

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI
BEFORE SHRI ABY T. VARKEY, JM AND SHRI S. RIFAUR RAHMAN, AM

आयकर अपील सं/ I.T.A. No.2349/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2012-13)

DCIT, Central Circle-6(2) Room No. 1903, 19 th Floor, Air India Building, Nariman Point, Mumbai-400021.	बनाम / Vs.	Shri Dilip B. Jiwrajka 15 th Floor Orbit Villa, 16, Darabsha Lane, Off Neapeansea Road, Mumbai-400036.
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Cross Objection No. 93/Mum/2022
Arising out of I.T.A. No.2349/Mum/2021
(निर्धारण वर्ष / Assessment Years: 2012-13)

Shri Dilip B. Jiwrajka 15 th Floor Orbit Villa, 16, Darabsha Lane, Off Neapeansea Road, Mumbai- 400036.	बनाम / Vs.	DCIT, Central Circle-6(2) Room No. 1903, 19 th Floor, Air India Building, Nariman Point, Mumbai- 400021.
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आयकर अपील सं/ I.T.A. No.2326/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2013-14)

DCIT, Central Circle-6(2) Room No. 1903, 19 th Floor, Air India Building, Nariman Point, Mumbai-400021.	बनाम / Vs.	Shri Dilip B. Jiwrajka 15 th Floor Orbit Villa, 16, Darabsha Lane, Off Neapeansea Road, Mumbai-400036.
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Cross Objection No. 92/Mum/2022
Arising out of I.T.A. No.2326/Mum/2021
(निर्धारण वर्ष / Assessment Years: 2013-14)

Shri Dilip B. Jiwrajka 15 th Floor Orbit Villa, 16, Darabsha Lane, Off Neapeansea Road, Mumbai- 400036.	बनाम / Vs.	DCIT, Central Circle-6(2) Room No. 1903, 19 th Floor, Air India Building, Nariman Point, Mumbai- 400021.
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A.Ys. 2012-13 to 15-16
Shri Dilip B. Jiwarajka

आयकर अपील सं/ I.T.A. No.2350/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2014-15)

DCIT, Central Circle-6(2) Room No. 1903, 19 th Floor, Air India Building, Nariman Point, Mumbai-400021.	बनाम / Vs.	Shri Dilip B. Jiwarajka 15 th Floor Orbit Villa, 16, Darabsha Lane, Off Neapeansea Road, Mumbai-400036.
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आयकर अपील सं/ I.T.A. No.2354/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2015-16)

DCIT, Central Circle-6(2) Room No. 1903, 19 th Floor, Air India Building, Nariman Point, Mumbai-400021.	बनाम / Vs.	Shri Dilip B. Jiwarajka 15 th Floor Orbit Villa, 16, Darabsha Lane, Off Neapeansea Road, Mumbai-400036.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAGPJ8756J		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Bharat Kumar/Lalit Singh
Revenue by:	Shri S. H. Usmani (DR) Ms. Mahita Nair (DR)

सुनवाई की तारीख / Date of Hearing: 23/09/2022
घोषणा की तारीख /Date of Pronouncement 29/11/2022

आदेश / ORDER

PER ABY T. VARKEY, JM:

All these appeals have been filed by the Revenue against the respective orders of the Ld. Commissioner of Income Tax (Appeals)-54, Mumbai [in short 'Ld. CIT(A)'] against the orders dated 29-12-2017 passed by the Assessing Officer [in short 'AO'] u/s 153A/143(3) of the Income Tax Act, 1961 (hereinafter "the Act") for AYs 2012-13



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to 2015-16. The assessee has also preferred Cross Objections in AYs 2012-13 & 2013-14. Since the issues involved were common, all the appeals were heard together. Both the parties also argued them together, raising similar arguments on these issues. Accordingly, for the sake of brevity, we dispose all the appeals by this consolidated order.

2. Before we advert to the grounds taken in these appeals, it would first be relevant to cull out the facts of the case in brief. Search u/s 132 was conducted against the assessee, on 09-04-2015. The original returns of income for Assessment Year [in short 'AY'] 2012-13 & 2013-14 were filed on 31-08-2012 & 31-07-2013. Prior to the date of search, the time limit for issuance of notice u/s 143(2) had expired for both these AYs. Accordingly, AYs 2012-13 & 2013-14 were not pending before AO on the date of search, so it was unabated assessment years as per second proviso u/s 153A (1) of the Act. The original return of income for AY 2014-15 was filed on 31.07.2014 and the time limit for issuance of notice u/s 143(2) had not expired as on the date of search. Accordingly, AY 2014-15 was an abated assessment year. With regard to AY 2015-16, it was pointed out that the return of income for this year was filed only after the date of search. Therefore, except AYs 2012-13 & 2013-14, the other AYs 2014-15 & 2015-16 were abated assessments.

3. The additions/disallowances made in all these AYs were on account of (a) addition on account of receipt of sale consideration of sale of listed shares u/s 68 of the Act, and (b) addition of unaccounted



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commission u/s 69C of the Act. The Ld. AR pointed out that, the assessment orders passed by the AO for all the AYs 2012-13 to 2015-16 were verbatim same wherein the AO had, inter alia, discussed the transactions conducted by the assessee in seven (7) listed shares, in which the assessee had derived capital gains (both long term and short term). The AO, thereafter, added the proceeds received on the respective sale of such shares as unexplained cash credit u/s 68 of the Act in the respective year in which the transactions in such shares took place, across all these AYs 2012-13 to 2015-16. Consequently, the AO also estimated and added unexplained expenditure by way of commission paid for such trades to the assessee's income u/s 69C of the Act in all the four AYs. The summarized details are as follows:

Assessment Year	Details of Scrips whose proceeds have been taxed as unexplained income u/s 68 of the Act
2012-13	M/s Unisys Software and Holdings Industries Ltd & M/s Rander Corporation Ltd
2013-14	M/s Dhenu Buildcon Infra Ltd (formerly known as Hingir Rampur Coal Ltd) & M/s Wagend Infra Venture Ltd (formerly known as M/s Agarwal Holding)
2014-15	M/s Radford Global Ltd, Global Infratech & Finance Ltd (formerly known as Asianlak Capital & Finance Ltd) and M/s Shree Shaleen Textiles Ltd
2015-16	M/s Rander Corporation Ltd

4. Before the Ld. CIT(A), the assessee had objected to the merits of the above additions made u/s 68 & 69C of the Act. In AYs 2012-13 to 2013-14, it was also contended by the assessee that, there was no incriminating material found in the course of search at the premises of



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the assessee, and therefore the additions/disallowances made in these AYs which were unabated/ non-pending on the date of search, ought to be held to be un-sustainable on facts and in law. This plea raised in AYs 2012-13 & 2013-14 was dismissed by the Ld. CIT(A), as according to him incriminating material and information was gathered in the course of search by the Investigating authorities and therefore he upheld the validity of the orders passed u/s 153A/143(3) of the Act for these unabated AYs. The Ld. CIT(A) however allowed the appeal on the merits and deleted the additions made by the AO u/s 68 & 69C of the Act in all AYs 2012-13 to 2015-16. Aggrieved by the orders of the Ld. CIT(A), the Revenue is in appeal before us in AYs 2012-13 to 2015-16 objecting to the deletion of the additions by the AO u/s 68 & 69C of the Act. In the Cross Objections filed by the assessee for AYs 2012-13 to 2013-14, it has been contended that, since there was no incriminating material found in the course of search at the premises of the assessee, the Ld. CIT(A) had erred in upholding the validity of these unabated assessments.

5. Since the issue raised in the Cross Objections relates to the validity of the additions made in the unabated AYs 2012-13 & 2013-14, we consider it fit to adjudicate them first. It is noted that, the assessee was deriving salary, rental income and income from other sources. Apart from the foregoing, the assessee, being an active investor in shares & securities, had also earned capital gains. It was brought to our notice that, in the course of search conducted u/s 132 of the Act on 09-04-2015, the assessee was not present and therefore the



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brother of the assessee, Shri Surendra Jiwrajka, had his statement recorded u/s 132(4) of the Act whose relevant extracts has been extensively reproduced at Pages 68 to 72 of the order. Taking us through his statement, the Ld. AR showed to us that, Shri Surendra Jiwrajka was confronted with the interim order passed by the SEBI in 2014 in the case of the assessee relating to his transactions in the shares of M/s Radford Global Ltd. The Investigating Officer had stated that, the assessee was found by the SEBI to be involved in managing & manipulating the prices of this particular scrip due to which the demat account of the assessee had also been frozen since he had traded in these shares. Referring to this SEBI action, the Investigating Officer had required Shri Surendra Jiwrajka to explain as to why the investments in shares of M/s Radford Global Ltd should not be treated as bogus, and why the capital gains derived therefrom should not be treated as income from other sources. On similar lines, questions were posed by the Investigating Officer in relation to the trades conducted by the assessee in shares of Global Infratech & Finance Ltd and Shree Shaleen Textiles Ltd. It is noted that the assessee's brother had acceded to the offer of the Investigating Officer and agreed to withdraw the exemption claimed u/s 10(38) in relation to these three (3) scrips (i) M/s Radford Global, (ii) M/s Global Infratech & Finance, (iii) M/s Shree Shaleen Textiles Ltd and offered it as taxable income under the head 'Other Sources' for abated assessment years i.e. AY 2014-15 & AY 2015-16. And thus we note that the offer of assessee's brother was not pertaining to the un-abated assessment years which we



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are dealing with now which adjudicating the legal issue. Coming to the un-abated AY's (i.e. AY 2012-13 & AY 2013-14) the Ld. AR pointed out that there is no admission regarding the four (4) scrips, on which AO has made additions (in the unabated AY's 2012-13 & AY 2013-14). And for buttressing this fact submitted that, the Investigating Officer had also enquired about the trades conducted in the shares of M/s Dhenu Buildcon Infra Ltd (formerly known as Hingir Rampur Coal Co. Ltd) to which no admission was made by the brother of the assessee in the statement given u/s 132(4) of the Act which can be discerned from his statement records which are reproduced (infra). After taking us through these questions and answers, the Ld. AR also pointed out that, the Investigating Officer never questioned or doubted the correctness or genuineness of the trades conducted by the assessee in the shares of (i) M/s Rander Corporation Ltd, (ii) Unisys Software & Holding Industries Ltd and (iii) M/s Wagend Infra Ventures Ltd. He showed us that no question whatsoever was posed in relation to these scrips in the statement given u/s 132(4) of the Act. For the ease of understanding, we consider it necessary to extract the relevant portion of the statement so recorded u/s 132(4) of the Act, which read as follows:

“Q.2 Please state who looks after the financial matters of Shri Dilip B Jiwrajka?

Ans: In respect to this I confirm that all the financial matters of Shri Dilip B Jiwrajka are looked after by me only.

Q.3 Please provide the details of all the LTCG that has been earned by Shri Dilip Jiwrajka by way of sale of shares/securities since 01.04.2008?



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Ans: Sir, I am submitting the list of all LTCG earned by Shri Dilip Jiwarajka since 01.04.2008 as Annexure A. These details pertain to the period till AY 2014-15. The return for AY 2015-16 has not been filed and the details for the same are under compilation.

Q.4 During the course of search proceedings on 10.04.2015 and 11.04.2015, you had given a statement on oath u/s 132(4) of the I T Act, 1961 on behalf of Shri Dilip Jiwarajka. I am showing you the statement. Kindly go through the same and confirm.

Ans. Sir, I have gone through the statement given by me during the course of search proceedings on 10.04.2015 and 11.04.2015 on behalf of Shri Dilip Jiwarajka and I confirm the contents of the statement.

Q.5 Who advises Shri Dilip Jiwarajka regarding the investments to be made in the share market?

Ans: Sir, all the investments that have been made by Shri Dilip Jiwarajka in shares/securities have been advised and managed by me. I am giving this statement on behalf of Shri Dilip Jiwarajka as he is not well and I will be explaining all the details for the investments made by Shri Dilip Jiwarajka in various shares/securities.

Q.6 From the details submitted by you it is seen that Shri Dilip Jiwarajka has claimed exemption u/s 10(38) for the LTCG of Rs. 9,50,64,684/- by way of sale of shares of Radford Global Limited during AY 2014-15. Kindly Confirm

Ans. Yes Sir, I confirm that Shri Dilip Jiwarajka has claimed exempt income of Rs. 9,50,64,684/- as LTCG u/s 10(38) on the sale of shares of Radford Global Limited during AY 2014-15. These investments in the shares of Radford Global Limited were made on my advice and I will explain all the queries pertaining to the same.

Q.16 During the course of recording of statement u/s 132(4) on 11/04/2015, it was brought to your notice that the transactions in the shares of AWs Radford Global Ltd. are bogus and managed transactions and these shares have been utilized to provide entry of bogus LTCG. The fact that the shares of Radford Global Limited have been managed has also been confirmed by the SEBI order and based on the same facts the DEMAT Account of Shri Dilip Jiwarajka has also been frozen since he has transacted in the shares of M/s Radford Global Ltd. In light of the above you are required to explain as to why the transactions in the shares of Radford Global Limited should not be treated as penny share transactions. Please explain why the Long Term Capital Gain, claimed to have been earned by Shri Dilip Jiwarajka on sale of shares of Radford Global Limited, should not be treated as income from other sources and why the exemption u/s 10(38) should not be disallowed?

Ans: Sir, the transactions in the shares of Radford Global Limited have been made on Bombay Stock Exchange. Since it has come to light that some manipulations were done in the transaction of equity shares of M/s Radford Global Ltd, therefore, to avoid



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protracted litigation with the department I offer to withdraw the claim of exemption u/s 10(38) of the IT Act made by Shri Dilip Jiwrajka on the sale of the shares of Radford Global Limited. As I had stated during the course of recording of my statement on 11.04.2015, I again submit that Shri Dilip Jiwrajka will withdraw his claim of exemption on the profit of Rs. 9,50,64,684/- made on sale of shares of Radford Global Limited during AY 2014-15 and will pay the taxes which would be applicable as per the provisions of I T Act, 1961. I also reiterate that no penal or any such action should be initiated against Shri Dilip Jiwrajka for this offer.

Q.17 From the details submitted by you it is seen that Shri Dilip Jiwrajka has claimed exemption u/s 10(38) for the LTCG of Rs. 4,36,08,645/- by way of sale of shares of Shree Shaleen textiles Limited during AY 2014-15. Kindly Confirm

Ans. Yes Sir, I confirm that Shri Dilip Jiwrajka has claimed exempt income as LTCG u/s 10(38) on the sale of shares of Shree Shaleen Textiles Limited during AY 2014-15.

Q.26 During the course of recording of statement u/s 132(4) on 11/04/2015, it was brought to your notice that the transactions in the shares of M/s Shree Shaleen Textiles Limited are bogus and managed transactions and these shares have been utilized to provide entry of bogus LTCG. In light of the above you are required to explain as to why the transactions in the shares of Shree Shaleen Textiles Limited made by Shri Dilip Jiwrajka should not be treated as penny share transactions. Please explain why the Long Term Capital Gain, claimed to have been earned by Shri Dilip Jiwrajka on sale of shares of Shree Shaleen Textiles Limited, should not be treated as income from other sources and why the exemption u/s 10(38) should not be disallowed?

Ans:Sir, the transactions in the shares of Shree Shaleen Textiles Limited have been made on Bombay Stock Exchange. Since it has come to light that some manipulations were done in the transaction of equity shares of Shree Shaleen Textiles Limited, therefore, to avoid protracted litigation with the department I offer, on behalf of Shri Dilip Jiwrajka, to withdraw his claim of exemption u/s 10(38) of I T Act on the sale of the shares of Shree Shaleen Textiles Limited. As I had stated during the course of recording of my statement on 11.04.2015, I again submit that Shri Dilip Jiwrajka will withdraw his claim of exemption u/s 10(38) on LTCG of Rs. 4,36,08,645/- by way of sale of shares of Shree Shaleen textiles Limited for AY 2014-15 and will pay the taxes which would be applicable as per the provisions of I T Act, 1961. I reiterate that no penal or any other such action should be initiated against Shri Dilip Jiwrajka for this offer.

Q.27 From the details submitted by you it is seen that Shri Dilip Jiwrajka has claimed exemption u/s 10(38) for the LTCG of Rs. 3,76,53,409/- by way of sale of shares of Asianlak Capital and Finance Limited (Global Infratech and Finance limited) during AY 2014-15. Kindly Confirm

Ans. Yes Sir, I confirm that Shri Dilip Jiwrajka has claimed exempt income as LTCG u/s 10(38) on the sale of shares of Asianlak Capital and Finance Limited (Global Infratech and Finance Limited) during AY 2014-15.



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Q.33 When did Shri Dilip Jiwarajka buy the shares of Asianlak Capital and Finance Limited (Global Infratech and Finance Limited). Please explain the whole procedure.

Ans. In the case of Asianlak Capital and Finance Limited (Global Infratech and Finance Limited), off market purchase of 1,00,000 shares was made on 15.09.2011 from M/s. Sanchita Investments Ltd through M/s. Gungour Suppliers Put Ltd. These shares were credited to the demat account of Shri Dilip Jiwarajka on 20.03.2012. Subsequently, these shares were split in the ratio of 1:10 and these shares were sold during F.Y. 2013-14.

Q.36 During the course of recording of statement u/s 132(4) on 11/04/2015, it was bought to your notice that the transactions in the shares Asianlak Capital and Finance Limited (Global Infratech and Finance Limited) are bogus and managed transactions and these shares have been utilized to provide entry of bogus LTCG. In light of the above you are required to explain as to why the transactions in the shares of Asianlak Capital and Finance Limited (Global Infratech and Finance Limited) made by Shri Dilip Jiwarajka should not be treated as penny share transactions. Please explain why the Long Term Capital Gain, claimed to have been earned by Shri Dilip Jiwarajka on sale of shares of Asianlak Capital and Finance Limited (Global Infratech and Finance Limited), should not be treated as income from other sources and why the exemption u/s 10(38) should not be disallowed?

