THE INCOME TAX APPELLATE TRIBUNAL
"E" Bench, Mumbai
Shri B.R. Baskaran (AM) & Shri Anikesh Banerjee (JM)

I.T.A. No. 787/Mum/2021 (A.Y. 2018-19)
I.T.A. No. 322/Mum/2021 (A.Y. 2017-18)
I.T.A. No. 503/Mum/2021 (A.Y. 2016-17)
I.T.A. No. 504/Mum/2021 (A.Y. 2015-16)
I.T.A. No. 505/Mum/2021 (A.Y. 2014-15)
I.T.A. No. 506/Mum/2021 (A.Y. 2013-14)
I.T.A. No. 507/Mum/2021 (A.Y. 2012-13)

Sandeep Hisaria 74/80, 3rd Floor Souri Building Babu Genu Road Kalbadevi Mumbai-400 002.	Vs.	DCIT, CC-2(4) 802, Pratishtha Bhavan, M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

Assessee by	Shri Neelkanth Khandelwal
Department by	Shri H.N. Singh
Date of Hearing	27.07.2022
Date of Pronouncement	17.10.2022

O R D E R

Per Bench :-

The assessee has filed these appeals challenging the orders passed by the ld. CIT(A) for A.Y. 2012-13 to 2018-19.

2. The facts relating to the case are stated in brief. The Revenue carried out search and seizure operations under section 132 of the I.T. Act in the case of Hisaria Group on 16.11.2017 and the assessee herein was also covered. Consequently, the assessments relating to A.Y. 2012-13 to 2017-18 were completed under section 143(3) read with section 153A of the Act. The assessment of A.Y. 2018-19 was completed under section 143(3) of the Act. The AO completed the assessments of AY 2011-12 to 2018-19 by making various additions. Aggrieved by the additions so made, the assessee filed

appeals before Ld CIT(A). The assessee has filed these appeals challenging the orders passed by Ld CIT(A) on the issues decided against him.

ASSESSMENT YEARS : 2012-13 to 2016-17:-

3. We shall now take up the appeals filed by the assessee for Assessment years 2012-13 to 2016-17.

4. In the appeals filed for AY 2012-13 to 2016-17, the assessee has raised a legal issue questioning the validity of additions made in these years, in the absence of any incriminating materials found during the course of search. The legal ground urged in these years read as under:-

> *"The Ld CIT(A) has erred in law and in facts in confirming the additions made by the Assessing Officer without any incriminating evidence found at the time of search."*

We noticed earlier that the search has taken place in the hands of the assessee on 16.11.2017. The details of returns of income filed for AY 2012-13 to 2016-17 are given below:-

Asst. Year	**Date of filing ROI**
2012-2013	16-09-2012
2013-2014	30-09-2013
2014-2015	29-07-2014
2015-2016	29-08-2015
2016-2017	14.10.2016

It is submitted that the time limit for issuing notice u/s 143(2) of the Act has expired for the above said years prior to the initiation of search and hence no assessment was pending for these years as on the date of search. Accordingly, it was submitted that assessments of these five years would fall under the category of "unabated assessments".

5. The contention of the assessee is that all these assessments under consideration shall not abate, since no assessment was pending on the date of search. It was further contended that in the cases of unabated/ finalized/completed assessments, the AO could have interfered with the issues already concluded only if the search team has found any incriminating material during the course of warranting such interference. It is the submission of Ld A.R that the search officials did not unearth any incriminating material warranting interference with the capital gains/capital loss declared by these assessees in all the years under consideration. In support of these legal contentions, the Ld A.R placed his reliance on the decision rendered by the jurisdictional Hon'ble Bombay High Court in the cases of Continental Corporation (Nhava Sheva) Ltd (2015)(58 taxmann.com 78)(Bom) and Gurinder Singh Bawa (2017)(79 taxmann.com 398)(Bom). He also submitted that the legal proposition interpreted by the jurisdictional High Court has been followed by the Mumbai bench of Tribunal in the case of Smt Anjali Pandit vs. ACIT ITA No.3028 to 3032/Mum/2011 & others), by its order dated 17.11.2016.

