IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE
(CONDUCTED THROUGH VIRTUAL COURT)

BEFORE SHRI MANISH BORAD, ACCOUNTANT MEMBER&
Ms. MADHUMITA ROY, JUDICIAL MEMBER

I.T.A. Nos.199/Ind/2019
(Assessment Years: 2011-12)

Ashish Chhaparia 1703B, Aster Tower, Near Vibhgyor School, Opposite Oberoi Mall, Malad East, Mumbai-400097	Vs.	ITO Aaykar Bhawa, Station Road, Burhanpur-450331
PAN No.ABMPC4542L		
(**Appellant**)	..	(**Respondent**)

I.T.A. Nos.200&201/Ind/2019
(Assessment Years: 2011-12 & 2012-13)

Manish Chhaparia 1703B, Aster Tower, Near Vibhgyor School, Opposite Oberoi Mall, Malad East, Mumbai-400097	Vs.	ITO Aaykar Bhawan, Station Road, Burhanpur-450331
PAN No.ABMPC4541K		
(**Appellant**)	..	(**Respondent**)

I.T.A. Nos. 202/Ind/2019
(Assessment Years: 2011-12)

Pawan Kumar Chhaparia 1703B, Aster Tower, Near Vibhgyor School, Opposite Oberoi Mall, Malad East, Mumbai-400097	Vs.	ITO Aaykar Bhawan, Station Road, Burhanpur-450331
PAN No.ABMPC4540J		
(**Appellant**)	..	(**Respondent**)

Appellant by :	Shri Pankaj Shah, CA
Respondent by :	Shri Harshit Bari, Sr. DR

Date of Hearing	18.08.2021
Date of Pronouncement	22.09.2021

O R D E R

PER Ms. MADHUMITA ROY - JM:

The bunch of appeals filed by the different assessee(s) are directed against the common order dated 24.12.2018 passed by the Ld. CIT(A)-II, Indore, arising out of the separate orders dated 22.12.2016 & 23.12.2016 passed by the ITO, Burhanpur under Section 147/143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for A.Ys. 2011-12 & 2012-13 respectively.

2. ITA No. 199/Ind/2019 A.Y. 2011-12 is taken as the lead case. The disallowance of claim of long term capital gain on sale of listed shares amounting to Rs. 77,57,559/- is the issue before us. The said claim of the assessee has been rejected by both the parties below and hence the appeal before us.

3. We have heard the rival submissions made by the respective parties and we have also perused the relevant materials available on record.

4. The brief facts leading to the case is this that the assessee filed its return of income for the year under consideration on 30.03.2012 showing income at Rs. 1,87,830/- and agricultural income of Rs. 3,85,270/-. The assessee claimed long term capital gains of Rs. 77,57,559/-. Upon verification of ITD application by the department it was found that an investigation was carried out by DIT(Inv.), Kolkata on bogus claim of long term capital gain made by the various assessees through price rigging in

penny stock company. In that connection the case of the assessee was reopened under Section 147of the Act. Notice dated 31.03.2016 under Section 148 was issued and the proceeding was carried by the Ld. AO. Upon verification of computation of income it was found that the assessee had shown exempt long term capital gain on purchase/sale of shares at Rs. 74,88,105/-. The assessee in total purchased 2,00,000 quantity of scrip of M/s. Splash Media Works Ltd. from One M/s. A. S. Securities Shares and Investment Consultants, 63/2, Vadar Society, Malad (E), Mumbai. The purchase bill was submitted by the assessee. The assessee has claimed to have purchased these 5000 shares of Splash Media Works Ltd. through broker M/s. A. S. Securities Shares and Investment, Mumbai. These shares have been purchased @ Rs. 41=40 per shares. Subsequently, these shares was sold through broker M/s. Comfort Securities Ltd., S. V. Road, Malad, Mumbai. The assessee also submitted that subsequent to purchase of these shares the company has issued 15000 bonus shares on 31.12.2009 against holding of one share in the ratio of 3:1. Total number of shares held by the assessee in the company increased to 20000 shares. Subsequently the shares were splitted by the company into ten shares against holding of one share. Thus, the share holding in the said company increased to 200000 shares. These shares sold ultimately by the assessee through broker M/s. Comfort Securities Ltd. (BSE CASH) (A BSE Broker) during the period 25.02.2011 and 16.03.2011. Through these transactions assessee has claimed to have earned long terms capital gain at Rs. 77,57,559/- which the assessee has claimed exempt u/s. 10(38) of the I.T. Act. Since the A. S. Securities Shares and Investment Consultants, Mumbai has not entered into any transaction of any stock exchange the bills relating to such transaction

submitted by the assessee have been treated to be false by the Ld. AO. Relevant to mention that the assessee purchased shares of Splash Media from M/s. A. S. Securities, Mumbai vide bill dated 25.09.2009 for Rs. 2,07,000/- and the payment has been cleared from the assessee through Union Bank of India Account No. 4912 on 27.01.2010.

5. The Ld. AO is of the view that the payment has been cleared only on 27.01.2010, and the cheque has been issued to M/s. A. S. Securities, Mumbai on 22.08.2009 for Rs. 2,07,000/- of Union Bank of India, A/c No. 4912 bearing cheque no. 084015. Finally relying upon the statement made by one Shri Anil Agrawal and the report of the DIT(Investigation), Kolkata admittedly a copy whereof has not been given to the assessee the exempt LTCG of Rs. 77,57,559/- has been treated to be bogus claim made for introducing the assessee's own unaccounted money into books of accounts which was, in turn, confirmed by the Ld. CIT(A).

6. At the time of hearing of the instant appeal the Ld. Counsel appearing for the assessee submitted before us that the same issue has been decided in favour of the assessee by the ITAT Mumbai Bench in the case of M/s. Anil Agrawal (HUF) vs. DCIT in ITA No. 5512-5516/Mum/2019 for A.Y. 2010-11 to 2014-15. The relevant portion whereof is as follows:-

> ***"6. Our findings and Adjudication***
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> *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.

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." 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."*

7. We find that the facts mentioned in the judgments above referred is similar to that of the facts narrated in the appeal before us and, thus, in the absence of any changed circumstances respectfully relying upon the same we allow the appeal preferred by the assessee.

8. In the absence of any changed circumstances and/or facts we do not find any reason to deviate from the stand taken by the Ld. Mumbai Bench and respectfully relying upon the same we delete the addition to the tune of Rs. 77,57,559/- in respect of long term capital gain. Hence, the assessee's appeal is allowed.

ITA Nos. 200-202/Ind/2019 (A.Ys. 2011-12 & 2012-13):-

9. The identical issue involved in these cases has already been dealt with by us in ITA No.199/Ind/2019 for A.Y. 2011-12 and in the absence of any changed circumstances the same shall apply mutatis mutandis. Hence, the appeals preferred by the assessee are allowed.

10. In the combined result, the appeals filed by the assessee are allowed.

This Order pronounced in Open Court on 22 /09/2021

Sd/- Sd/-

(MANISH BORAD) (MADHUMITA ROY)
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

Ahmedabad; Dated 22 /09/2021
TANMAY, Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Indore
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Indore