Ans: Sir, the transactions in the shares of Asianlak Capital and Finance Limited (Global Infratech and Finance Limited) have been made on Bombay Stock Exchange. Since it has come to light that some manipulations were done in. the transaction of equity shares of Asianlak Capital and Finance Limited (Global Infratech and Finance Limited), therefore, to avoid protracted litigation with the department, I offer, on behalf of Shri Dilip Jiwarajka, to withdraw his claim of exemption u/s 10(38) of I T Act on the sale of the shares of Asianlak Capital and Finance Limited (Global Infratech and Finance Limited). As I had stated during the course of recording of my statement on 11.04.2015, I again submit that Shri Dilip Jiwarajka will withdraw his claim of exemption u/s 10(38) on profit of Rs. 3,76,53,409/- by way of sale of shares of Asianlak Capital and Finance Limited (Global Infratech and Finance limited) for AY 2014-15 and will pay the taxes which would be applicable as per the provisions of I T Act, 1961. I reiterate that no penal or any other such action should be initiated against Shri Dilip Jiwarajka for this offer.

Q.37 From the perusal of the details of the working of LTCG for AY 2013-14 furnished by you it is seen that Shri Dilip Jiwarajka had made investments in the shares of M/s Hingir Rampur Coal Co. Ltd. and he has claimed LTCG on sale of shares of this company as an exempt income u/s 10(38) during 2013-14. Please tell as to who advised him to invest in the shares of this company.

Ans.Sir, these investments have been made by Shri Dilip Jiwarajka on my advice. I will be providing all the details of the same.



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Q.47 From the perusal of the working of the long term capital gain in the case of Shri Dilip Jiwrajka for the AY 2013-14 it is noted that in AY 2013-14, 5,00,000 shares of M/s Hingir Rampur Coat Co. Ltd. are shown to be acquired on 30.11.2011 @Rs. 6/- per share and subsequently the entire holding of shares was sold between 17.01.2013 to 11.02.2013 in a total of 16 (sixteen) transactions at rates ranging between Rs. 152.77 to Rs. 164.44 per share for a total consideration of Rs.7,83,22,580 thereby showing a long term gain of Rs.7,53,22,580. As per your replies to the above questions you do not know the details of the companies/directors or their products / profitability / dividend yield. In spite of this, you have advised Shri Dilip Jiwrajka to invest in these shares. No prudent businessman is likely to make an investment of such quantum in such a manner. In view of the above and on the basis of the facts gathered in the course of this search action, the only conclusion that can be drawn is that the entire sequence of events has been made up to obtain entry of bogus LTCG. Please explain as to why such an inference be not drawn in this case. What you have to say in this regard?

Ans. Sir, these investments have been made by Shri Dilip Jiwrajka on my advice and these shares have been sold by Shri Dilip Jiwrajka on the stock exchange. I do not wish to comment anything else.

Q.58 From the perusal of the working of the long term capital gain in the case of Shri Dilip Jiwrajka for AY 2012-13, it is noted that in AY 2012-13, in KGN Industries Ltd, long term capital gain of Rs.1,66,10,816/- had been shown

As per your replies to the above questions you do not know the details you do not know the details of the companies/directors or their products / profitability / dividend yield. In spite of this, you have advised Shri Dilip Jiwrajka to invest in these shares. No prudent businessman is likely to make an investment of such quantum in such a manner. In view of the above and on the basis of the facts gathered in the course of this search action, the only conclusion that can be drawn is that the entire sequence of events has been made up to obtain entry of bogus LTCG. Please explain as to why such an inference be not drawn in this case. What you have to say in this regard?

Ans: Sir, these investments have been made by Shri Dilip Jiwrajka on my advice and these shares have been sold by Shri Dilip Jiwrajka on the stock exchange. I do not wish to comment anything else.”

6. The Ld. AR further pointed out that none of the documents which were seized by the Investigating Authorities in the course of search contained any incriminating material which could even remotely be linked to the additions made u/s 68 & 69C of the Act in



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the assessment orders of AYs 2012-13 & 2013-14. The Ld. AR also took us through the assessment order to show that, the AO has relied upon the third-party statements of so-called entry operators, which were recorded by different officers of Income-tax Department in some other proceedings, to justify the additions. According to him, these third-party statements cannot be said to constitute incriminating material found in the course of search conducted on 09-04-2015 consequent to which impugned assessment proceedings emanated. He further pointed out that these statements also did not contain any material incriminating the assessee of any wrong doing, and therefore no adverse inference could have been drawn based on these statements. The Ld. AR further showed us that, apart from relying on these statements, the AO in his show cause notice had undertaken his own subjective analysis of the movement in share prices and the financial performance of these four (4) scrips to allege that the gains derived on these listed shares were not genuine. It is noted that the assessee had responded to the show cause notice, which has also been extracted by the AO in the assessment order. The AO however did not agree with the assessee's contention. According to AO, the transactions conducted by the assessee in the scrips of M/s Dhenu Buildcon Pvt Ltd, M/s Rander Corporation Ltd, M/s Unisys Software & Holding Industries Ltd and M/s Wagend Infra Ventures Ltd were not genuine and held that source of sale proceeds of these shares remained unexplained which was accordingly assessed to tax u/s 68 of the Act. The AO further estimated and made addition on account of



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unexplained commission expenditure @ 7% of the sale proceeds by observing that the assessee would have incurred such expenditure outside the books to accommodate his unaccounted income in the guise of proceeds on sale of listed shares.

7. On appeal, the Ld. CIT(A) observed that the term '*incriminating evidence/material*' has not been defined in Section 153A of the Act and therefore it has to be understood in the manner as interpreted by the judicial authorities. According to Ld. CIT(A), if a search is conducted to investigate certain allegations which are found to be correct on analysis of the regular books of accounts seized in the course of search, then the AO is within his power to proceed u/s 153A of the Act. The Ld. CIT(A) observed that the AO had unearthed the modus operandi for certain dubious transactions and listed out unusual activities which was confirmed by the Director of investee company, entry operators etc. in their statements and therefore such statements/information constituted sufficient incriminating material to proceed against the assessee u/s 153A of the Act in the unabated AYs 2012-13 & 2013-14. Aggrieved by this finding of the Ld. CIT(A), the assessee has preferred cross objections before us.

8. We have heard both the parties. The facts of the case have been extensively discussed both by the AO and Ld. CIT(A) but at the cost of repetition, we deem it fit to recapitulate the same for better understanding of the issues under our adjudication. The assessee is an



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individual who is also an active investor in shares & securities. In the unabated AYs the assessee had transacted in several listed scrips on the Bombay Stock Exchange inter alia including M/s Dhenu Buildcon Pvt Ltd, M/s Rander Corporation Ltd, M/s Unisys Software & Holding Industries Ltd and M/s Wagend Infra Ventures Ltd. Before the AO the assessee had furnished all relevant contemporaneous evidences inter alia including purchase invoices, bank statements, demat accounts, broker ledgers, sale contract notes etc. to substantiate his transactions in these four (4) scrips and the short term/long term capital gain derived therefrom. It is not the case of the AO that any of these documents suffered from any infirmity or that these documents were false or fabricated. It is noted from the assessment order that the AO had initially referred to the statements of Shri Raj Kumar Kedia & Shri Manish Arora who had purportedly admitted that they had accommodated unaccounted monies of some beneficiaries by way of capital gains in the shares of M/s Rander Corporation Ltd. The AO thereafter analysed the financial performance of these shares and their price movements and observed that the increase in prices of these shares was unusual and therefore doubted the genuineness of the capital gains. The AO also extensively extracted the statement recorded from the brother of the assessee, Shri Surendra Jiwrajka u/s 132(4) of the Act (*already reproduced earlier*) wherein he had admitted to withdrawing exemption claimed u/s 10(38) of the Act in relation to three (3) scrips which is not pertaining to un-abated AY 2012-13 & AY 2013-14 ;*[and out of four (4) scrips for un-abated AYs,*



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no questions were asked by AO for three (3) scrips and for only one scrip question was asked from assessee's brother, who did not admit withdrawing exemption claimed u/s 10(38) of the Act for it]. And based on these material, the AO issued the show cause notice to the assessee to explain as to why the proceeds derived on sale of shares of M/s Rander Corporation Ltd, M/s Unisys Software & Holding Industries Ltd, M/s Dhenu Buildcon Ltd and M/s Wagend Infra Ventures Ltd should not be treated as his unexplained income of un-abated AY 2012-13 & AY 2013-14. Not being satisfied with the explanation offered, the AO added the same u/s 68 of the Act and also made further addition of unexplained commission expenditure u/s 69C of the Act.

9. The provisions of Section 153A, forming part Chapter XIV of the Act contain special provisions for completing assessments in case of Search conducted u/s 132 or requisitions u/s 132A. These provisions can be invoked only in cases where the Income-tax Department has exercised its extra ordinary powers of conducting search and seizure operations after complying with stringent pre-conditions prescribed in Section 132 of the Act. There is no denial that once a search u/s 132 is conducted against a person then irrespective whether any incriminating material is found, the AO is required proceed against such person for completing the assessments u/s 153A of the Act for the specified six assessment years and is required to issue notices u/s 153A to assess the income of the assessee for six assessment years preceding the date



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of search. These six assessment years comprise of two (2) classes of assessments (a) un-abated assessment and (b) abated assessments. The assessment years which are not pending for assessment before the AO on the date of search would be treated as un-abated AY's by virtue of second proviso to sub-section (1) of section 153A of the Act; and the other assessment years which are pending on the date of search would be treated as abated AYs. In case of abated assessments, the AO is free to frame the assessment in regular manner and determine the taxable income for the relevant year inter alia including the undisclosed income, having regard to the provisions of the Act. However, in relation to unabated assessments, which were not pending on the date of search, there is an embargo on the powers of the AO. In case unabated assessments, the AO can re-assess the income only to the extent and with reference to any incriminating material which the Revenue has unearthed in the course of search qua the assess qua the AY. It must be borne in mind that merely because an assessee is subjected to search, he cannot be placed on a different pedestal or put in a more disadvantageous position than an assessee who is not subjected to search unless in the course of search some incriminating documents or evidence or information is gathered by the Investigating authorities so as to vest the AO with the necessary powers to make additions to the total income in relation to assessments which did not abate on account of search. Considering these aspects the Hon'ble Delhi High Court in the case of **CIT vs Kabul Chawla reported in (2016) 380 ITR 573 (Del)** held as under:-



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“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: Once a search takes place under [section 132](#) of the Act, notice under [section 153A\(1\)](#) 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. 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 Ld AOs as a fresh exercise.

The Ld AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The Ld 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".

Although [Section 153A](#) 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 Ld 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."

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 complete assessment proceedings.

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



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for each AY on the basis of the findings of the search and any other material existing or brought on the record of the Ld AO.

Completed assessments can be interfered with by the Ld AO while making the assessment under [section 153A](#) 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."

38. The present appeals concern AYs 2002-03, 2005-06 and 2006-07, on the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed."

10. We find that the Hon'ble Delhi High Court while adjudicating the appeal in the case of CIT vs Kabul Chawla (2016) 380 ITR 573 had judicial note of host of the earlier decisions in the cases of CIT vs Anil Kumar Bhatia reported in (2013) 352 ITR 493 (Del) ; CIT vs Chetan Das Lachman Das reported in (2012) 211 Taxman 61 (Del HC) ; Madugula Venu vs DIT reported in (2013) 215 Taxman 298 (Del HC) ; Canara Housing Development Co. vs DCIT reported in (2014) 49 taxmann.com 98 (Kar HC) ; Filatex India Ltd vs CIT reported in (2014) 229 Taxman 555 (Del HC) ; Jai Steel (India) vs ACIT reported in (2013) 219 Taxman 223 (Del HC) ; CIT vs Murli Agro Products Ltd reported in (2014) 49 taxmann.com 172 (Bom HC) ; CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd reported in (2015) 374 ITR 645 (Bom HC) and All Cargo Global Logistics Ltd vs DCIT reported in (2012) 137 ITD 287 (Mum ITAT) (SB). We also



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find that Revenue's SLP against the decision of the Hon'ble Delhi High Court in the case of Kabul Chawla (Supra) was dismissed by the Hon'ble Apex Court which is reported in 380 ITR (St.) 4 (SC).

11. This view also finds support from the judgment of the Hon'ble Jurisdictional High Court in the case of **CIT Vs Gurinder Singh Bawa (386 ITR 483)** wherein it was held as follows:

“3. For the Assessment Year 2005-06, the respondent-assessee had filed his return of income declaring an income of Rs.9.61 lakhs. The return of income as filed by the respondent- assessee was processed under Section 143(1) of the Act. Admittedly, no notice under Section 143(2) of the Act has been issued. Thereafter on 5 January 2007, a search was conducted on the respondent-assessee under Section 132 of the Act. Consequent thereto, proceedings under Section 153A of the Act were initiated. During the assessment proceedings for A.Y. 2005-06, the Assessing Officer added an amount of Rs.93.72 lakhs (declared as gifts) as being covered by Section 68 of the Act and an amount of Rs.43.67 lakhs (accumulated profits of the lender) out of Rs.1.5 crores received as loan from one K.P. Developers Pvt. Ltd. as deemed dividend under Section 2(22)(e) of the Act. Undisputedly, respondent-assessee was a shareholder in M/s K.P. Developers (P) Ltd. The aforesaid additions are reflected in an assessment order dated 31 December 2008 passed under Section 143(3) r/w 153A of the Act determining the respondent-assessee's total income at Rs.1.47 crores.

4. In appeal, the CIT(A) held that the addition of an amount of Rs.43.67 lakhs as deemed dividend has to be deleted. This on the ground that there were no accumulated profits available with M/s K.P. Developers (P) Ltd. to distribute amongst it's shareholders. However, so far as the addition in respect of the unexplained gifts aggregating to Rs. 93.70 lakhs is concerned, the CIT(A) did not disturb the finding of the Assessing Officer.



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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 assessment 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



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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.

12. Identical view was expressed by the Hon'ble jurisdictional Bombay High Court in the case of **CIT Vs SKS Ispat & Power Ltd (398 ITR 584)** wherein it was held as follows:

“5. We have considered the arguments canvassed by the learned counsel for the respective parties. On perusal of section 153A of the Act, it is manifest that it does not make any distinction between assessment conducted under section 143(1) and 143(3). This court had occasion to consider the scope of section 153A of the Act in the case of Gurinder Singh Bawa and in the case of Continental Warehousing Corpn. (Nhava Sheva) Ltd. (referred to supra). It has been observed that section 153A cannot be a tool to have a second inning of assessment either to the Revenue or the assessee. Even in the case of Gurinder Singh Bawa (referred to supra) the assessment was under section 143(1) of the Act and the court held that the scope of assessment after search under section 153A would be limited to the incriminating evidence found during the search and no further. In the said judgment, the judgment of this court in Continental Warehousing Corpn. (Nhava Sheva) Ltd. (referred to supra) has been followed.

6. Considering the authoritative pronouncements of this court in the above referred cases one of which is also with regard to assessment under section 143(1), the issue is no longer *res integra* and stands concluded in the above referred judgments.”

13. The next aspect to be considered is to understand the meaning of the expression “*incriminating material*” or evidence. As rightly noted



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by Ld. CIT(A), there is no definition set out in the Act and the meaning of this term has to be discerned from its judicial interpretation made by different judicial forums. We understand that there can be several forms of incriminating material or evidence. In order to constitute an incriminating material or evidence, it is necessary for the AO to establish that the information, document or material, whether tangible or intangible, is of such nature which incriminates or militates against the person from whom it is found. Some common forms of incriminating material are for instance, where the search action u/s 132 of the Act reveals information (oral or documented) that the assets found from the possession of the assessee in form of land, building, jewellery, deposits or other valuable assets etc. do not corroborate with his returned income and/or there is a material difference in the actual valuation of such assets and the value declared in the books of accounts. Further, incriminating evidence may also constitute of information, tangible or intangible which suggests or leads to an inference that the assessee is carrying out certain activities outside books of accounts which is not disclosed to the Department. Incriminating material also comprises of document or evidence found in search which demonstrates or proves that what is apparent is not real or what is real is not apparent. In other words, if an assessee has recorded transactions in his books or other documents maintained in the ordinary course then in order to hold the material or evidence found in the course of search to be incriminating in nature, then seized document should lead to conclusion that the entries made in the books



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of the assessee do not represent true and correct state of affairs. Rather the evidence unearthed or found in the course of search should establish that the real transaction of the assessee was something different than what was recorded in the regular books and therefore the entries in the books did not represent true and correct state of affairs i.e. the assessee has undisclosed income/expense outside the books or that the assessee is conducting income earning activity outside the books of accounts or all the revenue earning activities are not disclosed to the tax authorities in the books regular maintained or the returns filed with the authorities from time to time etc. The nature of the evidence or information gathered during the search should be of such nature that it should not merely raise doubt or suspicion but should be of such nature which would prima facie prove that real and true nature of transaction between the parties is something different from the one recorded in the books or documents maintained in ordinary course of business. In some instances, the information, document or evidence gathered in the course of search, may raise serious doubts or suspicion in relation to transaction reflected in regular books or documents maintained in the ordinary course of business, but in such case the AO is not permitted to straightaway treat such material to be 'incriminating' in nature unless the AO thereafter brings on record further corroborative material or evidence to substantiate his suspicion and conclude that the transaction reflected in regular books or documents did not represent the true state of affairs. Until these conditions are satisfied, it cannot be held that every seized material or



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document or information is incriminating in nature justifying the additions in unabated assessments.

14. In view of the above legal position, let us now proceed to examine whether the additions/disallowances which the AO made in the orders of the unabated AYs impugned in this appeal (AY 2012-13 & AY 2013-14) was based on or made with reference to any incriminating material/information gathered in the course of search. From the assessment orders, it is clearly discernible that the additions were not based on any document/material/detail/asset found or unearthed in the course of search. Neither the AO nor the Ld. CIT(A) has referred to any document found or seized in the course of search to justify the impugned additions. Even the Ld. CIT(A) notes that the impugned additions were not based on any document or material found and seized in the course of search. Instead, according to Ld. CIT(A), the Investigating authorities were in possession of '*information*' regarding dubious transactions having been undertaken in these four (4) scrips. This '*information*' was purportedly obtained based on certain search or survey action conducted upon different persons/individuals by other tax officers in some unconnected proceedings. Based on this '*information*', search action u/s 132 of the Act was conducted upon the assessee and according to Ld CIT(A), based on analysis of books of accounts, recording of statements etc., certain information came to light which constituted '*incriminating evidence*' against the assessee. The Ld. CIT(A) also referred to the



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third-party statements of the purported entry operators/exit providers as 'incriminating material' qua the assessee.