6. The provisions of sec.153A of the Act provide for issuing of notice u/s 153A of the Act for six assessment years immediately preceding the year of search and thereafter, the AO shall assess or reassess the total income for the above said six years. This section further provides that all pending assessment or re-assessment pending as on the date of search shall abate. Hence the assessments of the assessment years falling within the period of above said six years which are not pending, i.e., which have attained finality shall not abate. Assessments of such assessment years are called "unabated/completed/finalized" assessments. The question as to whether the AO is entitled to interfere with such kinds of unabated/completed/ finalized assessments or not without there being any incriminating material found during the course of search, was examined by the Special bench of Tribunal in the case of All Cargo Logistics Ltd vs. DCIT (2012)(137 ITD

287)(Mum), wherein it was held that the AO could interfere with the unabated/completed/finalized assessments only if the incriminating materials found during the course of search warrant such interference, meaning thereby, if the search action did not bring out any incriminating material, then the AO cannot disturb the completed assessments and he has to simply reiterate the earlier total income in the present assessment order.

7. The above said view expressed by the Special bench has since been upheld by Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd (supra). The relevant observations made by Hon'ble Bombay High Court in the above said case are extracted below:-

> "31. We, therefore, hold that the Special Bench's understanding of the legal provision is not perverse nor does it suffer from any error of law apparent on the face of the record. The Special Bench in that regard held as under :
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> > "48. The provision under section 153A is applicable where a search or requisition is initiated after 31.5.2003. In such a case the AO is obliged to issue notice u/s 153A in respect of 6 preceding years, preceding the year in which search etc. has been initiated. Thereafter he has to assess or reassess the total income of these six years. It is obligatory on the part of the AO to assess or reassess total income of the six years as provided in section 153A(1)(b) and reiterated in the 1st proviso to this section. The second proviso states that the assessment or reassessment pending on the date of initiation of the search or requisition shall abate. We find that there is no divergence of views in so far as the provision contained in section 153A till the 1st proviso. The divergence starts from the second proviso which states that pending assessment or reassessment on the date of initiation of search shall abate. This means that an assessment or reassessment pending on the date of initiation of search shall cease to exist and no further action shall be taken thereon. The assessment shall now be made u/s 153A. The case of Ld. Counsel for the assessee is that necessary corollary to this provision is that completed assessment shall not abate. These assessments become final except in so far and to the extent as undisclosed income is found in the course of search. On the other hand, it has been argued by the Ld. Standing Counsel that abatement of pending assessment is only for the purpose of avoiding two assessments for the same year, one being regular

assessment and the other being assessment u/s 153A. In other words these two assessments coalesce into one assessment. The second proviso does not contain any word or words to the effect that no reassessment shall be made in respect of a completed assessment. The language is clear in this behalf and therefore literal interpretation should be followed. Such interpretation does not produce manifestly absurd or unjust results as section 153A (i)(b) and the first proviso clearly provide for assessment or reassessment of all six years. It may cause hardship to some assesses where one or more of such assessments has or have been completed before the date of initiation of search. This is hardly of any relevance in view of clear and unambiguous words used by the legislature. This interpretation does not cause any absurd etc. results. There is no casus omissus and supplying any would be against the legislative intent and against the very rule in this behalf that it should be supplied for the purpose of achieving legislative intent. The submissions of the Ld. Counsels are manifold, the foremost being that the provision u/s 153A should be read in conjunction with the provision contained in section 132(1), the reason being that the latter deals with search and seizure and the former deals with assessment in case of search etc, thus, the two are inextricably linked with each other.

49. Before proceeding further, we may now examine the provision contained in sub-section (2) of section 153, which has been dealt with by Ld. Counsel. It provides that if any assessment made under sub- section (1) is annulled in appeal etc., then the abated assessment revives. However, if such annulment is further nullified, the assessment again abates. The case of the Ld. Counsel is that this provision further shows that completed assessments stand on a different footing from the pending assessments because appeals etc. proceedings continue to remain in force in case of completed assessments and their fate depends upon subsequent orders in appeal. On consideration of the provision and the submissions, we find that this provision also makes it clear that the abatement of pending proceedings is not of such permanent nature that they cease to exist for all times to come. The interpretation of the Ld. Counsel, though not specifically stated, would be that on annulment of the assessment made u/s 153(1), the AO gets the jurisdiction to assess the total income which was vested in him earlier independent of the search and which came to an end due to initiation of the search.

