

**IN THE INCOME TAX APPELLATE TRIBUNAL,
“D” BENCH MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
MS.PADMAVATHY S, ACCOUNTANT MEMBER**

**ITA No.2067-2071/Mum/2019
(Assessment Year :2010-11 to 2014-15)**

Jt. CIT(OSD) Central Circle-5(1) Mumbai Room No. 1926, 19 th Floor, Air India BLDG, Nariman Point, Mumbai- 400021	Vs.	M/s. Aspen International P. Ltd Mumbai. 701, Embassy Centre Nariman Point, Mumbai- 400021
PAN/GIR No.AAFCA2740R		
(Appellant)	..	(Respondent)

**CO NO.68/MUM/2022
(Arising out of ITA No.2067/Mum/2019
(Assessment Year :2010-11)**

**CO NO.27/MUM/2022
(Arising out of ITA No.2068/Mum/2019
(Assessment Year :2011-12)**

**CO NO.26/MUM/2022
(Arising out of ITA No.2069/Mum/2019
(Assessment Year :2012-13)**

**CO NO.29/MUM/2022
(Arising out of ITA No.2070/Mum/2019
(Assessment Year :2013-14)**

&

**CO NO.28/MUM/2022
(Arising out of ITA No.2071/Mum/2019
(Assessment Year :2014-15)**

M/s. Aspen International P. Ltd Mumbai. 701 Embassy Centre	Vs.	Jt. CIT(OSD) Central Circle-5(1) Mumbai Room No. 1926, 19 th
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Nariman Point, Mumbai-400021		Floor, Air India BLDG, Nariman Point, Mumbai-400021
PAN/GIR No. AAFCA2740R		
(Appellant)	..	(Respondent)

Assessee by	Shri. Tapan Doshi
Revenue by	Smt. Ridhi Mishra
Date of Hearing	26/04/2023
Date of Pronouncement	27/ 04/2023

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeals have been filed by the Revenue and cross objections by the assessee against the common order dated 25/01/2019, passed by CIT (A)-53, Mumbai for the quantum of assessment passed u/s.143(3) r.w.s. 153C for the A. Yrs 2010-11 to 2014-15. In all the appeals, common ground has been raised by the Revenue which reads as under:-

1. "Whether on the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in deleting the addition of Rs. 15,03,340/-, being accommodation entry obtained In the nature of bogus long term capital gains by the assessee which fact was also concurred in the appellate order by the Id. CIT(A) that the assessee indulged in accommodation entries?"

2. "Whether on the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in deleting the addition of Rs. 75,167/-, being unaccounted commission paid for arranging

accommodation entry which is in the nature of bogus long term capital gains in patent violation of the infringement of the provisions of the Act?"

3. "Whether on the facts and in the circumstances of the case and in law, the Id. CIT (A), without prejudice to the above had erred in not rectifying the mistake of restricting the addition in the case of the assessee only to the extent of 5% of alleged accommodation entries undertaken by the assessee group as profit earned on unaccounted sales. The Id. CIT (A) also erred in not appreciating the fact that the huge amount of accommodation entry undertaken by the assessee group itself reflected the profit earned through unaccounted sales undertaken by the assessee in the course of deleting the additions?"

4. "Whether on the facts and in the circumstances of the case and in law, the Id. Commissioner of Income Tax (Appeals) erred in deleting the addition made in the assessment order, by merely relying on the submissions of the assessee that the funds generated through accommodation entry were directly/indirectly routed to the assessee company-without providing any opportunity of being heard or for verifying the submissions made by the assessee in the course of appellate proceedings, which is arbitrary and against the interests of the principles of natural justice?"

5. "Whether on the facts and in the circumstances of the case and in law, the Id. Commissioner of Income Tax (Appeals) erred in sustaining the protective addition of only 5% of GP margin on alleged unaccounted sales in the case of the assessee company -"Hazel Mercantile Ltd" while on the other hand according relief of entire addition of Rs. 15,03,340/- which is arbitrary and against the interests of the principles of natural justice.?"

6. "Whether on the facts and in the circumstances of the case and in law, the Id. Commissioner of Income Tax (Appeals) erred in not appreciating that the accommodation entries undertaken

by the assessee represented the final income earned by the assessee company, thereby confirming only the protective additions?"

3. Whereas in cross objection, the assessee has raised the following grounds:-

"1. On the facts and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in making an additions in the Assessment Order passed u/s. 153C r.w.s. 143(3) of the Act on issues not based on any incriminating material found during the course of search.