15. It is noted by us that the '*information*' referred to by the Ld. CIT(A) was the inputs received by the Investigating authorities from the SEBI and other Investigation Wings of the Department. The AO has noted at Para 4.3 of the impugned order that the SEBI had passed an interim order dated 19-12-2014 in the matters of the scrip, M/s Radford Global Ltd this scrip (not pertaining to AY 2012-13 & AY 2013-14 ie un-abated assessment years we are dealing with legal issue) and the assessee was found guilty therein of manipulation and rigging of prices on this scrip on stock exchange. Based on these inputs, search action u/s 132 of the Act was conducted upon the assessee on 09-04-2015 to unearth the modus operandi of the assessee. As already noted by us earlier, the Investigating Officer at Q Nos. 6 & 16 had enquired about the genuineness of the transactions in the shares of M/s Radford Global Ltd, in light of the aforesaid SEBI interim order, to which the brother of the assessee had offered to tax the capital gains as income under the head 'Other Sources' and accordingly offered to withdraw exemption claimed u/s 10(38) of the Act. Similarly, enquiries were made in relation to shares of M/s Global Infratech & Finance Ltd and M/s Shree Shaleen Textiles Ltd and the assessee is noted to have admitted and offered to tax the capital gains derived on these shares also as his taxable income under the head 'Other Sources'. It is noted that, the assessee had dealt in these shares in AYs 2014-15 & 2015-16



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viz., the abated years, and therefore these enquiries clearly did not relate to the unabated AYs ie AY 2012-13 & AY 2013-14 which presently we are dealing. The assessee we find to have neither sold nor received proceeds from these scrips in unabated AYs 2012-13 & 2013-14. The shares in question in the unabated AYs are M/s Rander Corporation Ltd, M/s Unisys Software & Holding Industries Ltd, M/s Dhenu Buildcon Ltd and M/s Wagend Infra Ventures Ltd. We find that neither any enquiry nor any question was put to the Shri Surendra Jiwrajka in relation to the transactions conducted in the shares of M/s Rander Corporation Ltd, M/s Unisys Software & Holding Industries Ltd and M/s Wagend Infra Ventures Ltd. Having regard to the foregoing sequence of events & facts, we find ourselves in agreement with averment made by the Ld. AR of the assessee that, there was no incriminating 'information' gathered in relation to these three (3) scrips prior to the date of search as alleged by the Ld. CIT(A). If that had been the case, then the assessee would have surely been questioned regarding the veracity of the transactions in these shares as well. The very fact that the assessee was interrogated regarding his transactions in shares of M/s Radford Global Ltd, M/s Global Infratech & Finance Ltd and M/s Shree Shaleen Textiles Ltd (which pertaining to abated AY's ie AY 2014-15 & AY 2015-16), but he was not questioned in relation to shares of M/s Rander Corporation Ltd, M/s Unisys Software & Holding Industries Ltd and M/s Wagend Infra Ventures Ltd shows that there was no 'inputs' or 'information' received by the Investigating authorities prior to the date of search nor



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was any incriminating 'information' gathered from the assessee in the course of search. As far as the shares of M/s Dhenu Buildcon Ltd (formerly known as Hingir Rampur Coal Ltd) is concerned, it is noted that although the Investigating officer is noted to have questioned the assessee but in the answers given to Q Nos. 37 & 47, Shri Surendra Jiwrajka (brother of assessee) did not admit of any wrong doing. Also, unlike the questions which were put in relation to the shares of M/s Radford Global Ltd in the backdrop of the inputs received from SEBI, it is noted that the relevant Questions Nos. 37 & 47 posed by the Investigating Officer were general in nature and there was no reference to any 'information' gathered from SEBI or any other Department of Investigation Wing. In fact, it is noted by us, that like Dhenu Buildcon Ltd, similar questions at Q Nos. 48 & 58 were put to the assessee regarding his transactions in the shares of M/s KGN Industries Ltd to which similar replies were furnished by the assessee. Upon enquiry by the Bench, it was gathered that the AO had accepted the genuineness of the capital gains earned by the assessee in the shares of M/s KGN Industries Ltd. There is nothing brought on record by the AO or the Revenue as to what was the distinguishing 'incriminating information' in the possession of the Department when based on same line of enquiry, they accepted the genuineness of the transactions in shares of M/s KGN Industries Ltd but disbelieved the genuineness of the transactions in the shares of Dhenu Buildcon Ltd. On the overall conspectus of the facts, as discussed in the foregoing, we thus hold that the fundamental reasoning given by the Ld. CIT(A) viz., existence of



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prior incriminating information (from SEBI/Inv Wing) against the assessee, to justify the validity of the additions made in the unabated assessments framed u/s 153A/143(3) of the Act for AYs 2012-13 & 2013-14 was flawed and based on irrelevant facts not pertaining to the un-abated AYs.

16. The Ld. CIT(A) is also noted to have referred to the third party statements of entry operators recorded in different search/survey actions as ‘incriminating information’ qua the assessee. The Ld. AR has rightly pointed out to us that, none of the statements referred to by the AO, which has been extracted in the assessments orders, were recorded in the course of search conducted against the assessee on 09-04-2015 or in any proceedings connected with the said search. It also appears from the discussion in the impugned orders that except, making selective reference to part of the statements of few persons, recorded in some unconnected proceedings by some other officers of the Department, the AO himself never examined any of the these entry operators, so as to bring on record relevant facts if any, which would prove his conclusion that assessee was beneficiary of the accommodation entries allegedly provided by any of them. It was also brought to our notice that none of these persons had named the assessee as one of the beneficiaries nor had they suggested that the gains derived by the assessee in these four (4) scrips were not genuine. In the circumstances we find merit in the Ld. AR’s claim that the third-party statements relied upon by the AO to justify the additions u/s 68



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& 69C cannot be said to be incriminating material or documents gathered in the course of search conducted against the assessee.

17. In this regard, we may gainfully refer to judgment of the Hon'ble Delhi High Court in the case of **CIT Vs Best Infrastructure (India) Pvt Ltd (397 ITR 82)**. In this case along with assessee's search, simultaneous search was also conducted upon Mr. T who admitted to providing accommodation entries to the assessee in form of share application monies, in lieu of cash. Relying on the statement of Mr. T, the AO made additions u/s 68 in the assessments framed u/s 153A for unabated AYs 2005-06 to 2009-10. On appeal the Hon'ble High Court reiterated the settled legal position that unless there is incriminating material qua each of the AYs in which additions are sought to be made, pursuant to search and seizure operation, the assumption of jurisdiction under Section 153A of the Act would be vitiated in law. In view of the aforesaid legal position, the Hon'ble High Court observed that the director of the assessee had admitted undisclosed income only in relation to the year in which search was conducted and no income was admitted in relation to any of the earlier six years. It further observed that no incriminating material was found from the assessee's premises which could justify the additions made u/s 68 of the Act. As regards the statement of Mr. T, the Hon'ble High Court noted that that not only the assessee had denied not knowing the said person but even the Revenue never afforded the opportunity of his cross examination to the assessee. It was further observed that Mr. T had also subsequently retracted his statement. For the reasons



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aforesaid, the Hon'ble High Court held that the statement of Mr. T could not be considered to be incriminating evidence justifying the inference against the assessee in relation to unabated assessment.

18. We may also place reliance on the decision of this Tribunal in the case of **Loyalka Farms Pvt Ltd Vs DCIT in ITA(SS) No. 67/Kol/2018 dated 14.11.2018**. In the decided case also additions were made by the AO u/s 68 referring to statements of alleged entry operators in the unabated assessments which were completed u/s 153A of the Act. On appeal this Tribunal held that the third party statements by themselves do not constitute incriminating material found in the course of search upon the assessee and therefore deleted the additions made u/s 68 by the AO. The relevant findings of the Tribunal are as follows:

“8. We have heard the rival submissions. We find it would be necessary to address the preliminary issue of whether the addition could be framed u/s 153A of the Act in respect of a concluded proceeding without the existence of any incriminating materials found in the course of search. At the outset, it is evident from the categorical findings of the Id CITA that there is absolutely no incriminating materials found during the course of search regarding the share capital and share premium received by the assessee company during the year under appeal except the fact that the modus operandi of raising of such capital was discovered in the search action. We find that the Id CITA was only harping on the admission made by certain parties at the time of search without corroborating the same with material evidences found during the course of search. In this regard, the instructions issued by the Central Board of Direct Taxes (CBDT in short) in F.No.286/2/2003-IT(Inv) dated 10.3.2003 would be relevant to be looked into wherein it is mentioned that while recording statement during the course of search and seizure and survey operations, no



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attempt should be made to obtain confession as to the undisclosed income. For the sake of convenience and clarity, the relevant instructions dated 10.3.2003 issued by CBDT is reproduced hereunder:-

To All Chief Commissioners of Income tax (Cadre Contra) & All Directors General of Income Tax Inv.

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

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

Yours
Sd/-

faithfully,

(S. R. Mahapatra] Under Secretary (Inv. II)

We find that there is absolutely no corroborative evidence found in the course of search by the search team or material evidence brought on record by the Id AO or by the Id CITA in order to give credence to the statement recorded during search. Hence we hold that no addition



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could be made merely by placing reliance on the statement recorded during search.”

19. Applying the ratio laid down in said judgment to the facts of the present case, we find that the assessee’s case is on a much better footing. In the first instance we note that no simultaneous search or survey proceedings were carried out against the so-called entry operators in connection with the search which was conducted against the assessee on 09-04-2015. Further, as already noted, that nowhere in the statements of the entry operators they had admitted of providing accommodation entries to the assessee during the relevant year. Even the AO himself never personally examined any of the entry operators nor was opportunity of cross examination afforded to the assessee though the addition was justified majorly with reference to their so-called statements. Having regard to these facts, we therefore find that the above cited decisions (*supra*) to be applicable in the facts of the present case.

20. For the reasons set out above, we are therefore of the view that there was *no incriminating material or information* gathered in the course of search (pre/post search) in relation to the transactions conducted by the assessee in the shares of M/s Rander Corporation Ltd, M/s Unisys Software & Holding Industries Ltd, M/s Dhenu Buildcon Ltd and M/s Wagend Infra Ventures Ltd and in that view of the matter the additions made by the AO u/s 68 & 69C of the Act in the unabated AYs 2012-13 & 2013-14 is held to be unsustainable on



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both law as well as on facts. Accordingly the grounds raised by the assessee in the cross objections stands allowed.

21. In view of our above findings, the appeals of the Revenue for AYs 2012-13 & 2013-14 have now been rendered academic in nature. We therefore dismiss the same as infructuous.

22. Now we take up the appeals of the Revenue for AYs 2014-15 & 2015-16. The common issues raised by the Revenue in both AYs against the orders of Ld. CIT(A) are, (a) addition on account of receipt of sale consideration of sale of listed shares u/s 68 of the Act, and (b) addition of unaccounted commission u/s 69C of the Act. The Ld. AR pointed out that, the assessment orders passed by the AO for all the AYs 2012-13 to 2015-16 were verbatim same wherein the AO had, inter alia, discussed the transactions conducted by the assessee in seven (7) listed shares, in which the assessee had derived capital gains (both long term and short term). The AO, thereafter, added the proceeds received on the respective sale of such shares as unexplained cash credit u/s 68 of the Act in the respective year in which the transactions in such shares took place, across all these AYs 2012-13 to 2015-16. Therefore, for the purpose of the present discussions, the case of AY 2014-15 is taken as the lead case and our findings and decision therein shall be uniformly followed in AY 2015-16 as well. For A.Y 2014-15, the Revenue has preferred the following grounds, which are as under:-



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“i) On the facts and circumstances of the case, the ld. CIT(A) erred in deleting the addition u/s.68 of the Act without appreciating the evidences mentioned by the assessing officer.

ii) On the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the addition u/s.68 of the Act without appreciating the facts that the Securities Exchange Board of India (SEBI) passed an order in the case of Radford Global Ltd and M/s Global Infratech and Finance Ltd Services Ltd on 19.12.2014 whereby it was observed by SEBI that the shares of Radford Global Ltd and M/s Global Infratech and Finance Ltd Services Ltd have been manipulated and it was suspected that these shares have been used to provide accommodation entry of bogus LTCG to preferential allottees.

iii) On the facts and circumstances of the case, the ld.CIT(A) erred in holding that the Assessing Officer did not corroborate the finding of investigation wing independently while the appellate order states that the same is not possibly in every case and without mentioning which facts were not independently corroborated by the assessing officer.

iv) On the facts and circumstance of the case, the Ld. CIT(A) erred in deleting the addition on account of penny stock without appreciating the fact that the most of the shares have been purchased by bogus/paper entities which are into the business of providing accommodation entries.

v) On the facts and circumstance of the case, the Ld. CIT(A) erred in deleting the unexplained expenditure without appreciating the fact that the Shri Amit Saraogi (one of the stock brokers) in its statement has clearly stated that he had provided accommodation entries of bogus LTCG by pr- arranged trading in the shares of Radford Global Ltd and earned commission of 0.5% of the cheque amount for providing accommodation of LTCG.”

23. The brief facts of the case as brought out from the assessment order is that, pursuant to the search and seizure action u/s 132 of the



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Act which was carried out by the Income Tax Department on the assessee on 09-04-2015, several documents, books of accounts and / or loose papers were found and/or seized from the premises of the assessee. In compliance with the notice issued u/s 153A of the Act, a return of income was filed by the assessee on 21-10-2016 for assessment year 2014-15 declaring total income at Rs.3,24,56,530/-. After filing return u/s 153A, the notices u/s 143(2) & 142(1) of the Act were issued from time to time, and the assessee had filed his response thereto, furnishing the details required in the assessment proceedings. The assessee was deriving salary, rental income and income from other sources. Apart from the above, the assessee, being an active investor in shares & securities, had also earned capital gains.

25. The main issues involved in this appeal is in relation to the proceeds received on the sale of certain listed shares, which has been added by the AO to the assessee's income u/s 68 of the Act. Consequently, the AO has also estimated and added unexplained expenditure by way of commission paid for such trades to the assessee's income u/s 69C of the Act. In order to appreciate these issues, it would first be necessary to cull out the background facts and the relevant findings of the AO leading to the impugned additions. It is noted that, in the course of search, the assessee was not present and therefore the brother of the assessee, Shri Surendra Jiwrajka, had his statement recorded u/s 132(4) of the Act (*already reproduced earlier*). In his answer to Q No. 2, he stated that, he was looking after all the



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financial matters of the assessee. It is noted that, he had also provided a list of all the capital gains earned by the assessee from the sale of investments since 01-04-2008. In the course of his statement, it was brought to the notice of Shri Surendra Jiwrajka that the shares of M/s Radford Global Ltd was found by the SEBI to be managed & manipulated due to which the demat account of the assessee had also been frozen since he had traded in these shares. Referring to this SEBI action, the Investigating Officer had required Shri Surendra Jiwrajka to explain as to why the investments in shares of M/s Radford Global Ltd should not be treated as bogus, and why the capital gains derived therefrom should not be treated as income from other sources. The Investigating Officer also asked the assessee's brother to explain as to why exemption availed u/s 10(38) of the Act by the assessee in relation to the gains derived from these shares and some other scrips should not be withdrawn. It is noted that, Shri Surendra Jiwrajka first pointed out that the transactions in shares were conducted on the floor of the Bombay Stock Exchange ('BSE'). However, taking note of these investigations of the SEBI, he proposed to withdraw the exemption claimed u/s 10(38) of the Act in relation to the gains derived from such shares and offer the same as income in order to avoid protracted litigation with the Income-tax Department. Similar enquiries were made in relation to the transactions in shares of M/s Global Infratech & Finance Ltd and M/s Shree Shaleen Textiles Ltd, which also the assessee acceded to the offer of the Investigating



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Officer to declare the gains derived therein as his taxable income from other sources.

26. The assessee (Shri Dilip B. Jiwrajka), however, did not withdraw the exemption claimed u/s 10(38) of the Act nor did he offer the capital gains that were derived on these shares as his taxable income. Instead, the assessee submitted all documentary evidences in support of the transactions in these listed shares, such as, copy of purchase invoices, demat account statements, bank statements, ledgers, broker notes, etc. Having regard to these background facts, the AO issued a show cause notice proposing to disallow the exemption claimed u/s 10(38) of the Act and tax the proceeds received by the assessee on sale of these shares as his unexplained income, as admitted by assessee's brother [Shri Surendra Jiwrajka] in the statement recorded u/s 132(4) of the Act. In response, the assessee filed his objections. The AO, however, was not agreeable to the same. Instead, he set out his observations, which he had inferred/gathered relating to the shares in question, which for the sake of brevity, is being summarized in brief below:-

- According to the AO, the mere furnishing of documentary evidences was not sufficient to prove the genuineness of the transactions as according to him the assessee was unable to explain the abnormal increase in the prices of these shares with their corresponding financials and/or future prospects of these companies. He observed that the financials of these entities were very poor during the period when the preferential shares were allotted and



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their business profile did not suggest that these companies were engaged in any substantial activities, which could attract investors. The AO observed that the entire transaction was a colourable device concocted for the purposes of routing the unaccounted income of beneficiaries into their regular books of accounts. In support of his argument, the AO relied upon decision of Hon'ble SC in the case of CIT Vs Durga Prasad More (1971) 82 ITR 540 (SC) and Sumati Dayal Vs CIT (1995) 214 ITR 801 (SC).

- The AO further noted that funds, inter alia also raised from the assessee, was through preferential allotment which have not been used for any business expansion but have been further advanced as loans and investments. According to him, this act of preferential allotment was a pre-arranged and a managed process so as to allot preferential shares to the beneficiaries of bogus LTCG, which could later be sold by them for accommodating bogus LTCG/STCG in the garb of sale proceeds on sale of shares.
- Referring to the interim orders of the SEBI passed in 2014, the AO observed that these shares were rigged on the stock exchange. He also referred to the statements of several persons/brokers/exit providers who have purportedly averred that these shares were being used for providing entry of bogus LTCG/STCG/loss. As regards the assessee's request seeking cross-examination of the statements of purported stock operators, manipulators, assistors, the AO denied the same by observing that it is practically not possible to provide the opportunity of cross-examination to the assessee.
- The AO, accordingly, held that the entire sale consideration received on sale of these shares was unexplained cash credit u/s 68 of the Act. The AO



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further added unexplained commission computed @ 7% of the traded value as the expenditure incurred outside the books for availing such accommodation entry u/s 69C of the Act. In this regard, he has relied upon the decision of the Hon'ble Delhi ITAT in the case of DCIT Vs Esha Securities P Ltd [ITA No. 3357 & 3358/Del/2013], and the decision of the Nagpur Bench of the Bombay High Court in the case of Sanjay Bimalchand Jain L/H Shantidevi Bimalchand Jain vs The Pr. Commissioner of Income Tax-I, Nagpur & Another [ITA No. 18/2017].