50. The provision contained in section 132 (1) empowers the officer to issue a warrant of search of the premises of a person where any one or more of conditions mentioned therein is or are satisfied, i.e. - a) summons or notice has been issued to produce books of account or other documents but such books of account or documents have not been produced, b) summons or notice has been or might be issued, he will not produce the books of account or other documents mentioned therein, or c) he is in possession of any

money or bullion etc. which represents wholly or partly the income or property which has not been and which would not be disclosed for the purpose of assessment, called as undisclosed income or property. We find that the provision in section 132 (1) does not use the word "incriminating document". Clauses (a) and (b) of section 132(1) employ the words "books of account or other documents". For harmonious interpretation of this provision with provision contained in section 153A, all the three conditions on satisfaction of which a warrant of search can be issued will have to be taken into account.

51. Having held so, an assessment or reassessment u/s 153A arises only when a search has been initiated and conducted. Therefore, such an assessment has a vital link with the initiation and conduct of the search. We have mentioned that a search can be authorised on satisfaction of one of the three conditions enumerated earlier. Therefore, while interpreting the provision contained in section 153A, all these conditions will have to be taken into account. With this, we proceed to literally interpret to provision in 153A as it exists and read it alongside the provision contained in section 132(1).

52. The provision comes into operation if a search or requisition is initiated after 31.5.2003. On satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income of six years immediately preceding the year of search. The word used is "shall" and, thus, there is no option but to issue such a notice. Thereafter he has to assess or reassess total income of these six years. In this respect also, the word used is "shall" and, therefore, the AO has no option but to assess or reassess the total income of these six years. The pending proceedings shall abate. This means that out of six years, if any assessment or reassessment is pending on the date of initiation of the search, it shall abate. In other words pending proceedings will not be proceeded with thereafter. The assessment has now to be made u/s 153A (1)(b) and the first proviso. It also means that only one assessment will be made under the aforesaid provisions as the two proceedings i.e. assessment or reassessment proceedings and proceedings under this provision merge into one. If assessment made under sub-section (1) is annulled in appeal or other legal proceedings, then the abated assessment or reassessment shall revive. This means that the assessment or reassessment, which had abated, shall be made, for which extension of time has been provided under section 153B.

53. The question now is - what is the scope of assessment or reassessment of total income u/s 153A (1)(b) and the first proviso ? We are of the view that for answering this question, guidance will have to be sought from section 132(1). If any books of account or other documents relevant to the assessment had not been produced in the course of original assessment and found in the course of

> search in our humble opinion such books of account or other documents have to be taken into account while making assessment or reassessment of total income under the aforesaid provision. Similar position will obtain in a case where undisclosed income or undisclosed property has been found as a consequence of search. In other words, harmonious interpretation will produce the following results :-
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> a) In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the AO,
> (b) in respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the course of search, and undisclosed income or undisclosed property discovered in the course of search.
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> 54. It may be mentioned here that Ld. Counsel for All Cargo Global Logistics Ltd. was questioned about the scope of pending assessments as it was his contention that all six assessments are to be made, if necessary, on the basis of undisclosed income discovered in the course of search. He was specifically questioned about the jurisdiction of the AO to make original assessment along with assessment u/s 153A, merging into one. However he took an evasive view submitting that this question need not be decided in his case although the question of jurisdiction u/s 153A was vehemently pressed on account of which ground No.1 in the appeal for assessment year 2004-05 was admitted as additional ground. He also wanted the additional ground to be retained in case of any future contingency."

8. The view expressed by Hon'ble jurisdictional Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd (supra) was reiterated by the Hon'ble Bombay High Court in yet another case of Gurinder Singh Bawa (2017)(70 taxmann.com 398) as under:-

> "5. On further appeal before the Tribunal, the assessee interalia challenged the validity of the assessment made under Section 153A of the Act. This on account of the fact that no assessment in respect of the six assessment years were pending so as to have abated. The impugned order accepted the aforesaid submission of the respondent-assessee by interalia placing reliance upon the decision of the Special Bench of the Tribunal in Al-Cargo Global Logistics Ltd. rendered on 6 July 2012. The Tribunal in the impugned order further held that no incriminating material was found during the course of the search. Thus the entire proceedings under Section 153A of the Act were without jurisdiction and therefore the

addition made had to be deleted on the aforesaid ground. The impugned order also thereafter considered the issues on merits and on it also held in favour of the respondent-assessee.