2. On the facts and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in disallowing the claim for exempt Long Term Capital Gains made by the Appellant in the return of income amounting to Rs. 15,03,340/- without appreciating the facts and circumstances of the case and position of law.

3. On the facts and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in treating the exempt LTCG as allegedly non genuine and adding the same u/s.68 of the Act without appreciating the facts and circumstances of the case and position of law.

4. On the facts and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in considering the facts and circumstances of the case by not providing an opportunity for cross examinations of third parties whose statements were relied upon."

4. At the outset, both the parties agreed that this issue now stands covered by the decision of this Tribunal in the group case of Nitin Kumar Dindayal Didwania and M/s. Hazel Mercantile

Ltd. vide order dated 23/01/2023. Even the cross objection raised by the assessee is also covered.

5. The brief facts are that a search u/s.132 and survey was conducted on Veritas group wherein certain emphatic evidences were found that Shri Nitin Kumar Dindayal Didwania and his family including Veritas Ltd and other group companies including the assessee company, M/s. Aspen International Pvt. Ltd. have entered into share transactions in the following scrips; (i) Nouveau Multimedia Ltd., (ii) JMD Telefilms Industries Ltd. (iii) D.B. International Stock Brokers Ltd. (iv) Rander Corporation Ltd. (v) Blue Circle Services Ltd.; (vi) Dhanleela Investments Company Ltd.; (vii) Effingo Textiles & Trading Ltd (viii) CCL International Ltd.; (ix) Mapro Industries Ltd.; and (x) Mishka Finance & Trading Ltd and claimed capital gain exempt income u/s 10(38) of the Act.

6. In the course of search on Shri Nitin Kumar Dindayal Didwania, a statement was recorded on 10/09/2015 and 13/09/2015 u/s.132(4), wherein he explained whole modus operandi of obtaining bogus long term capital gain on account of manipulated and fraudulent transactions. However, later on statement was retracted. Thereafter, the ld. AO after detailed discussion held that assessee who has also shown long term capital gain on sale of these shares which was claimed exempt u/s.10(38) as bogus and non-genuine which has been added u/s.68. Accordingly, the entire long term capital gain of

Rs.15,03,340/- has been added. However, the Id CIT(A) though has held that all the long term capital gains shown by Nitin Kumar Dindayal Didwania and his group concerns have taken bogus long term capital gain and which has been tabulated in the following manner:-

Person	AY 2010-11	AY 2011-12	AY 12-13	AY 2013-14	AY 2014-15	AY 2015-16	Total
M/s. Hazel Mercantile Ltd.	202,05,648	289,39,693	158,20,785	357,55,020	297,47,206	299,64,323	16,04,32,675
M/s. Aspen International Ltd.	15,03,340	99,24,463	29,49,332	85,05,399	198,10,394		4,26,92,856
M/s. Sanman Trade Impex Ltd.			31,60,227	105,96,724	246,95,532		3,84,52,483
M/s Veritas (I) Ltd.					200,76,725		200,76,725
Sh. Nitin Dindayal Didwania	701,34,900	577,49,901	2386,97,745		2148,94,044	1680,27,919	74,95,04,509
Niti Nitinkumar Didwania	559,17,609	298,13,063	64,52,697		100,91,36	219,72,700	1242,47,438
Sushmadevji Dindayal Didwania	6,59,300	23,92,654				118,34,452	148,86,406
Total Capital Gain(A)	1484,20,797	1288,19,747	2670,80,786	548,57,143	3193,15,225	2317,99,394	115,02,93,092
Commission @ 5% o'A(B)	74,21,040	64,40,987	133,54,039	27,42,857	159,65,761	115,89,970	575,14,655
Total (C)(A+B)	1558,41,837	1352,60,734	2804,34,825	576,00,000	3352,80,986	2433,89,364	120,78,07,747

7. The assessee company had also shown capital gains which have claimed as exempt in various orders are as under:-

Particular	AY 2010-11	AY 2011-12	AY 2012-13	AY 2013-14	AY 2014-15	AY 2015-16	AY 2016-17
Returned Income	99,36,466	418,46,760	177,73,110	203,07,075	17,80,490	-	-
LTCG Claimed as Exempt	15,03,340	99,24,436	29,09,153	85,05,399	198,10,394	-	-
Capital Gain on Alleged Penny Stock	15,03,340	99,24,436	29,49,332	85,05,399	198,10,349	-	-
Capital Gain on other Stock			-40,179	-	-	-	-