27. Being aggrieved by the order of the AO, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to delete the impugned additions. Aggrieved by this action of the Ld. CIT(A), the Revenue has preferred an appeal before us on the grounds as mentioned hereinabove at Para 22.

28. Assailing the action of the Ld. CIT(A), the Ld. CIT, DR heavily relied on the statement recorded u/s 132(4) of the Act by the brother of the assessee Shri Surendra Jiwarajka wherein the brother has accepted that the amount of gains were derived from transactions that were not genuine and therefore, the Ld. CIT, DR urged that the same may be viewed in accordance with the confession made by the assessee's brother. He further contended that the shares in question were identified as penny scrips in the Investigation Report prepared by Directorate of Investigation, Kolkata. According to him, the office of DIT, Kolkata had found that several assesseees had accommodated their unaccounted monies in the guise of bogus long-term capital gain &



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short term capital gain in these shares. To demonstrate his contention, he took us through the facts set out by the AO in the assessment order regarding the financials and prospects of these companies. He submitted that the huge sums of long/short term capital gains claimed to have been earned by the assessee within a short period of time from sale of these shares was impossible, given the preponderance of human probability. He thus submitted that these transactions of the assessee were not genuine in as much as the assessee was unable to discharge his burden of explaining as to how there was a spike in the price of the shares within such a short duration he held those shares. According to him, if one looked at the surrounding circumstances it clearly led to only one possible conclusion that the assessee has manipulated the entire record and availed the bogus transactions of long-term capital gain to convert his unaccounted income to avoid tax through long-term capital gains. For this, he relied on the judgment of the Hon'ble Supreme Court in the case of SEBI Vs Rakhi Trading Pvt Ltd (CA No. 1969 of 2011). The Ld. CIT, DR also took us through the statements of the persons/entry operators relied upon by the AO to justify the impugned additions. He has stated that the Ld. CIT(A) failed to take due cognizance of these materials which were unearthed by the SEBI and Investigation Wing of the Department on the issue of bogus long term capital gain. The Ld. CIT, DR thus agitated that the order of the Ld. CIT(A) be reversed and that the additions made by the AO be upheld/sustained.



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29. Per contra, the Ld. AR appearing on behalf of the assessee relied on the findings recorded by the Ld. CIT(A) for deleting the additions made by the AO. The Ld. AR first explained the circumstances in which the purported statement of the assessee's brother was obtained. He pointed out that on the date of search i.e. 09-04-2015, the assessee's brother was cornered with the adverse interim orders of the SEBI passed in 2014. According to these interim orders, the preliminary investigation conducted by the authorities suggested that the shares in question had been managed and manipulated and therefore until the enquiry was complete, the demat accounts of the investors were frozen. Faced with this strenuous adverse situation coupled with undue-pressure of the investigation wing, the assessee's brother had no other alternative but to give his consent to the proposal given by the Investigating Officer to withdraw the claim made u/s 10(38) of the Act. The Ld. AR, accordingly, stressed that the basis of the statement given u/s 132(4) of the Act by the assessee's brother proposing to withdraw the claim made u/s 10(38) of the Act, was the adverse interim actions of the SEBI passed against the shares in question in the year 2014. Thereafter, he brought to our notice that subsequently the SEBI vide orders dated 20-09-2017, inter-alia, had revoked its earlier interim actions against these shares/companies and exonerated the assessee upon completion of their investigation. He submitted that this subsequent development and crucial fact was brought to the notice of the Ld. CIT(A) by which SEBI cleared these companies as well as the assessee was exonerated from the charges of



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manipulation of the prices of the shares. Hence, it was urged that when the very basis of the acceptance of the proposal of the investigation wing (to withdraw the claim u/s 10(38) of the Act) by assessee's brother u/s 132(4) of the Act was on a mistake of fact (SEBI's adverse interim actions of 2014) and when in the year 2017, the SEBI itself after carrying out 360 degree investigation and inquiry had cleared the assessee and the shares of the company in question, consequently the foundation (factual basis) prevailing at the time of recording the statement u/s 132(4) of the Act has been completely removed; and accordingly the statement of assessee's brother u/s 132(4) accepting the proposal of the investigation wing to withdraw the exemption claimed u/s 10 (38) of the Act loses its relevance. The Ld. AR thus contended that the grounds raised by the Revenue agitating the impugned addition based on the interim adverse orders rendered by the SEBI in 2014, which has since been ultimately vacated/reversed by the SEBI, deserves to be rejected. Further, in support of the findings of the Ld. CIT(A), the Ld. AR referred to several judgments rendered by this Tribunal and the jurisdictional High Court of Bombay, which shall be discussed in the later part of this order. And thus he doesn't want us to interfere with the order of Ld. CIT(A) for AY 2014-15 & AY 2015-16.

29. We have considered the rival submissions and perused the material available on records. It is noted that the main plank urged by the Ld. CIT, DR and also in the grounds raised before us, is that the Securities Exchange Board of India ('SEBI') had passed adverse



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interim orders in the cases of M/s Radford Global Ltd & M/s Global Infratech & Finance Ltd on 19-12-2014. The AO noted that in these orders, SEBI had suspected that the prices of these shares have been manipulated and that these shares had been used to provide accommodation entry. Pursuant to these inputs received from the SEBI, the Revenue identified assessee as one of the beneficiaries of bogus LTCG in the shares of M/s. Radford Global Ltd & M/s. Global Infratech & Finance Ltd. Accordingly, search action u/s 132 of the Act was conducted upon him on 09-04-2015. Although the assessee was not available at the time of search due to illness, the statement of his brother Shri Surendra Jiwrajka was recorded u/s 132(4) of the Act wherein he had averred that he was in charge of the financial affairs of the assessee. When confronted with these SEBI's adverse interim actions/ orders, Shri Surendra Jiwrajka is noted to have acceded to the Investigating Officer's proposal of offering the capital gain derived in these shares as income from other sources and forego the exemption claimed u/s 10(38) of the Act, (as the SEBI had suspected the assessee of manipulation in the prices of these scrips). According to the Ld. CIT, DR, having regard to these interim orders passed by the SEBI in 2014 and the consequent statement given by the assessee's brother in the course of search u/s 132(4) of the Act offering to tax the gains derived on these shares, was sufficient evidence to justify the impugned additions before us. He therefore urged that the order of Ld. CIT(A) deleting these additions be reversed.



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30. From the material placed before us, it is noted that, the SEBI vide interim order dated 19-12-2014, inter-alia, restrained the assessee, from accessing the securities market and buying, selling or dealing in securities, either directly or indirectly, in any manner, till further directions, pending investigation in the scrip of M/s. Radford Global Ltd. The directions issued vide aforesaid interim orders were, inter-alia, confirmed vide subsequent orders passed by SEBI. Subsequent to the interim orders, SEBI carried out an investigation to look into the role of debarred entities in price manipulation in these scrips. Vide order dated 20-09-2017, the earlier interim order was modified by SEBI and the entities including the assessee against whom directions were issued vide aforesaid interim orders/actions were found to be not in violation of provisions of SEBI Act, 1992 and SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities) Market Regulations, 2003. Accordingly, SEBI vide aforesaid order dated 20-09-2017, revoked the directions issued vide earlier interim orders in exercise of powers conferred under section 19 of SEBI Act, 1992 read with section 11, 11(4) and 11B thereof, with immediate effect. The Ld. CIT(A) is noted to have taken note of the aforesaid order of the SEBI, whose relevant portion is reproduced below:

“5. Upon completion of investigation, the SEBI had passed order in the case of Radford Global Limited on 20.09.2017 vide order No. SEBI/WTM/MPB/efd-1-DRA-III/30/2017. In this order it is concluded as under:

“9. investigation did not find any adverse evidence/adverse findings in respect of violation of provisions of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities



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Market) Regulations, 2003 (PFUTP Regulations) in respect of 82 entities (against whom directions were issued vide the interim orders as confirmed vide the above said confirmatory orders) warranting continuation of action under Section 11B r/w 11(4) of SEBI Act. However, investigation has found adverse findings against Radford which warrants Adjudication Proceedings. The details of the 82 entities are as follows.....”

“10. Considering the fact that there are no adverse findings against the aforementioned 82 entities with respect to their role in the manipulation of the scrip of Radford, I am of the considered view that the directions issued against them vide interim orders dated December 19, 2014 and November 9, 2015 which were confirmed vide Orders dated October 12, 2015, March 18, 2016, and August 26, 2016 are liable to be revoked.

11. In view of the foregoing, I, in exercise of the powers conferred upon under Section 19 of the Securities and Exchange Board of India Act, 1992 read with Sections 11, 11(4), and 11B of the SEBI Act, hereby revoke the Confirmatory Orders dated October 12, 2015, March 18, 2016 and August 26, 2016 qua aforesaid 82 entities (paragraph 9 above) with immediate effect.

12. The revocation of the directions issued vide the abovementioned orders (at paragraph 11) is only in respect of the entities mentioned at paragraph 9 of this order in the matter of Radford Global Limited. As regards remaining entities in the scrip of Radford, violations under SEBI Act, SCRA, PFUTP Regulations, etc. were observed and SEBI shall continue its proceedings against them. Hence, the directions issued vide Orders dated October 12, 2015, March 18, 2016 and August 26, 2016 against the remaining 24 entities shall continue. This revocation order is without prejudice to any other action SEBI may initiate as per law.”

Thus, there is no evidence that the appellant has indulged in the manipulation of share price of Radford Global Limited.”



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31. In view of the above, we agree with the submission of the Ld. AR that, when there was no evidence of manipulation of share prices ultimately found by the SEBI upon completion of investigation, the entire basis of the statement of Shri Surendra Jiwrajka recorded in the course of search u/s 132(4) of the Act stood vacated. Perusal of the questions posed to Shri Surendra Jiwrajka (*already reproduced at Para 4 above*) shows that the Investigating Officer wing's had questioned the genuineness of the capital gains earned in the shares of M/s. Radford Global Ltd in light of the interim SEBI's adverse order dated 19.12.2014. Similarly, the Investigating Officer had also suspected the gains derived in the shares of M/s. Shree Shaleen Textiles Ltd & M/s. Global Infratech & Finance Ltd (formerly Asianlak Capital Finance Ltd.). Faced adversely with the strenuous, complex situation when the Investigations Officer proposed to disallow the exemption to the LTCG u/s 10(38) of the Act, the assessee's brother on mistaken belief of fact [*which was based on the adverse interim order of SEBI in 2014 which was subsequently on 20.09.2017 modified and assessee was exonerated*] instead offered it to tax under the head 'Income from Other Sources'. The Ld. AR has rightly explained that, since at that material time (i.e. 09.04.2015) the interim directions of the SEBI against the assessee were in force and even the demat account of the assessee had been frozen, in order to avoid further harassment and protracted litigation, the brother of the assessee in the course of the search was left with no option but to accede to withdraw the exemption u/s 10(38) of the Act,. It is further



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noted that the assessee's brother had confirmed that the transactions had taken place on the Bombay Stock Exchange but only since SEBI had found price manipulation in these scrips that the assessee's brother proposed to renounce the exemption available u/s 10(38) of the Act to the assessee. As far as the gains derived in shares of M/s. Rander Corporation Ltd (AY 2015-16) is concerned, it is noted that the Investigating Officer himself never doubted or questioned the assessee's brother regarding the same nor did he offer the same to tax in his statement, which was recorded u/s 132(4) of the Act.

32. Coming to the settled position of law regarding statement recorded u/s 132(4) of the Act is that, an admission legally made by a person u/s 132(4) of the Act is relevant evidence in any proceedings of the Act but if that person later explains the circumstances which led him to make such a statement which raises 'reasonable doubt' that the admission was obtained by threat or inducement, or that the admission was based on wrong assumption of facts (and able to show/prove that assertion) and he is able to adduce evidence/material to show that he was wrong on the facts that he admitted, then such statement loses its probative value and it can no longer be treated as relevant or reliable to justify any addition based solely on such statement. From the discussions made in the foregoing, it remains uncontroverted by the Revenue that the interim order of the SEBI dated 19.12.2014 has since been vacated by their later order dated 20.09.2017 (qua the assessee as well as M/s Radford Global); and that the assessee has been



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exonerated of any wrong doing, the foundation/basis on which offer was made by assessee's brother stands removed. Thus it is noted that the assessee has therefore been able to demonstrate that the statement given by the assessee's brother u/s 132(4) of the Act was based on incorrect facts/wrong assumption of facts (mistaken belief of facts) and the assessee has also adduced material viz., SEBI order dated 20.09.2017, which shows that his brother's statement given earlier was unreliable [*since it was based on adverse interim order of SEBI in 2014 which has been modified in 2017 & assessee was exonerated*]and therefore should not be given any credence/probative value. On these given facts, the impugned additions made by AO cannot be justified based solely on statements recorded during the course of search, which is otherwise not backed by corroborative evidence. For this, we may gainfully refer to the Instruction F.No.286/2/2003-IT (Inv. II), dated 10-3-2003 issued by the CBDT to the Assessing Officers:

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



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Further, in respect of pending assessment proceedings also, Assessing Officers should rely upon the evidences/materials gathered during the course of search/survey operations of thereafter while framing the relevant assessment orders. "

33. This view was again reiterated by the CBDT in their Circular No. F.NO.286/98/2013-IT (INV.II)], dated 18-12-2014 which reads as follows:

"Instances/complaints of undue influence /coercion have come to notice of the CBDT that some assesseees were coerced to admit undisclosed income during Searches/Surveys conducted by the Department. It is also seen that many such admissions are retracted in the subsequent proceedings since the same are not backed by credible evidence. Such actions defeat the very purpose of Search/Survey operations as they fail to bring the undisclosed income to tax in a sustainable manner leave alone levy of penalty or launching of prosecution. Further, such actions show the Department as a whole and officers concerned in poor light.

2. I am further directed to invite your attention to the Instructions/Guidelines issued by CBDT from time to time, as referred above, through which the Board has emphasized upon the need to focus on gathering evidences during Search/Survey and to strictly avoid obtaining admission of undisclosed income under coercion/undue influence.

3. In view of the above, while reiterating the aforesaid guidelines of the Board, I am directed to convey that any instance of undue influence/coercion in the recording of the statement during Search/Survey/Other proceeding under the I.T.Act,1961 and/or recording a disclosure of undisclosed income under undue pressure/coercion shall be viewed by the Board adversely.

4. These guidelines may be brought to the notice of all concerned in your Region for strict compliance.



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5. I have been further directed to request you to closely observe /oversee the actions of the officers functioning under you in this regard.

6. This issues with approval of the Chairperson, CBDT.”

34. For the above reasons therefore, we reject the Ld. CIT, DR’s reliance on the statement of assessee’s brother u/s 132(4) of the Act to justify the impugned addition/s before us.

35. In his next set of contention, the Ld. CIT, DR relied upon the surrounding circumstances of these scrips noted by the AO in the assessment orders wherein he has discussed their financial statements and future prospects and concluded that their financials did not inspire confidence to justify the upward trend of price movements on the stock exchange. To this, the Ld. AR first submitted that, the assessee had furnished contemporaneous evidences to substantiate its transactions in all these shares. For AY 2014-15, he invited our attention to the following facts relating to the transactions in the shares which were noted by the Ld. CIT(A).

“6.3 I have considered the assessment order and the written submission made by the appellant, and perused the material on record and also the legal position on the issues at hand.

From the details available on records, the undisputed factual matrix in this case is that the appellant has share transactions as under:

Radford Global Limited:



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The appellant was allotted 2,50,000 shares of Radford Global Limited through preferential allotment on 16.02.2012. These shares were purchased at Rs.15/per share (Rs.10/- face value and a premium of Rs.5/-). The purchase price was paid by the appellant through banking channels. These shares were credited in the demat account on 31.03.2012 which was held with the SEBI registered broker. These shares were further split in the ratio of 1:5 on 29.01.2013. Thus, after the split, the appellant held 12,50,000 (250000 x 5) shares. The appellant sold 12,50,000 shares during the period 01.04.2013 to 24.06.2013. The shares were sold through the SEBI registered broker. The sale consideration of Rs. 9,88,14,684 was received through banking channels.

Global Infratech & Finance Ltd (formerly known as Asianlac Capital and Finance Ltd)

The assessee was allotted 1,00,000 shares of Global Infratech & Finance Ltd (formerly known as Asianlac Capital and Finance Ltd) through the preferential allotment on 19.01.2012. These shares were purchased at Rs.15/per share (Rs.10/- face value and a premium of Rs.5/-). The purchase price was paid by the appellant through banking channels. These shares were credited in the demat account on 13.03.2012 which was held with the registered broker. These shares were further split in the ratio of 1:10 on 13.12.2012. Thus, after the split, the appellant held 10,00,000 (100000 x 10) shares. The appellant sold 10,00,000 shares during the period 08.04.2013 to 12.04.2013. The shares were sold through the SEBI registered broker. The sale consideration of Rs 3,86,53,409/-, was received through banking channels.

Shree Shaleen Textiles Ltd.

The appellant was allotted 7,500 shares of Shree Shaleen Textiles Ltd through preferential allotment on 15.11.2011. These shares had been purchased at Rs.205/- per share (Rs.10/- face value and a premium of Rs.195/-). The purchase price was paid by the appellant through banking channels. These shares were credited in the demat account on 10.01.2012. Subsequently, bonus shares were issued in the ratio of 19:1 on 30.03.2012. After that the shares held by the appellant stood at 1,50,000 (7,500 x 20). These shares were further split in the ratio of



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1:5 on 06.03.2013 and, therefore, the number of shares held by the appellant was 7,50,000 (1,50,000 x 5). 7.50.000 shares was sold by the assessee during the period 31.07.2013 to 24.12.2013. The shares were sold through the SEBI registered broker. The sale consideration of Rs 4,51,46,145/- was received through banking channels. ”

36. The Ld. AR brought to our notice that, similar facts were noted in AY 2015-16 as well, which were as follows:

“The assessee has purchased 50,000 shares of **Rander Corporation Ltd** between 11.03.2013 to 13.03.2013 for a value of Rs.8,52,867/-. Entire holding was sold on 28.05.2014 for a total consideration of Rs.35,00,871/-. The appellant has earned STCG on sale of shares of Rander Corporation Ltd.”

