transactions were carried out. The AO finally rejected the claim of the assessee under section 10(38) of the Act and added the entire sale consideration realised from sale of shares of these two companies viz. Rs.7,77,34,439/- as sale of shares of both the companies under section 68 of the Act as unexplained investment in the assessment framed under section 143(3) read with section 153A of the Act dated 27.12.2017.

13. In the appellate proceedings also the Ld. CIT(A) affirmed the order of AO by holding that the long term capital gain as claimed exempt under section 10(38) of the Act on sale of shares of two companies as stated hereinabove are bogus and fictitious and was rightly added u/s 68 of the Act by the AO.

14. After hearing both the parties and perusing the material on record, we observe that the assessee has earned capital gain of Rs. 7,46,41,952 by selling shares of two companies on a total sale consideration of Rs. 7,77,34,439/-. The assessee has claimed the said gain on the sale of these two scrips as exempt under section 10(38) of the Act. We note that assessee has purchased these shares through Bombay Stock Exchange and the payment was made through account payee cheques and the purchase of shares is duly evidenced by shares warrants which were converted into equity shares and listed on the stock exchange and were recorded in the in D-mat account of the assessee. Similarly, the sale of shares was also made through registered broker of Bombay Stock Exchange and evidenced by contract notes and payments by cheques and payment of STT. We also note that one of the two scrips namely M/s. Splash Media & Infra Ltd . on which a capital gain of Rs.6,11,99,883/- was earned has been held to be not a penny stock in the case of Anil Kumar HUF Vs DCIT ITA No.5512 to 5516/Mum/2019 order dated 05.04.2021. The coordinate bench has held that First Financial Services Ltd is not a penny stock in the same order as stated above. This is being mentioned that this scrip is involved in the subsequent assessment years which are also being adjudicated by us.

15. Therefore, respectfully, following the decision of the co-ordinate bench of the Tribunal, we hold that the long term capital gain on the sale of shares of M/s. Splash Media & Infra Ltd. is not a bogus capital gain as the AO has solely relied on the report of investigation/search team and has not carried out any further verification on the basis of documents furnished by the assessee. Similarly, the position of long term capital gain earned on the sale of shares of M/s. Comfort Intech Ltd. of Rs.1,34,42,069/- is same as the assessee has filed all the necessary evidences before the AO and AO has failed to carry out any further investigation to prove that the long term capital gain earned by the assessee is bogus and fictitious. Consequently, the appeal of the assessee succeeds on merit also. Accordingly, the issue raised in ground No.3 & 4 are allowed.

16. The issue raised in ground No.5 is against the order of Ld. CIT(A) confirming the addition of Rs.46,64,066/- by Ld. CIT(A) as made by the AO under section 69 of the Act towards commission paid on the accommodation entries. Since we have already decided the grounds raising legal as well as merits in favour of the assessee and consequently the addition of Rs.46,64,066/- is also ordered to be deleted as this is consequential one. Accordingly the ground No.5 is allowed.

17. Accordingly, the appeal of the assessee is allowed.

ITA Nos. 5762, 5764 & 5765/M/2019, Assessment Years 2011-12, 2013-14 & 2014-15

18. The issues involved in the above appeals are identical to the one as stated above in ITA No.5761/M/19 for A.Y. 2010-11. Therefore, our findings in ITA No. 5761/M/19 for A.Y. 2010-11,

mutatis mutandis, would apply to these appeals as well. Accordingly the appeals of the assessee are allowed.

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

Order pronounced in the open court on 15.07.2021.

**Sd/-
(Amarjit Singh)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 15.07.2021.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.