6. Mr. Kotangale, the learned Counsel for the revenue very fairly states that the decision of the Special Bench of the Tribunal in Al-Cargo Global Logistics Ltd. was a subject matter of challenge before this Court as a part of the group of appeals disposed of as CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd. [2015] 374 ITR 645/58 taxmann.com 78/232 Taxman 270 (Bom.) upholding the view of the Special Bench of the Tribunal in Al- Cargo Global Logistics Ltd. Consequently, once an assessment has attained finality for a particular year i.e. it is not pending then the same cannot be subject to tax in proceedings under Section 153A of the Act. This of course would not apply if incriminating materials are gathered in the course of search or during proceedings under Section 153A of the Act which are contrary to and/or not disclosed during regular assessment proceedings.

7. In view of the above, on issue of jurisdiction itself the issue stands concluded against the revenue by the decision of this Court in Continental Warehousing Corpn. (Nhava Sheva) Ltd. (supra). In the appeal before us, the revenue has made no grievance with regard to the impugned order of the Tribunal holding that in law the proceedings under Section 153A of the Act are without jurisdiction. This in view of the fact that no assessments were pending, so as to abate nor any incriminating evidence was found. The grievance of the revenue is only with regard to finding in the impugned order on the merits of the individual claim regarding gifts and deemed dividend. However once it is not disputed by the revenue that the decision of this Court in Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra) would apply to the present facts and also that there are no assessments pending on the time of the initiation of proceedings under Section 153A of the Act. The occasion to consider the issues raised on merits in the proposed questions becomes academic.

8. In the above view, the questions as framed in the present facts being academic in nature, do not give rise to any substantial question of law. Thus not be entertained."

9. The co-ordinate bench has followed the above said binding decisions of jurisdictional High Court in the cases of Smt Anjali Pandit vs. ACIT (supra) and held as under:-

"8. From the propositions in the above mentioned decisions, we find that the case of the assessee is squarely covered by the ratio laid down in the decisions cited supra. We therefore respectfully following the same hold that the AO has not jurisdictional to assess the long term capital gain as income from other sources as the same is not based upon the seized or incriminating materials found during the search proceedings qua the long term capital gain. Similarly the CIT(A) enhancing the assessment is also not

based upon any seized or incriminating materials found during the search and therefore the enhancement is also without jurisdiction u/s 153A. Accordingly, the additional grounds no. 1A and 1B raised by the assessee stand allowed in favour of the assessee and AO is directed accordingly."

10. We may also gainfully refer to the decision rendered by Hon'ble Delhi High Court in the case of Kabul Chawla, wherein identical view was expressed. The Hon'ble Delhi High Court has summarized the legal position with regard to the provisions of sec.153A as under:-

"**Summary of the legal position**

37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges

> into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.
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> vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

11. We notice that the Ld CIT(A) has taken support of the decision rendered by Hon'ble Karnataka High Court in the case of M/s Canara Housing Development. However, in view of the binding decision rendered by Hon'ble jurisdictional Bombay High Court, we do not find it necessary to refer to the decision rendered by Hon'ble Karnataka High Court in the above said case.

12. In the instant cases, the assessments of AY 2012-13 to 2016-17 were not pending as on the date of search and hence they would fall under the category of "unabated/finalized/completed assessments". There is also no dispute with regard to the fact that the search officials did not unearth any incriminating material during the course of search warranting interference of the issues already stood concluded in unabated assessments. Hence the decisions rendered by the Hon'ble Jurisdictional Bombay High Court in the case of Continental warehousing Corporation (Nhava Sheva) Ltd (supra) and Gurinder Singh Bawa (supra), in our view, shall squarely apply to the facts of the present case. Accordingly we hold that the AO, in the absence of any incriminating material found during the course of search relating to the impugned additions, was not justified in assessing them in AY 2012-13 to 2016-17.

13. In view of the foregoing discussions, we set aside the orders passed by Ld CIT(A) in the hands of these assessees in AY 2012-13 to 2016-17 and direct the AO to delete the additions made in these years in the impugned

assessment orders. Accordingly, we do not find it necessary to adjudicate grounds urged on merits.