37. The Ld. AR contended that no objective enquiry was conducted by the AO in respect of the contemporaneous transactional documents and evidences furnished by the assessee. Rather, these evidences were mechanically rejected by the AO. It is noted by us that, the assessee had furnished the following documents in support of his transaction in these four (4) scrips in question viz., M/s Radford Global Ltd, M/s Global Infratech & Finance Ltd, M/s Shree Shaleen Textiles Ltd & M/s Rander Corporation Ltd :

- (i) Copy of Bank Statement;
- (ii) Copy of demat account statement;
- (iii) Confirmation of invoices issued upon preferential allotment of shares;



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(iv) Copy of the contract notes issued by share broker upon sale of shares;

(v) Copy of the ledger accounts of the share broker;

38. We note that the aforesaid documents filed by the assessee before the lower authorities in order to substantiate the sale of listed shares has not been found to be false, fabricated and fictitious. The assessee is noted to have acquired the shares through preferential allotment, whose supporting evidences have been placed before us. It is noted by us, that this preferential allotment was approved at the respective Board meetings of these companies by passing a resolution and in-principle approval of the stock exchange was also obtained prior to the said preferential allotment. The purchase price is noted to have been paid via banking channels and subsequent thereto the shares are also found to have been credited to assessee's demat account. The sale of shares took place on screen based trading platform of Bombay Stock Exchange. The transaction was settled by making / receiving payment by account payee cheque/s through proper banking channels. The assessee had paid securities transaction tax (STT) on sale of shares. The transaction took place at the price prevailing on stock exchange on respective transaction dates and there is no adverse finding by the lower authorities in respect to the documents produced by the assessee to substantiate the sale of these shares. In the light of the documents filed as aforesaid, the assessee had discharged his initial burden to prove the genuineness of the long-term capital gain derived



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on sale of shares. Thereafter the 'onus' shift to AO, who has to verify the veracity of these documents and bring on record any infirmities if any found regarding the same. We find that AO has not found any defects in the documents produced by the assessee to substantiate the LTCG claimed to the assessee. There is no evidence brought before us to show that the documents filed by the assessee before the AO to substantiate the transaction regarding claim of capital gain in both AY 2014-15 & AY 2015-16 are false and fabricated.

39. In view of the above, the Ld. AR claimed that the assessee had discharged the burden to prove the genuineness of the transactions by bringing on record all relevant contemporaneous evidences. In such a backdrop, he claimed that it was incorrect for the AO to allege that the transactions were bogus on the basis of the purported surrounding circumstances noted by him, rather than disproving these evidences. Be that as it may, it is noted that the Ld. CIT(A) had taken cognizance of this argument of the Revenue and rejected the same by observing as under:

“Price of scrips depends on many factors, Companies are operating in different segments and sectors which are not possible to be related and the price of the scrips cannot be correlated with one or two such factors. As a matter of fact these factors may run into hundreds and still it may not be possible to say that all have been accounted for. Weak financial should not be the only parameter to suspicious trading of a company on Stock Exchange and as per the statistics 30% of listed companies on BSE are loss-making at any time and then their trading ought to be treated with suspicion.”



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40. To buttress his contention further, the Ld. AR submitted that, even otherwise the AO's premise that, the financials of these companies did not inspire confidence and that it did not correlate with the price movements so as to justify the genuineness of the capital gains, was factually untenable. For instance, in the context of M/s. Global Infratech & Finance Ltd, (formerly known as M/s. Asianlak Capital and Finance Ltd.), he pointed out that in the year of preferential allotment of shares, the turnover of the company had grown from Rs.8.90 lacs to Rs.191 lacs representing growth of 2046.07%. Correspondingly, the profit had increased from Rs.6.91 lacs to Rs.11.39 lacs representing growth of 64.83%. Thereafter, in FY 2012-13 the revenues had gone up to Rs.1515.58 lacs (increased by 693.50%) and the profit had increased to Rs.155.63 lacs (increased by 12.66%). Inviting our attention to the assessment order, the Ld. AR pointed out that the AO himself had taken note of the fact that the returned income of this company had increased from Rs.11.38 lacs in AY 2012-13 to Rs.155.62 lacs in AY 2013-14 and Rs.233.26 lacs in AY 2014-15. According to the Ld. AR, therefore, the financials of the company and its growth clearly reflected its bright future prospects which would entice investors to invest into the company's shares.

41. The Ld. AR had also submitted that, in similar fashion, the financials of other companies had also seen substantial tailwinds to justify the rise in their scrip prices. In the context of M/s. Rander



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Corporation Ltd., it was shown to us that revenue from operations grew from Rs.185.58 lacs (increased by 11.18%) in AY 2012-13 to Rs.239.30 lacs (increased by 28.94%) in AY 2013-14 to Rs.530.51 lacs (increased by 121.69%) in AY 2014-15 to Rs.434.02 lacs (decreased by 18.19%) in AY 2015-16. It was also brought to our notice that M/s Rander Corporation Ltd was also a dividend paying company which had declared dividend of Rs.0.5/share in 2011, Rs.0.6/share in 2012 and Rs.0.7/share in 2013. Hence, according to him, the AO's allegation that the financials of such companies did not support the increase in share prices was not justified.

42. The Ld. AR also brought to our notice that the shares of Global Infratech & Finance Ltd (formerly known M/s. Asianlak Capital and Finance Ltd.) were sold in the range of Rs.38.03 to 40.27 whereas these shares made a peak price of Rs.84.49 on the 17th of December 2013. Similarly, the shares of M/s. Radford Global Ltd were sold in the range of Rs.73.26 to 79.80 rather than at its peak price of Rs.85.55 that was achieved in the month of May 2013. Also, the shares of M/s. Shree Shaleen Textiles Ltd were sold in the range of Rs.59.13 to Rs.63.51 whereas the peak price of these shares was Rs.66.15 in October 2013. In the aforesaid factual back-ground, the Ld. AR accordingly submitted that, had the assessee been involved in availing accommodation entries/fixed transaction, then going by the AO's theory, the assessee ought to have sold the shares at the peak price to enjoy higher capital gains, and since that's not the case as evident from



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the aforesaid relevant facts, according to Ld AR, the AO's alleged theory fails. Before us, the Ld. CIT, DR was neither able to cogently rebut these averments of the Ld. AR, nor able to factually disprove the aforesaid relevant facts brought to our notice to counter the theory propounded by the AO to doubt the transaction. In such a scenario, even this contention of the Ld. CIT, DR cannot be the ground to overlook the documents submitted by the assessee to substantiate the transactions in question.

43. As far as the statements of brokers/entry operators etc., that have been relied upon by the Ld. CIT, DR, are concerned, the Ld. AR showed us that, neither in the sworn statements of the so-called entry operators had anyone admitted of providing accommodation entries to the assessee, nor had anyone admitted to have received any cash from the assessee in lieu of cheques. The Ld. AR further pointed out to us that the so-called entry operators were not even shareholders or directors of these listed companies so as to have been able to exert influence over the companies. According to him, the unfortunate part was that, the AO blindly relied on the bald statements of these operators, without bringing out any link to connect them with the assessee. It was contended that, had the AO wanted to use these statements of the so-called entry operators, then the AO ought to have summoned these brokers / entry operators and thoroughly examined them. The AO ought to have unearthed the links, materials, or relevant evidences, if any, against the assessee and thereafter the AO ought to



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have confronted the assessee with the support of the materials and/or statements, which he had discovered in the course of his investigation against the assessee. And thereafter, the AO ought to have given the assessee a reasonable opportunity to counter his discoveries/findings, by way of according the assessee the opportunity to rebut/explain the adverse material; and also allow the assessee to cross-examine the makers of the statement etc.; and only in the event, the maker of the statement could pass the cross-examination by the assessee, should such statement of the so-called entry providers be acted upon by the AO for being used in his case against the assessee. To illustrate the same, the Ld. AR showed us the misplaced reliance of the AO on the statements of these persons, inter alia including the statement of Shri Raj Kumar Kedia [*Page 4 to 8 of assessment order*]. It is noted by us that, Shri Kedia in his statement had admitted to arranging investment in shares of the companies impugned before us on behalf of “*some*” of the beneficiaries who wanted to reap LTCG in future. Shri Kedia thereafter went on to name the beneficiaries for whom he had arranged the accommodation entries [*undisputedly name of assessee is not in the list of beneficiary*]. The Ld. AR first stressed on the fact that, Shri Kedia had himself admitted that only *some* and not all investors in these shares were beneficiaries of bogus gains. He thereafter pointed out that the name of the assessee did not feature in his statement while giving the details of the purported beneficiaries. Having given our due consideration to the contents of this statement, we note that the statement of Shri Kedia on its own did not contain any material against



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assessee, on the basis of which any prudent person instructed in law would have reached the conclusion that, the transactions conducted by the assessee in publicly listed shares of the companies, in which any person could have traded/invested, had any connection with the averments made by Shri Kedia. Even otherwise, this statement also was not tested on the touch stone of cross examination, and so such third party statement could not have been acted upon to the disadvantage of the assessee, since it would be fragile for violation of the principles of natural justice. In this regard, we may gainfully refer to the decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries Vs. CCE reported in (2015) 281 CTR 241 (SC) wherein it has been held that, *failure to give the assessee the opportunity to cross examine witness, whose statements are relied upon, results in breach of principles of Natural Justice. It is a serious flaw which renders the order a nullity.* We also gainfully refer to the judgment of the Hon'ble Apex Court in the case of CIT Vs. Odeon Builders Pvt. ltd. (418 ITR 315) wherein also it was held that, the addition/disallowance made solely on third party information without subjecting it to further scrutiny and denying the opportunity of cross-examination of the third party renders the addition/ disallowance bad in law.

44. And further, the Ld. AR also pointed out that the statements of the [brokers/entry-operators] relied upon by the AO were recorded on various dates connected with some other proceedings which were in no



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way connected with the search action conducted upon the assessee. The Ld. AR therefore contended that, the circumstances under which the makers of the statement had made the statements and in what context did they give these statements is also not discernible. According to him, it is also not known whether the makers of these statements have given the same under threat, coercion, inducement, etc, [making it un-reliable]. Admittedly, we note that these statements were recorded in the absence/ behind the back of the assessee. Therefore, if the AO intended to use it against the assessee, then he ought to have summoned them and recorded their statements [if possible in the presence of assessee] and brought out clearly the role of assessee in any wrong doing and thereafter give a copy of the adverse material/statement and allow the assessee to cross-examine the maker of the adverse statement; and then if the AO finds that the maker of the adverse statement could withstand the cross examination of assessee, then AO could be justified to act against the assessee on the basis of incriminating oral evidence or it cannot be used against the assessee [because the assessee did not have any means to determine the veracity or correctness of the averments made in these statements]. Moreover, as noted by us in the earlier paras, none of the persons in their statements had admitted of having any transactions with the assessee. On the same lines, as discussed above, the AO relied on statements of other entry operators. On examination of these statements, we are satisfied that, in none of the statements has any of them admitted of having any transactions or providing accommodation



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entries to the assessee nor has the AO brought on record any material to link these entry operators / exit providers with the counter parties to whom the shares were sold by the assessee. We therefore hold that the AO was unjustified in making additions u/s 68 & 69C of the Act based on the unsubstantiated and irrelevant statements of entry operators / exit providers qua the assessee.

45. At this juncture, it is necessary to remind ourselves that, similar allegations had been levelled by the SEBI in as much as this watchdog had directly suspected the assessee of price rigging to reap LTCG, in their interim order passed in 2014. As noted earlier, upon completion of the investigation, SEBI has specifically exonerated the assessee of any wrong-doing or manipulation of shares prices of these companies on the BSE (Bombay Stock Exchange). Hence, on the peculiar facts of this case, since the direct evidences brought on record by the assessee shows that, unlike others, he was not a party or beneficiary of any price rigging or manipulation, the Revenue's reliance on the above referred third party statements, which as noted above, does not even pertain to the assessee, was clearly misplaced and so erroneous and is unsustainable in eyes of law.

46. Now coming to the judgments cited before us, it is noted that the Ld. CIT(A) had rightly relied upon the judgment of the Hon'ble jurisdictional Bombay High Court in the case of **Shyam R. Pawar (229 Taxman 256)**. In the decided case also, the assessee was



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purchasing and selling the shares through a broker in Mumbai. For the purchase of shares of (i) M/s. Bolton Properties Ltd., (ii) M/s Prime Capital and (iii) M/s. Mantra, he has transacted through the broker at Calcutta. Two operators namely Mr. Sushil Purohit and Shri Jagdish Purohit and one of them was the Director of M/s. Bolton Properties Ltd. had purportedly admitted to have manipulated the share price of M/s. Bolton Properties Ltd. Mr. Jagdish also reportedly floated several investment companies which were aggressively used in the entire deal with the broker M/s. Prakash Nahata & Co. According to AO, the shares offloaded by the beneficiaries through M/s. Prakash Nahata & Co., were ultimately purchased by the investment companies controlled by Shri Purohit. The name of the assessee figured during the course of the investigation. The AO noted that these entities/companies, whose shares were traded by the assessee, were not having sufficient business activities justifying the increase in their shares prices. Therefore, the AO concluded that certain operators and brokers devised a scheme to accommodate the unaccounted monies of the assessee in guise of capital gains. The AO accordingly added the capital gains derived by the assessee under Section 68 of the Act. On appeal, the Hon'ble jurisdictional High Court decided the issue in favour of the assessee and deleted the addition, by observing as under:

"....It was 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 STPL and RMPL respectively. Out of these two, only RMPL is listed in the appraisal report and it is stated to be involved in the modus operandi.



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It is on this material that the Assessing Officer holds that the transactions of 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 assessee utilized the scheme. [Para5]

The Tribunal concluded that there was something more which was required, which would connect the 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. A copy of the DMAT account, placed before the Tribunal showed the credit of share transaction. The contract notes in Form-A with two brokers were available which gave details of the transactions. The contract note is a system generated and prescribed by the stock exchange. From this material, 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 same, by 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 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 the Tribunal's order are not vitiated by any error of law apparent on the face of the record either. [Para6]

The appeals do not raise any substantial question of law. They are accordingly dismissed. [Para 7]..." "



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47. We may also gainfully refer to the decision rendered by this Tribunal in the case of **DCIT Vs Mukesh R Marolia (6 SOT 247)** wherein on similar facts and circumstances the addition made by the AO on account of purported bogus LTCG derived on sale of listed shares was deleted by observing as under:

“10. We heard both sides in detail and perused rival contentions in the light of the records of the case and the paper book filed by the assessee. In the return of income filed by the assessee for the year under appeal, the purchase of flat at Colaba for a consideration of Rs. 2,06,72,904 was reflected. The assessee’s contribution in the purchase of the flat was @ 70 per cent for which the investment amounted to Rs. 1,44,71,033. The source of investment was, among other things, the sale proceeds of shares of Rs. 1,41,08,484. This amount has been questioned by the revenue authorities.

10.1 The assessee has purchased the shares of four companies viz., Allan Industrial Gases Ltd., Mobile Telecom, Rashee Agrotech and Centil Agrotech, during the previous years relevant to the assessment years 1999-2000 and 2000-01. The books of account maintained by the assessee for both the years clearly reflected the purchase of those shares. The shares are reflected in the balance sheets filed by the assessee along with the returns of income for the assessment years 1999-2000 and 2000-01. Therefore, it is seen that as a prima facie evidence, the purchases of shares have been contemporaneously entered into the books of account of the assessee.

10.2 The assessee has been declaring agricultural income in his returns of income for the assessment years from 1990-91 to 2001-02. The total agricultural income returned by the assessee up to the assessment year 1999-2000 was at Rs. 7,57,883. The amount invested in the purchase of shares as on 31-3-1999 was Rs. 4,48,160. The cash available with the assessee by way of agricultural income was much



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higher than the investment made by the assessee in the purchase of shares as on 31-3-1999. After making the investments in the shares, the assessee had a surplus cash balance of Rs. 3,09,000 as on 1-4-1999. Thereafter, the assessee has further returned an agricultural income of Rs. 66,000 for the assessment year 2000-01. The amount invested in the purchase of shares in the year ending on 31-3-2000 was Rs. 2,57,020. Again the assessee had a cash balance thereof of Rs. 1,18,771. Therefore, it is, very clear that the investment made by the assessee in shares during the previous periods relevant to the assessment years 1999-2000 and 2000-01 was supported by cash generated out of agricultural income. The above agricultural income have been considered in the respective assessments. Therefore, the contention of the assessing authority that the assessee had no sufficient resourcefulness to make investments in the shares is unfounded.

10.3 Purchase and sale of shares outside the floor of Stock Exchange is not an unlawful activity. Off-market transactions are not illegal. It is always possible for the parties to enter into transactions even without the help of brokers. Therefore, it is not possible to hold that the transactions reported by the assessee were quite sham on the legal proposition arrived at by the CIT(A) that off-market transactions are not permissible. The assessee has stated that the transactions were made with the help of professional mediators who are experts in off-market transactions.

10.4 When the transactions were off-market transactions, there is no relevance in seeking details of share transactions from Stock Exchanges. Such attempts would be futile. Stock Exchanges cannot give details of transactions entered into between the parties outside their floor. Therefore, the reliance placed by the assessing authority on the communications received from the Stock Exchanges that the particulars of share transactions entered into by the assessee were not available in their records, is out of place. There is no evidential value for such reliance placed by the assessing authority. The assessee had made it very clear that the transactions were not concluded on the floor of the Stock Exchange. The matter being so, there is no probative value for the negative replies solicited by the assessing authority from the respective Stock Exchanges. We are of the considered view that the



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materials collected by the assessing authority from the Stock Exchanges are not valid to dispel or disbelieve the contentions of the assessee.