8. The details of capital gain in the case of the assessee in the various groups were as under:-

Sr. No	Name of the Scrip	Cost (Rs.)	Sale Value (Rs.)	Capital Gain (Rs.)	Gains As % of Cost
1.	D. B. International Stock Brokers Ltd.	13,61,829	2,11,72,179	1,98,10,349	1455%
		4,64,000	76,73,646	72,09,646	1554%
		8,23,808	1,00,15,432	91,91,623	1116%
2.	Nouveau Multimedia Ltd.	6,65,575	21,68,916	15,03,340	226%
		2,60,000	13,58,283	10,98,283	422%
		40,000	7,72,814	7,32,814	1832%
3.	Rander Corporation Ltd.	1,87,200	20,38,249	18,51,049	989%
		4,62,800	17,58,553	12,95,753	280%
	Total	42,65,212	4,69,58,072	4,26,92,857	1001%

9. The ld. CIT (A) held that, in his order in the case of M/s. Hazel Mercantile Ltd and Shri Nitin Kumar Dindayal Didwania for A.Y.2010-11 to 2015-16, an addition on account of non-genuine LTCG and commission for obtaining the LTCG has been upheld. However, he held that source of cash for obtaining this accommodation entry was on account of out of books sales of stock in cash in the case of M/s. Hazel Mercantile Ltd. which has been accepted by him and therefore, he held that same is taxable in the hands of M/s. Hazel Mercantile Ltd. However, in that case, the ld. CIT(A) has telescoped the entire addition of long term capital gain in all the cases for an addition of Rs.6,04,66,969/- made on account of gross profit on account of sales made protective by the ld. AO in that case which he held to be substantive. His relevant observations and findings are as under:-

“5.6. The facts and submissions are identical and have been dealt with at length in my appellate orders of even date for M/s Hazel Mercantile Ltd. and Nitinkumar Deendayal Didwania for AY 2010-11 to AY 2015-16. The additions made in respect of non-genuine LTCG and commission for obtaining the LTCG has

been upheld. The retraction has been disregarded. It has been held that the statement of admission and explanation of source of the cash for obtaining non-genuine LTCG in all the group concerns/entities has to be considered together. The explanation that the source was out of out of books sale of stocks in cash and expense incurred as commission for obtaining the LTCG in all the in the case of M/s Hazel Mercantile Ltd. has been accepted and the LTCG individual and entities of VERITAS/DIDWANIA group has been considered as taxable in the hands of M/s Hazel Mercantile Ltd.. The protective addition made in that case of M/s Hazel Mercantile Ltd. has been upheld as substantial.

57. In light of the facts of this case as well as the facts in the case of other group entities on this issue, the reasons elaborated in my appellate orders in the case of M/s Hazel Mercantile Ltd. and Nitinkumar Deendayal Didwania for AY 2010-11 to AY 2015-16 above, grounds of appeal no 2, 3, 4, 5 and contention regarding retraction in ground 6 are dismissed. However, the addition made by disallowing the claim of exemption for long term capital gains of Rs.15,03,340/- and further addition of Rs.75,167/- at the rate of 5% of the exempt long term capital gains earned during the year as unaccounted commission expenses incurred for earning the said exempt income is deleted in view of the decision in the case of M/s Hazel Mercantile Limited in whose hands the addition is upheld on substantial basis and ground of appeal no 6 regarding the AO not considering the explanation regarding source of cash. Hence these grounds are treated as partly allowed as above. The appellant and the other relevant entities in the VERITAS group will pass correctional accounting entries in all the concerned entities to reflect this position.”

10. We find that this issue in the case of Shri Nitin Kumar Dindayal Didwania and M/s. Hazel Mercantile Ltd. in the

appeals for A.Yrs. 2010-11 to 2015-16, this Tribunal has dealt this issue in detail and the relevant observation and finding of this Tribunal are reproduced hereunder:-

23. We have already stated that records shown that the whole group has earned a Long Term Capital Gain of more than Rs. 115 crores. Therefore, if there is a source of ₹115 crores unaccounted income that has been taxed in the hands of Hazel Mercantile Ltd. on account of unaccounted sale, then perhaps the finding of the learned CIT (A) may be considered as plausible.