ASSESSMENT YEAR : 2017-18

14. We shall now take up the appeal filed for A.Y. 2017-18 wherein the following issues are urged :

a) Addition made under section 68 of the Act, being sale consideration realised on sale of shares of Shantanu Sheorey Aqua.

b) Claim for deduction of education cess

15. The first issue relates to the addition of sale consideration of Rs.3.19 crores received on sale of shares of M/s Shantanu Sheroy Aquakult Ltd. The AO noticed that the assessee has sold shares of above company, which is now known as 52 weeks Entertainment Pvt. Ltd. The assessee had declared long term capital gain of on sale of the above said shares. The investigation wing reported this share as penny stock. Accordingly, based on the report of the investigation wing, the AO held that the assessee has only taken accommodation entries in respect of these shares. Accordingly, he assessed the sale consideration of Rs.3.19 crores as income of the assessee u/s 68 of the Act. The ld CIT(A) also confirmed the same.

16. The Ld A.R submitted that the assessee has purchased these securities in the normal course of his activities. He submitted that the assessee has furnished copies of "Contract notes cum bill of sales" for purchase of shares. The purchases of shares have been made through banking channels. The shares have entered D-mat account of the assessee. He further submitted that the assessee has also furnished the audited financial statements of the above said company and also master data of the Registrar of Companies. Accordingly, he submitted that there is no reason to suspect the long term

capital gains declared by the assessee. He further submitted that the AO has not established that the transactions of purchase and sale of shares are not genuine nor did he show that the assessee was part of the transactions of generating bogus capital gains. The ld A.R placed his reliance on the decision rendered by Hon'ble Bombay High Court in the case of Shyam Pawar (54 taxmann.com 108)(Bom).

17. The ld D.R, on the contrary, supported the order passed by Ld CIT(A).

18. We heard rival contentions and perused the record. We notice that an identical case of allegations that the assessee has availed accommodation entries by way of capital gains in order to convert unaccounted money into accounted one, was examined by the Hon'ble jurisdictional Bombay High Court in the case of Shyam Power (supra). The decision rendered by Hon'ble Bombay High Court in the above said case is extracted below:-

> **"3.** Mr.Sureshkumar seriously complained that such finding rendered concurrently should not have been interfered with by the Tribunal. In further Appeal, the Tribunal proceeded not by analyzing this material and concluding that findings of fact concurrently rendered by the Assessing Officer and the Commissioner are perverse. The Tribunal proceeded on the footing that onus was on the Department to nail the Assessee through a proper evidence and that there was some cash transaction through these suspected brokers, on whom there was an investigation conducted by the Department. Once the onus on the Department was discharged, according to Mr.Sureshkumr, by the Revenue-Department, then, such a finding by the Tribunal raises a substantial question of law. The Appeal, therefore, be admitted.
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> **4.** Mr.Gopal, learned Counsel appearing on behalf of the Assessee in each of these Appeals, invites our attention to the finding of the Tribunal. He submits that if this was nothing but an accommodation of cash or conversion of unaccounted money into accounted one, then, the evidence should have been complete. Change of circumstances ought to have, after the result of the investigation, connected the Assessee in some way or either with these brokers and the persons floating the two companies. It is only, after the Assessee who is supposed to dealing in shares and producing all the details including the DMAT account, the Exchange at Calcutta confirming the transaction, that the Appeal of the Assessee has been rightly allowed. The Tribunal has not merely interfered with the concurrent orders because another view was possible. It interfered

because it was required to interfere with them as the Commissioner and the Assessing Officer failed to note some relevant and germane material. In these circumstances, he submits that the Appeals do not raise any substantial question of law and deserve to be dismissed.

5. We have perused the concurrent findings and on which heavy reliance is placed by Mr.Sureshkumar. While it is true that the Commissioner extensively referred to the correspondence and the contents of the report of the Investigation carried out in paras 20, 20.1, 20.2 and 21 of his order, **what was important and vital for the purpose of the present case was whether the transactions in shares were genuine or sham and bogus. If the purchase and sale of shares are reflected in the Assessee's DMAT account, yet they are termed as arranged transactions and projected to be real, then, such conclusion which has been reached by the Commissioner and the Assessing Officer required a deeper scrutiny.** It was also revealed during the course of inquiry by the Assessing Officer that the Calcutta Stock Exchange records showed that the shares were purchased for code numbers S003 and R121 of Sagar Trade Pvt Ltd. and Rockey Marketing Pvt. Ltd. respectively. Out of these two, only Rockey Marketing Pvt.Ltd. is listed in the appraisal report and it is stated to be involved in the modus-operandi. It is on this material that he holds that the transactions in sale and purchase of shares are doubtful and not genuine. In relation to Assessee's role in all this, all that the Commissioner observed is that the Assessee transacted through brokers at Calcutta, which itself raises doubt about the genuineness of the transactions and the financial result and performance of the Company was not such as would justify the increase in the share prices. Therefore, he reached the conclusion that certain operators and brokers devised the scheme to convert the unaccounted money of the Assessee to the accounted income and the present Assessee utilized the scheme.