10.5 The next set of evidences relied on by the assessing authority are the statements obtained from various parties. When certain persons like Radha Ashok and Sandeep D. Shah made negative statements against the assessee, persons like Satish Mandovara and Mangesh Chokshi had given positive statements in support of the contention of the assessee. But, the assessing authority sought to pick and choose the statements given by various parties. While accepting and rejecting such statements given by the parties, the Assessing Officer has made a mistake of accepting irrelevant statements and rejecting relevant statements. During the relevant period in which the assessee transacted in shares, persons like Radha Ashok and Sandeep D. Shah were not carrying on their business of brokers as in the manner they carried on the business in the past. Even their Stock Exchange Memberships were cancelled. It was Shri Satish Mandovara who was carrying on the business mainly for and on behalf of Shri Mangesh Chokshi, Director of M/s. Richmond Securities Pvt. Ltd. Those two persons have categorically admitted before the assessing authority that they had dealings with the assessee in respect of the share transactions. They have confirmed the transactions stated by the assessee that he had with them. These positive statements made before the assessing authority supported the case of the assessee. There is no force in the action of the assessing authority in relying on the negative statements of the other parties whose role during the relevant period was either irrelevant or insignificant. Therefore, in the facts and circumstances of the case, it is, our considered view that certain statements relied on by the assessing authority do not dilute the probative value of the statements given by other persons in favour of the assessee confirming the share transactions entered into by the assessee.

10.6 The above circumstances have made out a clear case in support of the book entries reflecting the purchase and sale of shares and ultimately supporting the money received on sale of shares and finally investing the same in the purchase of flat. The chain of transactions



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entered into by the assessee have been properly accounted, documented and supported by evidences.

10.7 Therefore, we find that the explanations of the assessee seems to have been rejected by the assessing authority more on the ground of presumption than on factual ground. The presumption is so compelling that comparatively a small amount of investment made by the assessee during the previous year period relevant to the assessment years 1999-2000 and 2000-01 have grown into a very sizable amount ultimately yielding a fabulous sum of Rs. 1,41,08,484 which was used by the assessee for the purchase of the flat at Colaba. The sequence of the events and ultimate realization of money is quite amazing. That itself is a provocation for the Assessing Officer to jump into a conclusion that the transactions were bogus. But, whatever it may be, an assessment has to be completed on the basis of records and materials available before the assessing authority. Personal knowledge and excitement on events, should not lead the Assessing Officer to a state of affairs where salient evidences are over-looked. In the present case, howsoever unbelievable it might be, every transaction of the assessee has been accounted, documented and supported. Even the evidences collected from the concerned parties have been ultimately turned in favour of the assessee. Therefore, it is, very difficult to brush aside the contentions of the assessee that he had purchased shares and he had sold shares and ultimately he had purchased a flat utilizing the sale proceeds of those shares.

10.8 For a moment, even if all the above evidences are ignored, one cannot overlook the pressure of the evidence coming out of the survey carried out by the department in the business premises of the assessee. There was a survey carried out by the department in the business premises of the assessee. In the course of survey, contract notes for sale of shares, copies of bills thereof, photocopies of share certificates etc., were found. The purchase and sale of shares were also found recorded in the books of account. The department has no case that the survey was a staged enactment. A survey is always unexpected. So, it is not possible to presume that the assessee had collected certain fabricated documents and kept at his business premises so as to hoodwink the survey party to lead them to believe that the assessee had



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entered into share transactions. Atleast such an inference is not possible in law. The department has no defence against the forcible argument of the learned counsel that the survey conducted by the department has out and out upheld the contention of the assessee that he had purchased and sold shares. We find that this solitary evidence collected in the course of survey is sufficient to endorse the bona fides of the share transactions made by the assessee.

10.9 Therefore, in short on the basis of the internal evidences available with the assessee and the fact that the sale proceeds were collected through bank accounts and coupled with the external evidence of survey and statement of parties, we have to hold that the sale proceeds of Rs. 1,41,08,484 has been explained. Therefore, the said addition is deleted.

11. As we have held that the sum of Rs. 1,41,08,484 has been explained by the assessee, the assessee is entitled for the benefit of section 54E against the purchase of flat at Colaba, in accordance with law. The assessing authority is, therefore, directed to grant the benefit of section 54E to the assessee.”

48. On further appeal, it is noted that the Hon’ble Bombay High Court in their order in ITA No. 456 of 2007 dated 07-09-2011 has affirmed the order of this Tribunal.

49. The Ld. CIT(A) has rightly relied on another judgment of the Hon’ble Bombay High Court in the case of **CIT Vs Jamna Devi Agarwal (328 ITR 656)**. In the decided case also the Revenue had disputed the genuineness of the long term capital gains derived by the assessee on sale of shares of listed companies for similar reasons as cited in the present case. On appeal, the Hon’ble High Court upheld



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the decision of this Tribunal deleting the additions by observing as under:

“12. From the documents produced before us, which were also in the possession of the Assessing Officer, it is seen that the shares in question were in fact purchased by the assesseees on the respective dates and the company has confirmed to have handed over the shares purchased by the assesseees. Similarly, the sale of the shares to the respective buyers is also established by producing documentary evidence. It is true that some of the transactions were off-market transactions. However, the purchase and sale price of the shares declared by the assesseees were in conformity with the market rates prevailing on the respective dates as is seen from the documents furnished by the assesseees. Therefore, the fact that some of the transactions were off-market transactions cannot be a ground to treat the transactions as sham transactions.

13. The statement of Pradeep Kumar Daga that the transactions with the Haldiram group were bogus has been demonstrated to be wrong by producing documentary evidence to the effect that the shares sold by the assesseees were in consonance with the market price. On a perusal of those documentary evidence, the Tribunal has arrived at a finding of fact that the transactions were genuine. Nothing is brought to our notice that the findings recorded by the Tribunal are contrary to the documentary evidence on record.

14. The Tribunal has further recorded a finding of fact that the cash credits in the bank accounts of some of the buyers of shares cannot be linked to the assesseees. Moreover, in the light of the documentary evidence adduced to show that the shares purchased and sold by the assesseees were in conformity with the market price, the Tribunal recorded a finding of fact that the cash credits in the buyers' bank accounts cannot be attributed to the assesseees. No fault can be found with the above finding recorded by the Tribunal.

15. Reliance placed by the counsel for the Revenue on the decision of the apex court in the case of Sumati Dayal [\[1995\] 214 ITR 801](#) is wholly misplaced. In that case, the assessee therein had claimed



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income from horse races and the finding of fact recorded was that the assessee therein had not participated in races, but purchased winning tickets after the race with the unaccounted money. In the present case, the documentary evidence clearly shows that the transactions were at the rate prevailing in the stock market and there was no question of introducing unaccounted money by the assessees. Thus, the decision relied upon by the counsel for the Revenue is wholly distinguishable on the facts.

16. For all the aforesaid reasons, we hold that the decision of the Tribunal is based on findings of fact. No substantial question of law arises from the order of the Tribunal. Accordingly, all these appeals are dismissed. No order as to costs.”

50. As far as the reliance placed by the Ld. CIT, DR on the decision of **SEBI Vs Rakhi Trading Pvt Ltd (supra)** is concerned, it is noted that the said decision was rendered in the context of synchronized trading conducted by the said assessee in the F&O Segment of the Stock Exchange and therefore the facts involved therein are clearly distinguishable from the facts of the present case. Coming to the decisions of Hon’ble Delhi High Court in the case of **Suman Poddar vs ITO (112 taxmann.com 330)** and Hon’ble Bombay High Court in the case of **Sanjay Bimalchand Jain Vs Pr. CIT (89 taxmann.com 196)** relied upon by the Revenue, it is noted that the Ld. CIT(A) had examined the facts and circumstances involved in these judgments and found them to be distinguishable. The relevant findings of the Ld. CIT(A) are as under:

“6.7.5 The Hon'ble Supreme Court has dismissed the SLP filed by the assessee in the case of Suman Poddar v. Income Tax Officer [2019]



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112 taxmann.com 330 (SC) against the order of the Hon'ble High Court of Delhi. SLP is dismissed by the Hon'ble Supreme Court by a non-speaking order. The Hon'ble Supreme court in the cases of State of Manipur v. Thingujam Brojen Meetai (1996) 9 SCC 29, Sun Export Corporation v. Collector of Customs AIR 1997 SC 2658 and Palam Gas Service v. CIT [2017] 394 ITR 300 (SC) has held that when dismissed by a non-speaking order, it does not constitute a law declared by Hon'ble Supreme Court, and as such, it is not binding under Article 141 of the Constitution of India.

The Hon'ble High Court of Delhi in the case of Pr. CIT-12 Vs Smt. Krishna Devi (ITA 125/2020) noticed that the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income Tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks which sets out the modus operandi adopted in the business of providing entries of bogus LTCG, It was also noticed that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper.

The Hon'ble court has held that the reliance placed on the Investigation report, without further corroboration on the basis of cogent material, does not justify the conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. The learned ITAT has recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from demat account and the consideration has been received through banking channels." The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the



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provisions of Section 68 of the Act. There is no evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged.

The Hon'ble Court has further held that the theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent.

The Hon'ble Court has also held that the decision in the case of Suman Poddar was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. Similarly, the case of Sumati Dayal v. CIT too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue.

Accordingly, the appeals filed by the Revenue have been dismissed by the Hon'ble High Court of Delhi.

The Hon'ble Bombay High Court has occasion to examine the issue of genuineness of capital gain in the case of Sanjay Bimalchand Jain vs. Pr. CIT (2018) 89 taxmann.com 196 (Born), CIT vs Shyam R. Pawar 229 Taxman 256 (Born), CIT vs Jamnadevi Agrawal 328 ITR 656 (Bombay) and CIT v. Mukesh Ratilal Marolia [IT Appeal No. 456 (Born.) of 2007, dated 7-9-2011.

The case of Sanjay Bimalchand Jain vs. Pr. CIT (supra) has been decided by the Hon'ble Bombay High Court in favour of the revenue, whereas the cases of CIT vs Shyam R. Pawar (supra), CIT vs Jamnadevi Agrawal (supra) and CIT v Mukesh Ratilal Marolia (supra) has been decided by the Hon'ble Bombay High Court in favour of the assessee.

In the case of Sanjay Bimalchand Jain (supra), the payments were made by the assessee in cash for acquisition of shares of both the companies. The address of both the companies was interestingly, the



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same. The authorized signatory of both the companies was also the same person. The purchase of shares of both the companies was done by the assessee through Global Stock and Securities Ltd and the address of the said broker was incidentally the address of the two companies. On these peculiar facts of the case Hon'ble High Court decided the issue in favour of the revenue.

Hon'ble ITAT, Mumbai in the case of Vijayrattan Balkrishan Mittal Vs DCIT (supra) has considered the decision of Hon'ble Bombay High Court in the case of Sanjay Bimalchand Jain (supra) and found the facts of that case not applicable to the facts of case of Vijayrattan Balkrishan Mittal Vs DCIT and then the issue has been decided in favour of the assessee.”

51. Apart from the above, we have also taken suo-motto judicial notice of the judgment rendered by the Hon'ble Calcutta High Court in the case of **Pr. CIT Vs Swati Bajaj (288 Taxman 403)**. Having carefully perused the same, it is noted that peculiar facts were involved before the Hon'ble Court wherein eighty-nine different appeals of different assessee's were disposed off by the Tribunal in a single consolidated order without taking cognizance of the specific facts involved in each case (appeals preferred by different assessee's). The relevant observations made by the Hon'ble High Court is as follows:

“40. Before we examine the contentions, we are tempted to point out that the exercise done by the tribunal was a bit perfunctory. There is absolutely no discussion of the factual position in any of the 89 appeals, the exception is in paragraph 4 with regard to the certain facts of the assessee's case (SwatiBajaj). We are not very appreciative of the manner in which the bunch of appeals have been disposed of. The cardinal principles which courts and tribunal have followed consistently is that each assessment year is an individual unit and unless and until it is shown that there are distinguishing feature in a



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particular assessment year, the decision taken for the earlier years are to be followed to ensure consistency. While doing so the Courts/Tribunals are required to examine the facts and render a finding as to why the decision in the earlier assessment years should be adopted or not.”

52. Apart from the above, the Hon’ble Court noted that the assessee had never mentioned before the AO that, he wanted the copy of investigation report or the statements of the brokers/entry operators and therefore the assessee’s plea regarding non-availability of relevant material or denial of cross-examination claimed was rejected. The relevant observation of the Hon’ble High Court is as under:

“...Nothing prevented the assessee from mentioning that unless and until the report is furnished and the statements are provided, they would not in a position to take part in the enquiry which is being conducted by the assessing officer in scrutiny assessment under Section 143(3) of the Act.”

53. In the instant case, a specific request was made for a copy of investigation report as well as copies of statements recorded of different persons. The assessee is noted to have rebutted whatever details were provided by the AO and had sought cross-examination as well. Hence, the facts involved in the present case are noted to be distinguishable from the above case. Further, in respect of the circumstantial evidences the Hon’ble Calcutta High Court has not disturbed the settled position of law that circumstantial evidences can be looked into only when direct evidences are not available (Para 69).



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In the instant case, direct irrefutable evidences were made available to the AO and, therefore, ignoring the direct evidences and jumping to circumstantial evidences is not justified even if one refers to the decision of Hon'ble Calcutta High Court. Moreover, as noted by us earlier, this issue at hand is squarely covered by the binding judgments of the Hon'ble jurisdictional High Court, in favour of the assessee, and, therefore following the judicial discipline, the order of the Ld. CIT(A) does not require any interference since we have the benefit of guidance on this subject by the Hon'ble jurisdictional High Court, which is binding upon us.

54. We may gainfully refer to the following decisions rendered by the coordinate Benches of this Tribunal wherein also, on similar facts and circumstances, following the above referred judgments of the jurisdictional High Court, this Tribunal deleted the addition/s made by the AO u/s 68 of the Act in relation to the long-term capital gains derived on these listed shares.

54.1 In the case of Shri Vasantlal Nyalchand Kikavat Vs. DCIT (ITA No. 7921 & 7922/Mum/2019) dated 17.12.2021, the AO acting on the information shared by the Investigation Wing at Kolkata had held that the long term capital gain earned by the assessee in shares of M/s Unisys Software & Holdings Ltd was not genuine and similarly assessed it as unexplained cash credit u/s 68 of the Act. On appeal this Tribunal observed that, except for general allegations, as narrated in



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the Investigation Wing Report, there was no evidence brought on record by the AO to prove assessee's involvement in jacking up the prices of the shares with a view to earn artificial gains. Taking note of the material evidences placed by the assessee, it was held that assessee had fulfilled all the requirements laid down to claim exemption u/s 10(38) of the Act. The relevant findings of this Tribunal were as follows:

4.4 Upon perusal of all the aforesaid 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. No defect has been pointed out by the revenue in documentary evidences furnished by the assessee. 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 general findings of investigation wing and third-party statements on the basis of which it has been alleged that the scrip of Unisys was penny stock, there is nothing in the kitty of the revenue to prove the assessee's involvement in manipulating the prices of the scrip. No exchange of cash between the assessee and the various exit providers could be proved. Therefore, the onus as casted upon revenue to dislodge the assessee's claim, remain un-discharged.

4.5 So far as the observations of Ld. AO as to financial and profitability of Unisys 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



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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. Therefore, the aforesaid observations as well as conclusion of Ld. AO would not support the case of the revenue.

4.6 Proceeding further, it could be observed that the primary reason to doubt the genuineness of assessee's transactions is findings of investigation wing which was based on general statement of various stock-brokers / operators including statement of Shri R.K. Kedia and Shri Jagdish Prashad Purohit, wherein these persons, without naming the assessee specifically, made an admission that the scrip of Unisys was a penny stock scrip. However, despite specific request of the assessee, the adverse material which form the very basis of addition, no opportunity to cross-examine these persons was ever provided to the assessee. The failure to do so would make the additions unsustainable as per settled legal position. Further, the adverse statements made by these persons are not backed by any cogent corroborative material on record to establish the assessee's involvement in price rigging of shares of Unisys No collusion between the assessee and alleged entry providers or operators or exit providers is shown to have existed. There is no admission or evidence-based finding that any cash got exchanged between the assessee and any of the bogus purchasers of the scrip. 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. We find that except for general allegations as narrated in the investigation wing report, there is no evidence which would link



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assessee's involvement in jacking up the prices of the shares with a view to earn artificial gains. The additions so made could not be sustained 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).

4.7 The proposition 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.

4.8 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, is 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



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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.

4.10 Finally, keeping in the facts and circumstances of the case, we are inclined to hold that impugned additions are not sustainable in the eyes of law. The assessee had discharged the primary onus of establishing the genuineness of the transactions whereas the onus as casted upon revenue to corroborate the impugned additions by controverting the documentary evidences furnished by the assessee and by bringing on record, any cogent material to sustain those additions, could not be discharged by the revenue. The whole basis of making additions is third-party statement and no opportunity of cross-examination has been provided to the assessee to confront these parties. As against this, the assessee's position that that the transactions were genuine and duly supported by various documentary evidences, could not be disturbed by the revenue. Hence, going by the factual matrix and respectfully following the binding judicial precedents as enumerated in the order, the additions made by Ld. AO and confirmed by Ld. CIT(A), are not sustainable in the eyes of law. Therefore, we are inclined to delete the same. We order so. Consequentially, the addition of estimated commission also stands deleted. Resultantly, the appeal, on merits, stand allowed.

54.2 Similarly in the case of Mrs. Pratibha S. Mhatre Vs. ITO (ITA No. 695/Mum/2018) dated 11.06.2021, this Tribunal on similar facts and circumstances deleted the additions made by the AO u/s 68 on account of long term capital gains derived in the scrip, M/s Shree Shaleen Textiles Ltd. The relevant findings are as follows:

"2. Facts of the case are, the assessee is a partner in a firm M/s. Saurabh Realtors, engaged in the business of construction. She filed her return of income on 21st November 2014, declaring total



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income of ` 5,52,450. The Assessing Officer noticed that the assessee had purchased share of M/s, Shree Shaleen Textiles Ltd., through preferential offer in the year 2012–13 and purchased 50,000 shares by payment of ` 5,75,000. The company later on split these shares at ` 2, per share on 7th March 2013. Therefore, the total shares allotted to the assessee was 2,50,000 shares. The assessee had sold 2,50,000 shares of M/s. Shree Shaleen Textiles Ltd., for trade value of ` 1,26,05,797, during the year under consideration. In the computation of income, the long term capital gain of ` 1,20,11,807, was claimed under section 10(38) of the Act which arose out of the above transactions. The Assessing Officer tried to verify the genuineness on the basis of material available on record and the submissions made by the Authorised Representative of the assessee. However, not convinced with the submissions of the assessee, the Assessing Officer on the basis of circumstantial evidences available on record concluded that the transactions were sham transactions and aimed only to bring unaccounted money in the guise of exempted long term capital gain and paper work was made up and done merely to give a colour of authenticity to the transaction and by creating a façade of legitimate transactions. Therefore, the total amount of ` 1,20,11,807 was added under section 68 of the Act as the assessee has deliberately and willfully concealed its unaccounted income..