24. Though the issue may still arise that how the provisions of Section 68 of the Act can be given a go-bye merely because some other company has shown the unaccounted sales and has earned income in its hands. Thus, on careful reading of the Provisions of Section 68 of the Act, the order of the learned CIT (A) is clearly unsustainable on this count itself.

25. On the second aspect, we find that gross profit addition of unaccounted sales in case of M/s Hazel Mercantile Ltd. has been upheld by the learned CIT (A) for A.Ys. 2010-11 to A.Y. 2016-17 is only to the extent of ₹6,04,66,969/-. Thus, it is clear that the learned CIT (A) has deleted the Long Term Capital Gain addition of ₹115 crores and converting the protective addition of ₹604,66,969/- in the hands of M/s Hazel Mercantile as substantive addition to delete the bogus Long Term Capital Gain addition in the hands of this assessee. There is gross mismatch between the amount to be taxed in the hands of individuals and companies on account of penny stock addition and amount upheld as addition on account of gross profit of Hazel mercantile limited. Ld CIT (A) just referred answer to one question, i.e. q no 43 of the statement of Assessee and allowed telescoping in hands of different assessee.

26. The below mentioned statement of capital gain earned by Mr. Nitin Kumar Didwania, Mrs. Nitti Didwania and M/s Hazel Mercantile Ltd. for A.Y. 2010-11 to 2016-17 shows Long Term Capital Gain in the hands of these three assessee of ₹103 crores. The learned CIT (A) has made GP addition in the hands of Hazel Mercantile Ltd of only ₹6,04,66,969/- for deleting the addition of Long Term Capital Gain.

AY	Long term capital gain earned by Mr. Nitin Didwania	Long term capital gain earned by Mrs. Nitti Didwania	Long term capital gain earned by Hazel mercantile Limited	Gross profit addition upheld in case of Hazel Mercantile Limited
(1)	(2)	(3)	(4)	(5)
2010-11	7,01,34,900	5,59,17,609	2,02,05,648	77,92,092
2011-12	5,77,49,901	2,98,13,063	2,89,39,693	67,63,037
2012-13	23,86,97,745	64,52,967	1,58,20,785	1,40,21,741
2013-14	Nil	Nil	3,57,55,020	28,80,000
2014-15	21,48,94,044	1,00,91,369	2,97,47,206	1,67,64,049
2015-16	16,80,27,919	2,19,72,700	2,99,64,323	1,20,60,372

Total	74,95,04,509	12,42,47,438	16,04,32,675	6,02,81,291
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27. There is no working mentioned by the learned CIT (A) in his order that how he is telescoping the addition of Long Term Capital Gain earned by these entities with the gross profit addition made in the hands of M/s Hazel Mercantile Ltd.
28. There is no justification/ reasoning of the time of long-term capital gain earned in respective years and amount of gross profit addition in case of company. There is year wise gross mismatch between AY of earning of capital gain and profit taxed in the hands of Hazel mercantile Limited.
29. There is no evidence found during the course of search, which even remotely suggests that income is earned by company, and it came in to hands of this assessee for conversion of that unaccounted income as LTCG in their hands. No evidence mentioned by the LD CIT (A) for allowing the telescoping.
30. In case of Hazel Mercantile Limited Bogus LTCG is Rs 16.04 Cr, whereas addition because of GP is merely Rs. 6.02 Cr, which is not even enough to cover Bogus LTCG in the same company, how the other entities unaccounted income is subsumed in that is not made clear by the LD CIT (A).
31. Therefore, all the grounds of appeal of the Revenue are set aside back to the file of the learned CIT (A) to give a reasoned finding how the amount of Long Term Capital Gain earned by the assessee is subsumed in gross profit addition made in the hands of Hazel Mercantile Ltd. Thus, ground nos.1 to 6 of the appeal of the learned Assessing Officer are allowed.
32. Now, we come to the cross objection filed by the assessee. Ground no.2 to 4 of the CO, are relating to the addition on the merits, which we have already held in the appeal of the learned Assessing Officer therefore, the same are dismissed.
33. The ground no.1 of the CO challenged the facts that there is no incriminating material found during the course of search and therefore, no addition can be made in the hands of the assessee.