6. It is in that regard that we find that Mr.Gopal's contentions are well founded. **The Tribunal concluded that there was something more which was required, which would connect the present Assessee to the transactions and which are attributed to the Promoters/Directors of the two companies.** The Tribunal referred to the entire material and found that the investigation stopped at a particular point and was not carried forward by the Revenue. There are 1,30,000 shares of Bolton Properties Ltd. purchased by the Assessee during the month of January 2003 and he continued to hold them till 31 March 2003. The present case related to 20,000 shares of Mantra Online Ltd for the total consideration of Rs.25,93,150/-. These shares were sold and how they were sold, on what dates and for what consideration and the sums received by cheques have been referred extensively by the Tribunal in para 10. A copy of the DMAT account, placed at pages 36 & 37 of the Appeal Paper Book before the Tribunal showed the credit of share transaction. The contract notes in Form-A with two brokers were available and which gave details of the transactions. The contract note is a system generated and prescribed by the Stock Exchange. From this material, in para 11 the Tribunal concluded that this was not mere accommodation of cash and enabling it to be converted into accounted or regular payment. The discrepancy

pointed out by the Calcutta Stock Exchange regarding client Code has been referred to. But the Tribunal concluded that itself, is not enough to prove that the transactions in the impugned shares were bogus/sham. The details received from Stock Exchange have been relied upon and for the purposes of faulting the Revenue in failing to discharge the basic onus. If the Tribunal proceeds on this line and concluded that inquiry was not carried forward and with a view to discharge the initial or basic onus, then such conclusion of the Tribunal cannot be termed as perverse. The conclusions as recorded in para 12 of the Tribunal's order are not vitiated by any error of law apparent on the face of the record either.

7. As a result of the above discussion, we do not find any substance in the contention of Mr.Sureshkumar that the Tribunal misdirected itself and in law. We hold that the Appeals do not raise any substantial question of law. They are accordingly dismissed. There would no order as to costs.

8. Even the additional question cannot be said to be substantial question of law, because it arises in the context of same transactions, dealings, same investigation and same charge or allegation of accommodation of unaccounted money being converted into accounted or regular as such. The relevant details pertaining to the shares were already on record. This question is also a fall out of the issue or question dealt with by the Tribunal and pertaining to the addition of Rs.25,93,150/-. Barring the figure of loss that is stated to have been taken, no distinguishable feature can be or could be placed on record. For the same reasons, even this additional question cannot be termed as substantial question of law."

19. In the instant case also, we noticed that the AO has simply relied upon the report of the investigation department and held that the long term capital gains declared by the assessee are not genuine. No other material was brought on record by the AO to prove that the assessee has indeed availed only accommodation entries. We noticed that the assessee has furnished all documents relating to purchase and sale of securities. The shares have entered and exited his demat account. The purchase and sale transactions have been routed through the bank accounts of the assessee. All these documentary evidences produced by the assessee have not been disproved. Accordingly, we are of the view that the decision rendered by the jurisdictional Hon'ble Bombay High Court in the above said case of Shyam R Pawar (supra) is squarely applicable to the facts of the present case. The Ld A.R also relied upon following decisions, which support the case of the assessee:-

(a) CIT vs. Smt Jamnadevi Agrawal (2012)(20 taxmann.com 529)(Bom)

(b) PCIT vs. Ziauddin A Siddique (ITA No.2012 of 2017)(Bom)

(c) PCIT vs. Smt Renu Agarwal (ITA No.44 of 2022)(Bom)

(d) Shri Sohanraj Uttamchand vs. DCIT (ITA No.1787/Chny/2017)

20. In view of the above, in the facts and circumstances of the case, we hold that the tax authorities are not justified in disbelieving the long term capital gains declared by the assessee. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the addition relating to assessment of sale consideration of Rs.3.19 crores realised on sale of shares of Shantanu Sheorey Aqua.