.....

7. Considered the rival submissions and perused the material on record. We find that the issue for our adjudication relates to the disallowance under section 68 of the Act on account of unaccounted income. Exactly similar issue has been decided by the Co–ordinate Bench of the Tribunal, Mumbai, in HUF of her husband’s case in Shashikant B. Mhatre v/s ITO, being ITA no.694/Mum./2018, order dated 29th May 2019, a copy of which is placed on record, wherein the Co–ordinate Bench of the Tribunal, on identical and on similar set of facts and circumstances, after considering the submissions of the parties has decided the issue in favour of the assessee and against the Revenue. Respectfully following the above decision, we allow the appeal filed by the assessee.”



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54.3 We also gainfully refer to the decision rendered in the case of Shri. Mukesh B Sharma Vs. ITO (ITA No. 6249/Mum/2018) dated 29.05.2019. In the decided case also the AO had relied upon statements of certain brokers/entry operators recorded in unconnected proceedings to hold that the transactions conducted by the assessee in the shares of M/s Global Infratech & Finance Ltd ('GIFL') (formerly known as M/s. Asianlak Capital) was bogus. Like in the present case, the AO had denied the exemption claimed by the assessee u/s 10(38) of the Act and assessed the sale proceeds to tax u/s 68 of the Act. On appeal the Tribunal noted that, upon completion of investigation initiated by the SEBI, vide their order dated 08-01-2018, it had found that neither the assessee therein nor the brokers were guilty of price manipulation or artificial rigging of its prices. It was therefore held that when the watchdog, SEBI did not find the assessee or its brokers to be guilty of any wrong doing, it was incorrect on the AO's part to doubt the genuineness of the transactions carried out by the assessee in the shares of GIFL in open market on electronic platform. The Tribunal also examined the financials of this scrip and found that the AO's allegation that the company did not have any value to justify the rise in prices was factually untenable. It was further noted that the assessee had furnished all contemporaneous evidences in support of his transaction in shares of GIFL and therefore there was no reason to doubt its correctness. This Tribunal also held that, the statements of the persons referred to by the AO, was never subjected to cross-



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examination, despite the assessee's request for the same. This Tribunal accordingly deleted the addition by holding as under:

"6. We have heard the rival submissions. The primary facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. The assessee submitted the following details with regard to purchase of shares :-

- a) Copy of relevant extract of bank statement reflecting the payment of Rs 30 lacs made by the assessee by account payee cheque to the company directly and source thereof along with allotment letter issued by the said company (i.e GIFL) and copy of share certificate issued by GIFL to the assessee on 12.6.2012. These documents are enclosed in pages 71 to 73 of Paper Book.*
- b) Demat account held with NKGSB Co-operative Bank Limited reflecting credit of shares purchased (enclosed in page 154 of Paper Book).*
- c) Copy of approval letter from GIFL.*
- d) Copy of allotment letter from GIFL for shares allotted to the assessee.*
- e) Copy of share certificate issued by GIFL.*
- f) Various events reported by GIFL to BSE.*

6.1. The assessee submitted the following details with regard to sale of shares:-

- a) Copy of demat statement reflecting the sale of shares.*
- b) Copies of Contract Notes issued by both the brokers for sale of shares.*
- c) Copy of Holding Statement for financial years 2012-13 and 2013-14.*
- d) Price chart of GIFL from the date of purchase of shares till the recent period.*
- e) Copy of relevant extract of bank statement of the assessee reflecting the sale proceeds received from the broker and credited to the bank account.*

6.2. We find that the assessee pleaded that in an online platform, there would be no nexus between the purchasers and the seller and the delivery of shares and payments would be made through their respective stock brokers. Hence the ld AO ought to have summoned the assessee's brokers to examine the authenticity of the sale of shares of GIFL and the amount received on sale of shares. We find that the ld AR also placed evidences on record to prove that the said company



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GIFL is still listed in the stock exchange and shares of this company are being traded and SEBI had not passed any adverse order against the said company. We find that the details of revenue and profits of GIFL for various years are as under:-

<u>Financial Year ending</u>	<u>Revenue</u>	<u>Profit</u>
31.3.2012	191 lacs	7.97 lacs
31.3.2013	1515.58 lacs	105.13 lacs
31.3.2014	2487 lacs	161 lacs
31.3.2015	3836 lacs	76 lacs

6.3. We find that the ld AO had placed reliance on certain statements recorded by the Investigation wing of Kolkata Income Tax Department during some survey proceedings conducted in third party cases. We find that in none of those statements, the name of the assessee or the name of the brokers through whom assessee had transacted were mentioned. We also find that there is no mention of any connivance on the part of the assessee with the share broker and stock exchange to launder the unaccounted monies of the assessee and bring it back in the form of sale proceeds of shares and claim exemption u/s 10(38) of the Act for the long term capital gains derived thereon. None of the parties on whom survey actions were conducted in Kolkata were related to assessee or the brokers in any manner whatsoever. We find that the various purchase and sale details together with the supporting evidences were not controverted by the revenue before us. Even the cross examination of the parties mentioned in the show cause notice issued to the assessee by the ld AO were sought by the assessee and the same were refused by the ld AO. We find that the ld AO had also placed reliance on the order passed by SEBI while concluding that the transactions carried out by the assessee in the form of sale of shares as sham and bogus. From the perusal of the SEBI order dated 25.8.2016 in the case of First Financial Services Ltd, we find that from the extracts thereon, that it was stated that M/s GIFL was involved in providing exit to the sellers of equity shares of First Financial Services Ltd and no where stated that this company was involved in providing accommodation entries in the form of capital gains by transacting its own shares through the alleged bogus operators. We also find that the SEBI had passed on order dated 8.1.2018 in the case of GIFL, wherein it was found that the name of the assessee herein or the brokers through whom the assessee transacted were not even included in the said order as parties against whom any adverse inference / findings were found in respect of violation of provisions of SEBI. We find that SEBI had issued a show cause notice vide Reference SEBI/EAD-



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12/SM/EE/693/25/2018 dated 8.1.2018 which are enclosed in pages 252 to 266 of the paper book. In pages 257 and 258 of the Paper Book, the list of parties to whom show cause notices were issued by SEBI is listed out. In the entire list, neither the name of the assessee nor his brokers were included. Later there another show cause notice vide Reference EFD/DRA3/OW/NB/6663/2018 dated 1.3.2018 was issued by Enforcement Department of SEBI mentioning the list of parties to whom show cause notices were issued. Even in this list, the name of the assessee or his broker was not included by SEBI. Hence it could be safely concluded that SEBI did not allege any wrong doing on the part of the assessee or his brokers with regard to carrying out transactions in sale of shares of GIFL in open market in online platform. In this subsequent show cause notice dated 1.3.2018, the SEBI also takes records the fact of issuance of shares on preferential allotment basis on 12.6.2012 by GIFL to various parties (which includes the assessee also though not named in the SEBI show cause notice). In this show cause notice also, the SEBI only accused Notice No. 1 to 7 listed in the said notice which admittedly does not include the assessee or his brokers, to have engaged in manipulation of price of the scrip of GIFL. The said show cause notice dated 1.3.2018 also stated that Notice Nos. 13 to 46 listed in the said notice which admittedly does not include the assessee or his brokers, to have sold the shares at inflated price and booked substantial profit. The said show cause notice dated 1.3.2018 also stated Notices Nos. 8 to 12 (which admittedly does not include the assessee or his brokers) were part of the manipulative scheme to make preferential allotment and manipulate the price, through, entities connected to company and promoter, to benefit promoter, promoter related entities and connected preferential allottees. It is not the case of the revenue that the assessee or his brokers were either the promoters of GIFL, or promoter related entities of GIFL or related to connected preferential allottees thereon. Hence it could be safely concluded that the SEBI had not found any adverse findings with regard to the assessee or his registered share brokers vis a vis GIFL. Hence there is absolutely no iota of evidence linking the assessee or the registered brokers to even remotely allege that they were involved in artificial rigging of price of scrips which were dealt by the assessee herein.

6.4. We find that the ld AO had stated that GIFL is a company of no value. The revenue stream and the profitability chart reproduced hereinabove does not support the case of the ld AO. Moreover, the status reported by the ld AO about GIFL was in Asst Year 2008-09 which is neither the year of purchase of shares by the assessee nor the



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year of sale of shares in open market. Hence those findings are totally irrelevant for adjudication of the issue before us.

...

6.7. We find that the ld AO had furnished certain list of parties who were alleged purchasers of shares from the assessee when it was sold in the open market by the assessee. The assessee had pleaded that since the shares were sold in the open market in online platform, he is not aware of the name of the parties as to who had bought the same in the open market. The ld AO sought to issue summons to those alleged purchasers of shares u/s 131 of the Act, which remain uncomplied by those parties. Based on this, the ld AO had drawn an adverse inference against the assessee disregarding the entire documentary evidences on record and the prevailing market practices with regard to purchase and sale of shares in the open market in online platform. It is not in dispute that the assessee had received the sale proceeds of shares from the registered broker through the stock exchange only and not from the alleged purchasers of shares directly. Moreover, the ld AO states that the assessee had sold the shares at Rs 211.76 per share whereas the average sale price of the assessee was only Rs 89 per share.

6.8. We find that the ld DR made general submissions with regard to the investigations carried out by Kolkata Income Tax Department after identifying 84 scrips to be penny stocks and the modus operandi adopted by those scrips with the connivance of various entry operators, brokers and stock exchange. We find that the ld DR was not specifically able to controvert the documentary evidences filed by the assessee for purchase and sale of shares and various other documents referred to in the Paper Book more particularly the SEBI show cause notice as detailed hereinabove, except stating that SEBI show cause notice was issued in the name of GIFL, the scrip in which assessee dealt. The ld DR also sought permission from the Bench to grant time for filing his written submissions with regard to the entire appeal. No such written submission was filed by the ld DR till the date of dictation of this order. The ld DR drew our attention to the statement recorded from the assessee by the ld AO during the course of assessment proceedings on 19.12.2016, the gist of which is mentioned in page 31 of Assessment Order. We have gone through the same and we find that the assessee had stated before the ld AO that he had made investment in shares of GIFL without looking into the fundamentals of the said company and based on information given by a family friend. We have already seen the documentary evidences available on record



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wherein the assessee in response to an invitation letter issued by GIFL for making investment in preferential allotment basis, had issued account payee cheques and got the shares allotted in his name on preferential allotment basis. These facts have also been noted by SEBI in the second show cause notice dated 1.3.2018 which has been discussed hereinabove. Merely because the assessee himself is engaged in independent manufacturing business, it cannot be said that all his investment decisions would be prudent and would be done only after analyzing the entire fundamentals and financials of the investee company. It is in everybody's knowledge, that an investor would try to take calculated risks by investing his money on an unknown scrip based on certain information from friends, relatives, or in some stock market related websites and take a chance. Since the scrip purchased by the assessee was showing considerable growth from the time of purchase, the assessee being a gullible investor, continued to hold it for a period of 26 months and later sold it in open market in online platform at prevailing market prices.

...

6.10. It would be pertinent to address the case law relied upon by the ld DR before us on the decision of Hon'ble Bombay High Court (Nagpur Bench) in the case of Sanjay Bimalchand Jain vs Pr.CIT (Nagpur) reported in (2018) 89 taxmann.com 196 (Bombay) dated 10.4.2017 on the impugned issue. From the facts of Sanjay Bimalchand Jain supra, we find that (i) in that case, the broker company through which the shares were sold did not respond to AO's letter regarding the names and address and bank account of the person who purchased the shares sold by the assessee; (ii) Moreover, at the time of acquisition of shares of both the companies by the assessee, the payments were made in cash; (iii) The address of both the companies were interestingly the same; (iv) The authorized signatory of both the companies were also the same person; (v) The purchase of shares of both the companies was done by that assessee through broker, GSSL and the address of the said broker was incidentally the address of the two companies. Based on these crucial facts, the Hon'ble Bombay High Court rendered the decision in favour of the revenue. None of these factors were present in the facts of the assessee before us. Hence it could be safely concluded that the decision of Hon'ble Bombay High Court supra is factually distinguishable.



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6.11. *We find that the Hon'ble Jurisdictional High Court in the case of CIT vs Mukesh Ratilal Marolia in ITA No. 456 of 2007 dated 7.9.2011 had held as under:-*

5. *On further appeal, the ITAT by the impugned order allowed the claim of the assessee by recording that the purchase of shares during the year 1999-2000 and 2000-2001 were duly recorded in the books maintained by the Assessee. The ITAT has recoded a finding that the source of funds for acquisition of the shares was the agricultural income which was duly offered and assessed to tax in those Assessment Years. The Assessee has produced certificates from the aforesaid four companies to the effect that the shares were in-fact transferred to the name of the Assessee. In these circumstances, the decision of the ITAT in holding that the Assessee had purchased shares out of the funds duly disclosed by the Assessee cannot be faulted.*

6. *Similarly, the sale of the said shaers for Rs 1,41,08,484/- through two Brokers namely, M/s Richmond Securities Pvt Ltd and M/s Scorpio Management Consultants Pvt Ltd cannot be disputed, because the fact that the Assessee has received the said amount is not in dispute. It is neither the case of the Revenue that the shares in question are still lying with the Assesse nor it is the case of the Revenue that the amounts received by the Assessee on sale of the shares is more than what is declared by the Assessee. Though there is some discrepancy in the statement of the Director of M/s Richmand Securities Pvt Ltd regarding the sale transaction, the Tribunal relying on the statement of the employee of M/s Richmand Securities Pvt Ltd held that the sale transaction was genuine.*

7. *In these circumstances, the decision of the ITAT in holding that the purchase and sale of shares are genuine and therefore, the Assessing Officer was not justified in holding that the amount of Rs 1,41,08,484/- represented unexplained investment under section 69 of the Income Tax Act, 1961 cannot be faulted.*

8. *In the result, we see no merit in this Appeal and the same is dismissed with no order as to costs.*

6.12. *In view of the aforesaid findings in the facts and circumstances of the case and respectfully following the various judicial precedents*



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relied upon hereinabove, we hold that the ld CITA was not justified in upholding the action of the ld AO in bringing the sale proceeds of shares of GIFL in the sum of Rs 7,88,77,854/- as unexplained income of the assessee treating the same as just an accommodation entry. Consequentially, the addition made towards commission on such accommodation entry at the rate of 5% in the sum of Rs 39,43,898/- is also hereby directed to be deleted. Accordingly, the grounds raised by the assessee are allowed”.

54.4 We note that this Tribunal in the case of **Ripu Sudan Kundra Vs. ITO (ITA No. 2792/Mum/2018) dated 05.10.2021**, had examined the genuineness of the transactions conducted by the assessee in the listed shares, inter alia, including M/s Radford Global Limited and M/s Dhenu Build Infrastructure Ltd [now known as Hingir Rampur Ltd] (*the assessee has also dealt in these scrips in the present case*). Similar to the facts of present case, in this decided case also, the assessee therein had produced documents, viz., contract notes, share certificates, etc. to substantiate the genuineness of the transactions carried out through banking channels and that there was no direct contact between the buyer and the seller. The Tribunal after analyzing the statements of the entry operators / brokers noted that neither were these statements backed by any corroborative material, nor did they implicate the assessee of any wrongdoing, nor was the assessee afforded any opportunity for cross-examination. This Tribunal, accordingly, held that the additions made by the AO was purely based only on suspicion, surmises and conjectures without there being any tangible evidence on record against the assessee and, therefore deleted the same. The relevant extracts of this order is reproduced below:



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“10. Considered the rival submissions and material on record. We notice that assessee has regularly dealing in purchase and sale of shares and he has made investments through reputed portfolio manager, Standard Chartered Securities (India) Ltd. and it was submitted that based on their advice he has made investments. We notice from the records and assessment order that assessee has invested in the scrip Radford Global on August 2013 at the prevailing market rate and sold the same on January 2014 at the prevailing market rate and incurred loss. Similarly, assessee purchased shares of Dhenu Build Infrastructure Ltd on February 2013 at the prevailing market rate and sold the same on November 2013. The assessee also purchased shares of Shreenath Commercial and Finance Limited on January 2013 and sold the same on September 2013 as per the market rate. The assessee also purchased shares of Tuni Textile Mills Ltd on January 2013 and sold the same on May 2013. From the data submitted before us indicates that assessee has purchased the same from the stock market and sold the same by reacting to market condition and the steep fall in the price of the shares. From the conduct of the assessee we notice that assessee has purchased the same from the stock market on the advice of portfolio manager. The crux of the matter is regarding claim of loss arising from the trading in shares of following companies, namely:

- a) Dhenu Builder, India (Rs. 3,95,17,365/-)*
- b) Shri Nath Commercial (Rs. 10,94,32,186/-)*
- c) Tuni Textile Mills (Rs. 2,19,43,210/-)*
- d) Rad Global (Rs.4,14,88,123/-)*
- e) Rad Global (Buy) Rs. 4,85,67,264/-)*

From a perusal of the order of the lower authorities it is apparent that the disallowance as made by the AO and sustained by the Ld.CIT (A) is based on the enquiries conducted by Investigation Directorates of Kolkata & Ahmedabad on certain stock-brokers and entry providers and the statements recorded from them during the course of search. The analysis made by the Investigation Directorates on the financials/business profile of the impugned companies forms the base for rejecting the claim of loss. The lower authorities have referred to investigation carried out by the Directorates of Investigation on Radford Global to come to a conclusion that entities that have



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purchased shares of Radford Global are bogus/paper entities. Further, based on the findings in the Investigation Reports, the lower authorities have observed that a common pattern is seen in respect of all the impugned companies in that the financial health of all such impugned entities are poor, there is sudden rise of prices in their shares followed by a steep fall, statements recorded of key persons confirms manipulation in prices of stock to provide capital gains/loss to interested parties. Borrowing from the findings of the Investigation Reports, the lower authorities have held the claim as non-genuine, rejecting the submission of the assessee that the investments were made through reputed portfolio manager who takes the call on the basis of market price, future perception of the company and that assessee is thus not directly involved in any transaction of purchase/sale between buyer and seller. The assessee had also placed documentary evidence before the AO in support of the impugned transaction.