The fact clearly shows that there was a search on 10 September 2015 on the assessee and all the group concerns. The main allegation of the search was that the assessee and his family members along with group entities have earned bogus long term capital gain of ₹115 crores. We are fully convinced that there are enough incriminating material found prior to research as well as during the course of search based on which the addition on account of bogus long-term capital gain on by the assessee on penny stock is based. Firstly there was an information prior to the search that the assessee and his family members along with the companies controlled by him have earned bogus long-term capital gain accommodation entries by selling the sale of various non-descript companies through a fraudulent scheme of tax evasion and money-laundering in a very large scale over the years and unaccounted money generated has been colored as exempt long-term capital gain introduced into the books of accounts of the family members in a pre-arranged manner of hundreds of crores of rupees. This has led to search on 10/9/2015. During the course of search, the long-term capital gain earned by the assessee claimed as exempt under section 10 (38) of the act was found recorded in the books of account of these non-genuine companies. The statement recorded of the assessee under section 132 (4), assessee himself has explained whole modus operandi of the scheme and admitted that long-term capital gain claimed by the assessee and his family members and the companies is bogus, nongenuine and all out of many political and fraudulent transactions. Further statement recorded on 14 October 2015 in case of VERITAS India Ltd, assessee confirmed that long-term capital gain earned by him, his family member and the companies is bogus. He also mentioned the name of the person Mr. Girish Zaveri, giving his telephone numbers, giving the name of the companies in which the long-term capital gain is shown, corroborating that he has claimed bogus long-term capital gain. He also gave Person wise, script -wise, assessment year wise, minutely to the extent of each and every rupee of such bogus long-term capital gain earned and also explained from which companies such gain are obtained. He also confirmed that how the above scheme was explained to him by the accommodation entry provider and how he obtained such bogus gains. He also confirmed how the cash was paid to the brokers. He also confirmed that he has taken all

the responsibility of obtaining such bogus gain in the hands of the assessee, his family members and companies operated by him. He also admitted that he has paid commission to Mr. Girish Jhaveri and Mr. Natwar for obtaining these accommodation entries. He also explained that unaccounted income is generated out of Hazel mercantile Limited. However, he did not stated how much income he earned out of unaccounted sales. He admitted to have made the sales of ₹ 120 crores out of the books of Hazel Mercantile Ltd (5% of which is added as income of the assessee being gross profit of Rs. 120 crores amounting to ₹ 6 crores). The books of accounts of Hazel Mercantile Ltd Hazel Mercantile Ltd was not produced, the reconciliation or systematic records of the cash generation in that company used for obtaining accommodation entries was also not mentioned. Further, the reason of the search was capital gain claimed as exempt income shown by the assessee, which was contrary to the investigation of the various agencies including securities and exchange board of India. The inquiries were also confirmed by statements of accommodation entry providers, the directors of the companies shares of those companies were sold to obtained bogus long-term capital gain, statement of exit providers, statement of and identification of persons who acted on behalf of the assessee at the insistence of the assessee such as Mr. Girish and Mr. Natwar, data of stock exchange showing trading data of group companies of the assessee and assessee and his relatives, ignorance of the assessee about the companies in which assessee has invested to earn unaccounted income, the operators operating on behalf of the exit providers having their permanent account number is and matching stock exchange trading data, unfamiliarity of the assessee with respect to trading of shares, ignorance of the assessee how he came to know about preferential shares allotment of the invested companies, despite investing heavily in preferential sale allotment of the companies ignorance about even the business of those companies and directors of those companies, no explanation provided by the assessee despite confronting assessee with all those statements of persons involved in scheme of conversion of unaccounted income in bogus long-term capital gain, authorization of obtaining long-term capital gain scheme shown to the assessee by Mr. Girish and Mr. Natwar, Mr. Girish being an employee of the assessee, explaining the

scheme in answer to question number 42, explaining the source of money given for obtaining unaccounted income in question number 43, explaining how the unaccounted payments were made in answer to question number 44, confirming in answer to question number 45 that he has entered into a scheme for conversion of unaccounted income, non-attendance in any of the company's annual general meeting confirmed by him wide answer to question number 46, non-receipt of any dividend from these companies clearly shows that authorities who conducted search, show all the documents in their possession which are confirmed by the assessee and admitted the unaccounted income. Therefore, thereafter nothing is required to be unearthed during the course of search as more than enough incriminating material was already available with the search party confronted to the assessee were admitted having the unaccounted income. It is always not necessary that there have to be some paper trail, which should have been found during the course of search for making an addition. The statement made by the assessee confirming the information, admitting the unaccounted income, explaining the modus operandi of earning such income, naming the parties involved in such activity shows clear-cut evidences of earning unaccounted income. Therefore, we do not find any infirmity in the order of the learned CIT – A the extent holding that that the addition of unaccounted long-term capital gain which is proved to be bogus is based on material found during the course of search and satisfies all the conditions prescribed under section 153A of the.