21. The next issue urged by the assessee relates to the claim for deduction of Education Cess. In view of the retrospective amendment brought in by Finance Act, 2022 holding that the education cess is not allowable as deduction, we hold that the claim of the assesee is not tenable. Accordingly, we reject this ground of the assessee.

ASSESSMENT YEAR 2018-19

22. We shall now take up the appeal for A.Y. 2018-19 wherein the following issues are urged :

a) Addition made under section 68 of the Act being sale consideration realized on sale of shares of Steel Exchange India.

b) Addition of cash balance found during the course of search of Rs. 22,53,620/-

c) Claim for deduction of education cess.

23. The first issue relates to the assessment of sale consideration realized on sale of shares of Steel Exchange India Ltd. The assessee had sold shares of the above said company for a sum of Rs.96,56,439/- and declared long term capital gain of Rs.19,53,439/- thereon. As in the preceding year, the

AO took the view that the assessee has availed only accommodation entries and accordingly assessed the sale consideration of Rs.96,56,439/- as income of the assessee. The Ld CIT(A) also confirmed the same.

24. We heard the parties on this issue. The facts relating to this issue, arguments advanced, evidences furnished and the case laws relied upon by the assessee are identical with the issue considered in AY 2017-18 in the preceding paragraphs with regard to the sale of shares of M/s Shantanu Sheorey Aqua Ltd. Accordingly, on identical reasoning, we hold that the AO was not justified in making addition of Rs.96,56,439/- in AY 2018-19. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete this addition.

25. The next issue urged by the assessee relates to the addition of cash balance of Rs.22,53,620/- found during the course of search. The facts relating to this issue are that the search officials found cash balance of Rs.22,53,620/- at the residence of the assessee and seized the same. The assessee explained before the AO that the above said cash represent cash balances belonging to various family members and group concerns. The assessee also gave breakup details of cash belonging to them. The AO did not accept the explanations of the assessee and accordingly assessed the above said amount of Rs.22,52,620/- as income of the assessee u/s 69A of the Act. The Ld CIT(A) also confirmed the same.

26. It is the submission of the assessee that he has furnished copies of cash book belonging to family members and group concerns certifying the cash balance available with them on the date of search. The Ld A.R submitted that all these parties have also file affidavits before Ld CIT(A) confirming the amount of cash balance belonging to them. The Ld A.R submitted that the tax authorities have not appreciated these evidences

furnished by the assessee. Accordingly, he prayed for deletion of this addition.

27. We heard the parties on this issue and perused the record. We notice that the assessee has furnished evidences in the form of copies of cash book maintained by the respective parties in support his contention that the cash seized during the course of search consisted of cash balance belonging to his family members and group concerns. Before Ld CIT(A), the assessee has furnished affidavits obtained from them, but the same have not been admitted by Ld CIT(A). In our view, if the assessee could prove the sources of cash along with supporting evidences, then there is no reason to disbelieve the same without examining those documents. Accordingly, we are of the view that the tax authorities are not justified in rejecting the contentions of the assessee without proper examination. Accordingly, we are of the view that this issue requires fresh examination at the end of the assessing officer for examining the claim of the assessee afresh duly considering the evidences furnished by the assessee. We also direct the AO to give credit for the cash balance shown in the cash books of family members and group concerns, if the said cash balance has not been claimed as source for any other expenses/investment etc. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of AO for examining the claim in accordance with the discussions made supra.

28. The next issue urged by the assessee relates to the claim for deduction of Education Cess. In view of the retrospective amendment brought in by Finance Act, 2022 holding that the education cess is not allowable as deduction, we hold that the claim of the assesee is not tenable. Accordingly, we reject this ground of the assessee.

29. In the result, the appeal filed by the assessee for AY 2012-13 to 2016-17 are allowed. The appeals filed for AY 2017-18 and 2018-19 are partly allowed.

Order pronounced in the open court on 17.10.2022.

Sd/-	Sd/-
(ANIKESH BANERJEE)	(B.R. BASKARAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 17/10/2022

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)

PS ITAT, Mumbai