It is the finding of the Ld.CIT (A) that assessee has not provided any cogent evidence to explain how shares of an unknown company jumps manifold in no time. According to the Ld.CIT (A), the assessee could not give any cogent and convincing reply to the observations of the AO. On the other hand, the assessee is aggrieved in that the AO has erroneously relied on some of the stock transactions of sale of shares of companies considered as dealing in penny stock and that have no relevance to the transaction of sale of shares carried out by the assessee to deny the claim of loss incurred by the assessee and that the findings of the AO as confirmed by the First Appellate Authority are on the basis of unsubstantiated / imaginary charges and allegations. We have given our anxious thought and consideration to the matter in hand. The AO has disallowed the claim of the assessee based on analysis of the information received from Directorate of Investigation as a result of enquires undertaken by the officers of the Directorate. Based on the said information received, the AO has observed a pattern in the trading in scripts of those companies that has resulted in the claim of short-term capital loss to the assessee. Such companies were seen to have little financial credentials, no profitability, and no apparent explanation for abrupt rise in prices followed by a steep fall in price of shares. Besides, there are statements of brokers/ entry



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providers who have accepted that they were involved in the scam of price rigging to facilitate accommodation entries to beneficiaries who have routed their unaccounted cash into the books through circuitous means. However, at the same time the assessee has produced documents to substantiate the genuineness of the transactions carried out through banking channels, through the medium of portfolio management whereby there is no contact between the buyer and the seller. The fact remains that there is direct evidence placed on record by the assessee to support the genuineness of the impugned transactions such as contract notes, share certificates, corroborative evidence indicating purchase/ sale through registered broker as juxtaposed against the findings of the AO based on the general report from Investigation and the modus operandi adopted by unscrupulous entry providers. There is no denying that there is no assessee-specific material on record of the AO to pin-point that the assessee has entered into an unholy nexus with entry providers so as to stage manage accommodation entry of STCL. The statements relied on by the AO in the nature of admissions are bereft of corroborative material to implicate the assessee herein in such scam. At the same time the material furnished by assessee to substantiate its claim remains unchallenged and uncontroverted. The purchases were neither offmarket nor through preferential allotment. Besides, no copy of any report of information received was supplied to the assessee. The assessee was not confronted with any statement or material allegedly detrimental to the assessee arising or culled out of the Investigation report. Thus, the fact remains that the findings of the lower authorities are not based on evidence but on generalizations and probabilities. The AO could not place anything on record, maybe through a process of his own enquiry, to decisively prove that assessee has obtained bogus STCL through his connivance with entry operators / exit providers. No such enquiry or investigation is seen carried by the AO other than borrowing information to be used against the assessee from the general report of Investigation Directorate. The claim of the assessee appears to have been rejected more on the basis of presumption rather than evidence. The fact also remains that copies of statements used against the assessee were not provided to the assessee. It certainly has incapacitated the assessee from effectively rebutting the same and also from seeking an opportunity for cross examination.



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When copies of statements relied upon were not provided, when there was no opportunity to cross examine those witnesses whose statements were relied upon by the AO to conclude that the transaction in question was part of penny scam, we have no hesitation in holding that the lower authorities erred in disallowing the claim stating that the assessee failed to provide cogent and convincing reply to the allegations raised. We observe from the record that in identical situation the Coordinate Bench of ITAT in ITA Nos. 4843 & 1228/Mum/2018 for Assessment Year 2013-14 & 2014-15 in the case of Ramprasad Agrawal Vrs. ITO (reported in [2018] 100 taxman.com 172 – Mum Trib) and Kamla Devi S. Doshi vrs. ITO reported in 88 taxmann.com 773 (Mum-Trib) decided the issue in favour of the assessee on merits. From the above decision, it is trite that denial of such crucial rights is a fatal flaw that renders the assessment order a nullity. An assessment purely based on suspicion, surmises and conjectures without any tangible evidence on record against the assessee of any connivance or collusion is unsustainable in law.”

54.5 We also refer to the decision rendered in the case of **Shri Mukesh Bhoormal Jain v. ITO (ITA No. 6387/Mum/2019)** dated **23.12.2021** in which, the AO had doubted the genuineness of the long term capital gain derived on sale of listed shares, by observing that the scrip was insignificant and lacked business fundamentals. On appeal, this Tribunal deleted the addition by observing as under:

“3. Assessing Officer observed that the scrip in which assessee traded was proved to be insignificant, bogus, without business fundamentals and required the assessee to prove the genuineness of the same. In reply assessee vide letter dated 11.12.2017 submitted that the long term capital gain generated was genuine stating the details of section 10(38) of the Act. Not convinced with the submissions of the assessee, the Assessing Officer added the sale proceeds of ₹.5,49,04,773/- u/s 68 of the Act, to the taxable income of the assessee. Assessment u/s 143(3) of the Act was completed on 28.12.2017 determining income at



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₹.5,65,51,920/- by making addition of ₹.5,49,04,773/- u/s. 68 of the Act and ₹.16,47,143/- u/s. 69 of the Act towards the commission paid to entry provider. Aggrieved assessee preferred appeal before the Ld.CIT(A) and Ld.CIT(A) sustained the addition made by the Assessing Officer. Aggrieved assessee preferred appeal before us raising following grounds in its appeal: -

.....

6. Considered the rival submissions and material placed on record, on identical facts in the case of Shri Amit Mafatlal Shah v. ACIT in ITA.No.5793/Mum/2019 dated 20.01.2020, the Coordinate Bench following various judicial pronouncements deleted the addition made by the Assessing Officer observing as under: -

'12. After examining the facts of the case and the orders of the authorities below, we note that assessee has filed all the necessary evidences as stated above before the AO as well as before the Ld. CIT(A). However, no further enquiry was carried out by the AO or by Ld. CIT(A) but merely relied on the report of the investigation wing and statements of certain individuals recorded during the course of search who have stated that they were engaged in providing accommodation entries for LTCG/LTCL in various shares which are called penny stocks. However, these information were never provided to the assessee. Similarly, no cross examination was allowed by the AO to the assessee during the assessment proceedings. In other words, the AO has merely relied on the investigation report and did not try to collect further evidences by conducting further investigation to prove that the assessee own funds have changed hands. Under these circumstances, we are not in a position to subscribe to the conclusion by the authorities below. The case of the assessee is squarely covered by a series of decisions referred and relied by the Ld. A.R. during the course of hearing as reproduced hereinabove a few of which are discussed below:-

In the case of CIT vs. Mukesh Ratilal Marolia (supra). In this case, the issue is whether the amount received by the assessee on sale of shares can be treated as unexplained investment under section 69 of the Act. The Tribunal deleted the addition by allowing the appeal of the assessee by holding that the purchase



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of shares were duly recorded in the books of accounts and the source of funds is also explained and the shares were in fact transferred in the name of the assessee and thus the purchases of the assessee can not be fault with. Similarly, the sale of shares was effected can not be disputed because the amount received by the assessee is not in dispute and it is not the case of the Revenue that shares are still lying with the assessee or amount received by the assessee on sale of shares is more than the declared value by the assessee. Under these circumstances, the Hon'ble High Court has held that AO is not justified in holding that sale proceeds of Rs.1,41,08,484/- represented unexplained investment under section 69 of the Act and thus the order of the Tribunal was upheld by the Hon'ble High Court. The Hon'ble Supreme Court also dismissed the appeal of the Revenue filed against the Hon'ble Bombay High Court order.

Similarly, in the case of CIT vs. Mrs. Kesar A. Gada (supra) the ITAT deleted the addition by holding that the transaction of purchase and sale of shares made by the assessee were genuine and no addition under section 68 was called for by relying on the decision of Hon'ble Bombay High Court in the case of CIT vs. Mukesh Ratilal Marolia (2005) 12 TMI 457 ITAT, Mumbai. The High Court also dismissed the appeal of the Revenue by holding that no substantial question of law arises for reconsideration.

In the case of CIT vs. Sham R Pawar (supra) the Hon'ble Bombay High Court has decided the issue against the Revenue by upholding the order of ITAT wherein the Tribunal has held that the assessee has declared the capital gain on sale of shares and mere observation of the AO that transactions were done through brokers at Kolkata and the performance of the concerned company was not satisfactory as it would not justify the increase in share prices and thus held the transaction as bogus as assessee converted his own unaccounted money into accounted income and thus made the addition under section 68 of the Act. The Tribunal deleted the addition by observing that D-Mat account and contract notes showed the details of shares, transactions and Revenue stopped enquiry at particular point and did not carry forward it to discharge the basic onus and High Court has upheld the order of ITAT.

Ramprasad Agarwal vs. ITO (supra) wherein assessee has produced all the relevant records to show the allotment of shares by the company on payment of consideration by cheque and



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subsequent dematerialization of shares in the Dmat account. The Tribunal reversed the order of AO wherein the AO has made addition by not allowing cross examination to the assessee and also not providing the information to the assessee which were used against the assessee while making addition. The tribunal followed the decision of coordinate bench in the case of Meghraj Singh Shekhawat Vs DCIT ITA No. 444/JP/2017 AY 2013-14 and 2014- 15 which in turn has followed apex court decision in the case of M/s. Andaman Timber Industries vs. CCE Civil Appeal No.4228 of 2006.

In the case of Fara Marker vs. ITO (supra) the similar issue has been decided under the similar set of facts by holding that the long term capital gain is genuine as the assessee has fully discharged its onus and AO has not done any further verification.

In the case of Kamaladevi vs. Doshi vs. ITO the similar issue has been decided by the Tribunal in favour of the assessee by observing and holding as under:

“14. We have given a thoughtful consideration to the facts of the case and are of the considered view that the assessee had placed on record substantial documentary evidence to substantiate the genuineness and veracity of the purchase and sale of 10,200 shares of M/s Talent Infoways Ltd., viz. copy of the Contract note, dated. 15.04.2004 evidencing the purchase of shares; Copy of the contract note, dated. 06.04.2004 as regards the speculation income, and the copy of the cash receipt for Rs. 168/-; Copy of her account in the books of account of M/s MSPL; Copy of the letter from M/s Talent Infoways Ltd., dated. 29.05.2004, therein confirming the transfer of shares; Copy of the contract notes for sale of shares in the months of September and October, 2005; Copy of the bank statement evidencing receipt of payment for of shares; Copy of STT paid statements on the shares of M/s Talent Infoways Ltd ; Copy of its account as appearing in the books of account of M/s Alliance Intermediateries & Network Pvt. Ltd. evidencing the sale of the shares of M/s Talent Infoways Ltd.; Copy of delivery instructions of shares to the depository for dematerialization of the shares; and Copy of the return of income alongwith the computation of income for A.Y. 2005-06, which revealed the speculation income of Rs. 15,975/-, and the fact of purchase of 10,200 shares of M/s Talent Infoways Ltd, alongwith the source of purchase. We find that the aforesaid substantial documentary evidence placed on record by the assessee, which as



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a matter of fact supported the entire chain of events of purchase and sale of 10,200 shares of M/s Talent Infoways Ltd. by the assessee, was however never rebutted by the A.O on the basis of any concrete and irrebutable evidence which could go to inescapably disprove the genuineness of the said documents which were brought on record by the assessee We find that the A.O had rather chosen to merely rely on the stand alone statement of Sh. Mukesh Choksi (supra) and taking the same as gospel truth, had therein drawn adverse inferences in the hands of the assessee by merely referring to the said statement of Sh. Mukesh Choksi (supra). We though do not approve of the reliance placed by the A.O on the stand alone statement of Sh. Mukesh Choksi (supra) for drawing of adverse inferences in respect of the share transactions carried out by the assessee during the year under consideration, but rather find that even no cross examination of Sh. Mukesh Choksi (supra), whose statement was so heavily being relied upon by the A.O, was ever provided to the assessee. We find that the failure on the part of the A.O to provide cross examination of the person, relying on whose statement adverse inferences are drawn in the hands of the assessee goes to the very root of the validity of such adverse inferences drawn in the hands of the assessee, had been looked into by the Hon'ble High Court of Bombay in the case of: CIT-13 Vs. M/s Ashish International (ITA No 4299 P a g e | 26 of 2009; dated. 22.02.2011), wherein the order of the Tribunal was affirmed by the Hon'ble High Court. We thus in the backdrop of our aforesaid observations, are neither able to persuade ourselves to subscribe to the adverse inferences drawn by the lower authorities in respect of the share transactions of the assessee by referring to the stand alone statement of Sh. Mukesh Choksi, as the same as observed by us hereinabove, suffer from serious infirmities, and as such cannot be summarily accepted, nor are able to dislodge the genuineness of the purchase and sale of shares of the aforesaid 10,200 shares of M/s Talent Infoways Ltd., which we find had been duly substantiated by the assessee on the basis of material made available on record, which we find had not been dislodged by the lower authorities. We thus in the backdrop of the totality of the facts of the case are unable to find ourselves to be in agreement with the view arrived at by the lower authorities. We thus set aside the order of the CIT(A), and delete both of the additions of Rs. 9,36,164/- and Rs. 46,808/- made by the A.O, which thereafter were sustained by the CIT(A). The appeal of the assessee is allowed.



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13. We have also gone through other decisions cited by the Ld. A.R. and observed that the case of the assessee is squarely covered by the various decisions. We therefore respectfully following the same set aside the order of CIT(A) and direct the AO to delete the addition of Rs.3,43,62,880/- under section 68 of the Act. Ground No.1 & 2 are allowed.

14. The issue raised in ground no.3 is against the confirmation of addition of Rs.6,87,257/- by CIT(A) as made by the AO towards arranging this purchase and sale of shares by applying 2% on the total value of transactions. The ground No.3 is consequential to ground no.1 & 2 which have been allowed in favour of the assessee (supra). Accordingly, the addition made under this ground of Rs.6,87,257/- is ordered to be deleted. Ground is allowed.'

7. As the facts are exactly identical and the grounds raised by the assessee in this case are also similar. Respectfully following the above said decision of the Tribunal, we direct the Assessing Officer to delete the addition made u/s.68 and u/s. 69 of the Act. Accordingly, grounds raised by the assessee are allowed."

55. In view of the above therefore we do not find any infirmity in the order of the Ld. CIT(A) deleting the additions made u/s 68 of the Act and the consequent addition of unexplained commission expenditure made u/s 69 of the Act and uphold to the same.

56. Before parting, it is relevant to mention another important fact which came to our notice. For argument sake, even if all the above evidences are ignored, one cannot overlook the fact that no unrecorded revenues, bogus purchases, unexplained cash, undisclosed valuables or any other unaccounted assets or undisclosed bank accounts of the assessee was found. Similarly, no documents or papers were found from assessee's premises, which in any manner indicated payment of any unaccounted monies. No cogent evidence of transactions



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pertaining to the assessee outside the books was found. In the orders impugned before us, the theory propounded by the AO suggests large-scale generation & investment of unaccounted monies took place, but even after conducting an invasive search action, no evidence to support such addition was unearthed. Going by AO's premise, the assessee had earned & routed unrecorded income regularly in each year. If that be so, it would have certainly reflected in some incriminating papers, documents in form of undisclosed sales or bogus expenses etc. The AO has noted that the primary sources of income of the assessee were salary, rental income, other sources and capital gains. The AO has however not been able to bring on record any material or evidence unearthed during search which would reveal as to from which income-earning activity did the assessee derive such unaccounted monies to support his theory that he had routed such unaccounted monies in the guise of bogus capital gains. Before us, the assessee has placed on record copies of the panchnamas, details of cash & valuables found, details of documents impounded etc. and the Revenue was unable to point to any specific item or evidence which would lend credence to their case. Although these aspects are not sufficient to draw definite conclusions but coupled with the facts and circumstances discussed in the foregoing, it does lend persuasive value to the case of the assessee.

57. For the above reasons therefore, we do not see any reason to interfere with the order of the Ld. CIT(A) deleting the additions made by the AO u/s 68 & 69C of the Act in AY 2014-15. Accordingly the appeal for AY 2014-15 stands dismissed.



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58. Now we take up the appeal for AY 2015-16. As noted earlier, the assessment order passed for AY 2015-16 is verbatim as that of AY 2014-15. It is noted that the scrip in question in this year is M/s Rander Corporation Ltd whose proceeds have been assessed to tax u/s 68 of the Act and further 7% of its traded value has been added as unexplained commission expenditure u/s 69C of the Act. The facts relating to the transaction in shares of Rander Corporation Ltd has been taken note of at Para 36 above. As noted earlier, the assessee has furnished all contemporaneous evidences including purchase invoices, bank statements, sale contract notes, demat statements, broker's ledger etc. which he is required to maintain in ordinary course to substantiate the gains derived in this scrip. We have already taken note of the fact that, unlike the facts involved in AY 2014-15, there was no SEBI order against the assessee qua this scrip. The Investigation Officer also did not have any '*information*' against this scrip and for that reason, Shri Surendra Jiwrajka was not even questioned regarding the capital gains derived in the shares of M/s Rander Corporation Ltd in the course of the recording of his statement u/s 132(4) of the Act. Accordingly, the statement given u/s 132(4) of the Act did not have any relevance in the context of AY 2015-16. We have already analyzed the financials of M/s Rander Corporation Ltd at Para 41 above and noted that the AO's allegation that the increase in its share prices did not correlate with the financials was factually misplaced. We have also examined the statement of so-called entry operator Shri Kedia at Para 43 to 45 above and found it to be unsubstantiated and irrelevant to justify the



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impugned additions. Therefore, following the elaborate reasoning set out by us, while deciding the appeal for AY 2014-15, we hold that the Ld. CIT(A) was justified in deleting the additions made by the AO u/s 68 & 69C of the Act in AY 2015-16 as well. Hence, the appeal for AY 2015-16 also stands dismissed.

59. In the result, the Cross Objections for AYs 2012-13 & 2013-14 in CO Nos. 93 & 92/Mum/ 2021 stands allowed and the corresponding appeals of the Revenue in ITA Nos. 2349/Mum/2021 & 2326/Mum/2021 stands dismissed as infructuous and the appeals of the Revenue for AYs 2014-15 & 2015-16 in ITA Nos. 2350/Mum/2021 & 2354/Mum/2021 also stands dismissed.

Order pronounced in the open court on this 29/11/2022.

Sd/-

(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

Mumbai; Dated 29/11/2022.
Vijay Pal Singh, (Sr. PS)



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

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