34. In view of this, we do not find any merit in the cross objections of the assessee, hence it is dismissed.
35. In view of this, the appeal filed by the learned assessing officer is allowed for statistical purposes setting aside back to the file of the learned CIT – A to give clear-cut finding as to how merely an addition of ₹ 6 crores is enough where as bogus long-term capital gain earned is more than ₹ 120 crores. The learned CIT – A is also directed to give a specific finding year wise, amount twice, assessee wise with reasons that how telescoping of the long-term capital gain earned by individuals and companies can be subsumed in a meager addition of ₹ 6 crores in the hands of Hazel Mercantile Ltd. Needless to say, the assessee is directed

to submit, if desired, all his submissions within 90 days of this order, thereafter, the learned CIT – A may decide the issue in accordance with the law.

- 36. Accordingly, appeals of the learned AO are allowed for statistical purposes and the cross objections of the assessee are dismissed.*
- 37. Identical facts exists for assessment year 2011 – 12, 2012 – 13, 2014 – 15, 2015 – 16 and 2016 – 17. Therefore, similar directions are also given for all these years allowing the appeal of the learned assessing officer for statistical purposes and dismissing cross objections of the assessee.*
- 38. Accordingly, in case of Mr. Nitinkumar Deendayal Didwania, all the appeals filed by the learned assessing officer are allowed for statistical purposes and cross objections filed by the assessee are dismissed for all these years.*
- 39. Coming to the appeal is filed by the learned assessing officer in case of Mrs. Nitti Nitinkumar Didwania for assessment year 2010 – 11, 2011 – 12, 2012 – 13, 2014 – 15 and 2015 – 16 as well as cross objections filed by the assessee for all these assessment years are having similar facts except the change of amounts of long-term capital gain. Therefore, for the reasons given by us while disposing of the appeal of the learned AO and cross objections of Mr. Nitinkumar Didwania, we also allow the appeals of the learned assessing officer in case of Mrs. Nitti Nitinkumar Didwania for statistical purposes with similar direction and dismiss the cross objections of the assessee for all these years.*
- 40. Now we come to the appeal of learned assessing officer in Hazel Mercantile Ltd for respective assessment years and cross objections or appeal of the assessee.*
- 41. For assessment year 2010 – 11, the assessee has filed its original return under section 139 (1) on 22/01/2011 declaring a total income of ₹ 21,798,074. This return was revised at the same income on 22/2/2014. The assessment was completed under section 143 (3) of the act on 26/11/2012 assessing the total income of the assessee at ₹ 26,636,430. The assessment*

was reopened under section 148 of the act which was also resulted into an assessment passed under section 143 (3) read with section 147 of the income tax act at ₹31,574,830. Subsequently, re-assessment order was challenged before the CIT – A wherein as per order dated 14/7 /2016 the additions were deleted.

42. Subsequently on account of search on 10/9/2015, respective is under section 153C was issued on 29/12/2017 wherein the income of the assessee was assessed at ₹55,644,450/-. The assessee company was found to have earned bogus long-term capital gain of ₹20,205,648/- for the impugned assessment year. Similarly, for other assessment years starting from assessment year 2011 – 12 – 2015 – 16 also assessee was found to have earned non-genuine long-term capital gain. The total long-term capital gain allegedly as bogus unaccounted income was to the tune of ₹16.04 crores. Based on the statement of the managing director/main officer of the assessee company this long-term capital gain was added to the total income of the assessee under section 68 of the income tax act. Further commission thereon for earning such bogus long-term capital gain at the rate of 5% that too based on the statement of Mr. Nitinkumar Didwania was made in the hands of the assessee for all those years. Accordingly, commission at the rate of 5% for assessment year 2010 – 11 to 2015 – 16 was determined at ₹57,514,654. It was added as unexplained expenditure under section 69C. The learned assessing officer for the impugned assessment year made an addition of ₹20,205,648 on account of bogus long-term capital gain and commission expenditure of ₹ 1,010,282.
43. The learned assessing officer also found that assessee has unrecorded sales of ₹ 155,841,837 for assessment year 2010 – 11, ₹135,216,734 for assessment year 2011 – 12, ₹ 284,034,824 for assessment year 2012 – 13, ₹ 576 Lacs for assessment year 2013 – 14, ₹ 335,280,986 for assessment year 14 – 15 and ₹ 243,389,364/- for assessment year 2015 – 16 amounting to ₹ 1,207,870,747 for all these years taken together. The learned assessing officer also added to the income of the assessee 5% gross profit out of these unaccounted sales. Therefore, on account of unaccounted sales of ₹ 120 crores

taken together for all these years 5% of gross profit works out to ₹ 6 crores. Thus, corresponding addition was made for all these years.

- 44. On appeal before the learned CIT – A, the addition of long-term capital gain and commission expenditure was confirmed on the merits where the learned CIT – A has categorically held that about long-term capital gain shown by the assessee is bogus and correctly taxed under section 68 of the act. Similar findings were with respect to the expenditure.*
- 45. However, the learned CIT – A held that the addition in the Hands of the assessee on account of gross profit on account of unaccounted sales subsumes the addition on account of nongenuine long-term capital gain. He held that when the unaccounted income on account of gross profit earned on unaccounted sales is added in hands of the assessee, there is no requirement of further making an addition of unaccounted long-term capital gain.*
- 46. Accordingly, in a nutshell, he held that though the long-term capital gain earned by the assessee is nongenuine and correctly taxable in the hands of the assessee but however for the reasons that gross profit on unaccounted sale is already taxed at the rate of 5% in the hands of the assessee, no separate addition with respect to the bogus long-term capital gain is required. Thus, he confirmed addition to the extent of ₹ 6 crores for all these assessment years but held that bogus long-term capital gain earned of ₹ 16.04 crores in the Hands of the assessee subsumes in the above addition of ₹ 6 crores.*
- 47. Therefore, the assesseees as well as the learned assessing officer both are aggrieved by the order of the learned CIT – A. Assessee is aggrieved by the confirmation of the addition of bogus long-term capital gain and commission expenses earned thereon as well as 5% gross profit confirmed on unaccounted sales. The learned assessing officer is aggrieved with giving telescoping of the addition of ₹ 6 crores for covering bogus long-term capital gain of ₹ 16.04 crores.*
- 48. We have carefully considered the contentions of the learned CIT DR and perused the orders of lower authorities. As we have*

confirmed the long-term capital gain chargeability in the hands of Mr. Nitinkumar Didwania as well as payment of 5% of the commission for earning such long-term capital gain, the facts and circumstances are exactly similar except the change of the amount. Therefore, we do not have any hesitation in dismissing ground number 1 – 4 of the appeal of the assessee for all these assessment years.

49. *For the reasons given by us while allowing the appeal of the learned assessing officer in case of Mr. Nitinkumar Didwania challenging the action of the learned CIT – A in not making a separate addition for long-term capital gain but holding that capital gain addition is subsumed in the addition of 5% on account of unaccounted sales of Hazel Mercantile Ltd, we set aside the whole appeal of the learned assessing officer for all these years back to the file of the learned CIT – A to decide a fresh and give a detailed finding as to how the telescoping of the gross profit addition in the hands of this assessee company amounting to ₹ 6 crores subsumes all the additions of penny stock in the hands of Mr. Nitin Didwania as well as his family members and companies of Rs 120 crores can be telescoped. Accordingly the appeal of the learned assessing officer for all these assessment years are allowed for statistical purposes with above directions.*

11. Thus, this Tribunal after detailed reasoning had set aside this issue to the file of the ld. CIT(A) to give a finding as to how the addition of Rs.6 Crores is enough to cover bogus capital gain for more than Rs.120 Crores. Accordingly, following similar line of direction in these appeals, the entire issue is set aside and remanded back to the file of ld. CIT (A) to be decided in accordance with same line of direction.

12. Consequently, the Revenue's appeal is allowed for statistical purposes.

13. In so far as cross objections are concerned, the same have also been dealt in detail by the Tribunal in para 33. Accordingly, on the same ground, the cross objections filed by the assessee are dismissed.

14. In the result, appeals of the Revenue are allowed for statistical purposes and Cross Objections of the assessee are dismissed.

Order pronounced on 27th April 2023

Sd/-

(PADMAVATHY S)

ACCOUNTANT MEMBER

Mumbai; Dated 27/04/2023
KARUNA, sr.ps

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

Sd/-

(AMIT SHUKLA)

JUDICIAL MEMBER

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai