IN THE INCOME TAX APPELLATE TRIBUNAL

"G" BENCH, MUMBAI

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.2431/Mum./2021
(Assessment Year : 2012–13)

Dy. Commissioner of Income Tax
Central Circle–6(2), Mumbai ……. Appellant

v/s

Shri Surendra B. Jiwrajka
901–902, Palm Beach, 67–A
Sir Pochkhanwala Road
Worli, Mumbai 400 025
PAN – AACPJ4316L ……. Respondent

C.O. no.66/Mum./2022
(Arising out of ITA no.2431/Mum./2021)
(Assessment Year : 2012–13)

Shri Surendra B. Jiwrajka
901–902, Palm Beach, 67–A
Sir Pochkhanwala Road
Worli, Mumbai 400 025
PAN – AACPJ4316L ……. Cross Objector
(Original Respondent)

v/s

Dy. Commissioner of Income Tax
Central Circle–6(2), Mumbai ……. Respondent
(Original Appellant)

ITA no.2432/Mum./2021
(Assessment Year : 2013–14)

Dy. Commissioner of Income Tax
Central Circle–6(2), Mumbai ……. Appellant

v/s

Shri Surendra B. Jiwrajka
901–902, Palm Beach, 67–A
Sir Pochkhanwala Road
Worli, Mumbai 400 025
PAN – AACPJ4316L ……. Respondent

C.O. no.65/Mum./2022
(Arising out of ITA no.2432/Mum./2021)
(Assessment Year : 2013–14)

Shri Surendra B. Jiwrajka
901–902, Palm Beach, 67–A
Sir Pochkhanwala Road
Worli, Mumbai 400 025
PAN – AACPJ4316L

……. Cross Objector
(Original Respondent)

v/s

Dy. Commissioner of Income Tax
Central Circle–6(2), Mumbai

……. Respondent
(Original Appellant)

ITA no.2433/Mum./2021
(Assessment Year : 2014–15)

Dy. Commissioner of Income Tax
Central Circle–6(2), Mumbai

……. Appellant

v/s

Shri Surendra B. Jiwrajka
901–902, Palm Beach, 67–A
Sir Pochkhanwala Road
Worli, Mumbai 400 025
PAN – AACPJ4316L

……. Respondent

ITA no.2434/Mum./2021
(Assessment Year : 2015–16)

Dy. Commissioner of Income Tax
Central Circle–6(2), Mumbai

……. Appellant

v/s

Shri Surendra B. Jiwrajka
901–902, Palm Beach, 67–A
Sir Pochkhanwala Road
Worli, Mumbai 400 025
PAN – AACPJ4316L

……. Respondent

Assessee by : Shri Bharat Kumar
Revenue by : Dr. Kishore Dhule

Date of Hearing – 14/06/2023	Date of Order – 30/06/2023

O R D E R

PER BENCH

The captioned appeals have been filed by the Revenue challenging the separate impugned orders passed by the learned Commissioner of Income Tax (Appeals)–54, Mumbai, ["*learned CIT(A)*"] of even date 16/07/2021 (for A.Y. 2012–13 & 2014–15) and orders of even date 20/07/2021 (for the A.Y. 2013–14 & 2015–16) and cross objection by the assessee have been filed for the assessment year 2012–13 and 2013–14.

2. Since the present batch of matters arise out of a similar factual matrix and involve similar issues, therefore, as a matter of convenience, these matters were heard together and are being disposed off by way of this consolidated order.

3. We find that Revenue's appeals are time-barred by 67 days. It is submitted that the aforesaid impugned orders dated 16/07/2021 and 20/07/2021 were received by the Revenue on 18/08/2021 and the appeals were filed on 23/12/2021. We find that the Hon'ble Supreme Court, vide order dated 10/01/2022, passed in M.A. no.21 of 2022, in M.A. no.665 of 2021, in Suo–Motu Writ Petition (Civil) no.3 of 2020, directed that the period from 15/03/2020 till 28/02/2022, shall stand excluded for the purpose of limitation as may be prescribed under any general or special laws in respect of all judicial and quasi-judicial proceedings. As the due date for filing the present appeals was falling within the aforesaid time period, in view of the order passed by the Hon'ble Supreme Court, there is no delay in filing the present appeals by the Revenue and we proceed to decide the same on merits.

4. In its appeals, the Revenue has challenged the deletion of additions made under section 68 and section 69C of the Act on the account of long-term capital gains and short-term capital gains claimed by the assessee. While, the assessee, vide its cross objection, has challenged the assumption of jurisdiction under section 153A of the Act for the assessment years 2012-13 and 2013-14 in the absence of any incriminating material.

5. In the present batch of cases, it is undisputed that the Assessing Officer ("*AO*") has passed separate assessment orders under section 153A read with section 143(3) of the Act for the assessment years 2012-13 to 2015-16, however, the same are

identical and verbatim similar discussing the transactions conducted by the assessee in the following 7 scrips and deriving capital gains:-

- *Radford Global Ltd.;*
- *Global Infratech & Finance Ltd. (formerly known as Asianlac Capital and Finance Ltd.);*
- *Shree Shaleen Textiles Ltd.;*
- *Hingir Rampur Ltd. (Formerly known as Dhenu Buildcon Infra Ltd.);*
- *Unisys Softwares and Holding Industries Ltd.;*
- *Rander Corporation Ltd.; and*
- *Wagend Infra Venture Ltd. (Formerly known as Agarwal Holdings Ltd.).*

6. The brief facts of the case are that the assessee is an individual and derives income from salary, rental income, capital gains, and income from other sources. The search and seizure operation under section 132(1) of the Act was conducted on the assessee on 09/04/2015. During the course of the search, the residential premise/lockers of the assessee were searched. During the proceedings under section 153A of the Act, it was observed that the assessee has earned huge long-term capital gains and short-term capital gains which are of suspicious nature. Accordingly, information with respect to the assessee was gathered by the Department that he had earned these long-term capital gains in a suspicious manner, using dubious means. The AO took into consideration the investigation report received from the Directorate of Investigation, Delhi, whereby it was brought to the notice that certain scrips, namely Radford Global Ltd and Global Infratech and Finance Ltd, in which the assessee has also dealt, were being used for the purpose of providing accommodation entry for bogus long term capital gain claims. The AO also referred to the orders passed by the Securities and Exchange Board of India ("*SEBI*") in the case of Radford Global Ltd and Global Infratech and Finance Ltd. The AO also referred to the independent enquiries conducted separately by the investigation directorate, search/survey action conducted in the case of some beneficiaries, some exit providers and share brokers of exit providers in the case of Radford Global Ltd and Global Infratech and Finance Ltd. In the assessment order, the AO referred to the statement recorded of one of the accommodation entry providers, namely Shri Raj Kumar Kedia and his employee Shri Manish Arora. The AO also referred to the statement of the ex-director of Radford Global Ltd. The AO analysed the price movement of the shares as per the information available on the website, www.moneycontrol.com. Accordingly, the AO came to the conclusion that the financials of Radford Global Ltd was very poor

during the period when the preferential shares were allotted to the assessee. Further, the business profile shows that the company was not engaged in any substantial activity and the whole process of preferential allotment was a pre-arranged and managed process so as to allow the preferential shares to the beneficiaries of bogus long-term capital gain which could later be sold by them for booking accommodation entry of bogus long-term capital gain/short-term capital gain in the garb of sale proceeds on the sale of shares. Similarly, in respect of Global Infratech and Finance Ltd, the AO analysed the price movement of the shares, statements of some of the beneficiaries, and statements recorded in their cases. Accordingly, the AO came to the same conclusion as in Radford Global Ltd. Likewise, the AO also referred to similar information in the case of other scrips in which the assessee has traded. The AO also referred to the statement of the assessee recorded on behalf of his brother Shri Dilip B. Jiwrajka. The summary of the share transactions by the assessee in the aforesaid scrips, as mentioned on page 76 in the assessment order for the assessment year 2012-13, is as under:-

Surendra B. Jiwrajka						
Sale value of the shares in Rs.						
Sr. no.	*Name of the Scrip*	*F.Y. 11–12*	*F.Y. 12–13*	*F.Y. 13–14*	*F.Y. 14–15*	*Total*
1.	*Radford Global Ltd.*			*98999153.5*		*98999153.5*
2.	*Global Infratech & Finance Ltd.*			*36140000*		*36140000*
3.	*Shri Shaleen Textiles Ltd.*			*46172181.25*		*46172181.25*
4.	*Dhenu Buildcon Infra Ltd.*		*78368689.8*			*78368689.8*
5.	*Unisys Softwares and Holding Industries Ltd.*	*34608122*				*34608122*
6.	*Rander Corporation Ltd.*	*7840804*			*3514070*	*11354874*
7.	*Wagend Infra Venture Ltd.*		*37688695*			*37688695*
	Total:					*343331715.6*

7. Thus, by treating the aforesaid 7 scrips as penny stocks used for providing accommodation entry of bogus long-term capital gains/short-term capital gains, the AO made the addition of the sale consideration under section 68 of the Act. The AO further made an addition under section 69C of the Act by treating 7% of the total sale consideration as unaccounted expenditure on payment of commission to the parties

who have assisted the assessee to claim bogus long-term capital gains/short-term capital gains. The additions made by the AO under section 68 and section 69C of the Act in the years under consideration, i.e. assessment years 2012-13 to 2015-16, are as under:-

A.Y.	*Sale consideration (relating to LTCG)*	*Sale consideration (relating to STCG)*	*Total*
2012–13		*4,23,72,172*	*4,23,72,172*
2013–14	*7,82,23,206*	*3,76,14,150*	*11,58,37,356*
2014–15	*18,09,70,565*		*18,09,70,565*
2015–16	*35,07,439*		*35,07,439*
Total:			*34,26,87,532*

A.Y.	*Total of Sale consideration (relating to LTCG and STCG)*	*7% of total sale consideration*
2012–13	*4,23,72,172*	*29,66,052*
2013–14	*11,58,37,356*	*81,08,615*
2014–15	*18,09,70,565*	*1,26,67,940*
2015–16	*35,07,439*	*2,45,521*
Total:	*34,26,87,532*	*2,39,88,128*

8. The learned CIT(A), vide separate impugned orders, rejected the plea of the assessee regarding the absence of incriminating material and information, and thus, upheld the validity of the orders passed under section 153A read with section 143(3) of the Act for the assessment years 2012-13 and 2013-14. However, the learned CIT(A), vide impugned orders, allowed the appeal of the assessee on merits and deleted the additions made by the AO under section 68 and section 69C of the Act for the assessment years 2012-13 to 2015-16. Being aggrieved by the decision on merits, the Revenue is in appeal before us, while the assessee has filed cross-objections in the assessment years 2012-13 and 2013-14 on the jurisdictional aspect of the absence of incriminating material.

9. During the hearing, at the outset, the learned Authorised Representative ("*learned AR*") submitted that similar additions on the similar basis in respect of identical scrips were made in the case of Shri Dilip B. Jiwrajka, i.e. the brother of the assessee, for the same assessment years, i.e. 2012-13 to 2015-16. It was further submitted that the coordinate bench of the Tribunal vide order dated 29/11/2022 in

DCIT v/s Shri Dilip B. Jiwrajka, in ITA No. 2349/Mum./2021, etc., decided a similar issue, as arising in the present batch of cases, in favour of the taxpayer. The learned AR placed on record the copy of the decision of the coordinate bench of the Tribunal in Shri Dilip B. Jiwrajka as well as the assessment order in Shri Dilip B. Jiwrajka passed for the assessment year 2012-13.

10. On the contrary, the learned Departmental Representative ("*learned DR*") vehemently relied upon the assessment orders passed in the present batch of cases. The learned DR accepted that the factual matrix resulting in the impugned addition in the present batch of cases is similar to the case of assessee's brother, i.e. Shri Dilip B. Jiwrajka.

11. We have considered the submissions of both sides and perused the material available on record. A search in the present case was conducted on 09/04/2015. The original return of income for the assessment years 2012-13 and 2013-14 were filed by the assessee on 31/08/2012 and 30/07/2013, respectively. Thus, the time period for issuance of notice under section 143(2) of the Act for the aforesaid assessment years was already expired on the date of the search and no assessment proceedings were pending on the date of the search. Therefore, in the present case, it is undisputed that the assessment years 2012-13 and 2013-14 are unabated assessment years as per the 2nd proviso to section 153A(1) of the Act. Thus, the existence of incriminating material is *sine qua non* in order to initiate the proceedings under section 153A of the Act. The said aspect has recently been affirmed by the Hon'ble Supreme Court in PCIT v/s Abhisar Buildwell (P.) Ltd., [2023] 149 taxmann.com 399 (SC), wherein the Hon'ble Supreme Court held that if no incriminating material is found during the search, the AO cannot make any additions to the completed/unabated assessments. We find from the assessment order in Shri Dilip B. Jiwrajka, for the assessment year 2012-13, that the following transactions in the similar scrips were examined by the AO, and additions under section 68 and section 69C of the Act were made on the similar basis as in the present case:-

Dilip B. Jiwrajkar						
Sale value of the shares in Rs.						
Sr. no.	*Name of the Scrip*	*F.Y. 11–12*	*F.Y. 12–13*	*F.Y. 13–14*	*F.Y. 14–15*	*Total*
1.	*Radford Global Ltd.*			*98996103.55*		*98996103.55*

2.	*Global Infratech & Finance Ltd.*			*38726250*		*38726250*
3.	*Shri Shaleen Textiles Ltd.*			*45279524.6*		*45279524.6*
4.	*Dhenu Buildcon Infra Ltd.*		*78468203.2*			*78468203.2*
5.	*Unisys Softwares and Holding Industries Ltd.*	*31866387.2*				*31866387.2*
6.	*Rander Corporation Ltd.*	*15684955*			*3507500*	*19192455*
7.	*Wagend Infra Venture Ltd.*		*38874539.2*			*38874539.2*
	TOTAL					*351403462.8*

12. While examining the issue of the existence of incriminating material for initiating proceedings under section 153A of the Act in the unabated assessment years, i.e. 2012-13 and 2013-14, in the similar factual matrix in Shri Dilip B. Jiwrajka (supra), the coordinate bench of the Tribunal observed as under:-

> *"13. The next aspect to be considered is to understand the meaning of the expression "incriminating material" or evidence. As rightly noted 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 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 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 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 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 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 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 & 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 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 ld 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 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 & seizureand survey operation regarding Instances have come to the notice of the Board where assessees 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 assessees 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 notlikely 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 faithfully,
Sd/-
(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 ld AO or by the ld CITA in order to give credence to the statement recorded during search. Hence we hold that no addition 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 both law as well as on facts. Accordingly the grounds raised by the assessee in the cross objections stands allowed."

13. Since, in the present case, no difference in facts has been pointed out by the Revenue, therefore, respectfully following the decision of the coordinate bench of the Tribunal cited supra, we uphold the plea of the assessee that there was no incriminating material or information found during the course of the search in relation to the transactions conducted by the assessee during the assessment years 2012-13 and 2013-14. Therefore, in light of the law laid down by the Hon'ble Supreme Court in Abhisar Buildwell (P.) Ltd. (supra), the grounds raised in assessee's cross objections for the assessment years 2012-13 and 2013-14 are allowed.

14. Accordingly, the appeals by the Revenue for the assessment years 2012-13 and 2013-14 have been rendered academic and therefore are dismissed as infructuous.

15. Insofar as assessment years 2014-15 and 2015-16 are concerned, the same are admitted to be abated assessment years. We find that while dealing with a similar factual matrix in the case of assessee's brother in Shri Dilip B. Jiwrajka, the

coordinate bench of the Tribunal vide order dated 29/11/2022 cited supra deleted the additions made by the AO under section 68 and section 69C of the Act, observing as under:-

> *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 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.*
>
> *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 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."

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 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 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 assessees 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.*
>
> *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 assessees 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.

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:

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 though 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.

<u>Global Infratech & Finance Ltd (formerly known as Asianlac Capital and Finance Ltd)</u>

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 though 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*
>
> *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;
(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 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."*

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 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 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 over-look 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 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 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 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 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. to
54. …….

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 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."

16. We find that while deciding the issue in favour of the taxpayer in the aforesaid decision, the coordinate bench took into consideration the orders passed by SEBI exonerating the taxpayer from the charges under the SEBI Act, 1992 and SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities) Market, Regulations, 2003 in respect of scrip of Radford Global Ltd. During the hearing, the learned AR also placed on record similar order dated 29/07/2022 passed by SEBI under section 15-I of the SEBI Act, 1992 read with rule 5 of SEBI (Procedure for Holding Enquiry and Imposing Penalties) Rules, 1995, wherein at para 63 of the order, the assessee was found to be not involved in price manipulation, volume manipulation, circular trades, reversal trades, synchronised trades, selling shares at an artificially inflated price, etc. of scrip of Global Infratech and Finance Ltd. We find that in the aforesaid decision, the coordinate bench of the Tribunal from para 46-55, considered in detail various decisions relied upon by the learned CIT(A). We find that the coordinate bench also considered the decision of the Hon'ble Calcutta High Court in PCIT v/s Swati Bajaj (288 Taxman 403) and found the same to be factually distinguishable in paragraph 51-53 of the aforesaid order. During the hearing, the learned DR made submissions against the conclusion reached by the coordinate bench in the aforesaid decision. However, no material has been brought on record to show that the said decision has either been stayed or overruled by the higher court. Therefore, in view of the fact that the factual matrix, on the basis of which the aforesaid decision has been arrived, has been accepted by parties to be similar to the present case, we find no basis to deviate from the conclusion so reached by the Tribunal in the case cited supra. We find that the decision of the Hon'ble Supreme Court in SEBI v/s Kishore R. Ajmera, Civil Appeal No. 2818 of 2008, judgment dated 23/02/2016, relied upon by the learned DR, is in respect of an issue which is different from the issue under consideration before us and therefore the observations of the

Hon'ble Court were qua the facts which were under consideration before the Hon'ble Court. Further, in the present case, the assessee furnished various documents in support of its claim before the AO in order to substantiate the sale of shares, which were not found to be false, fabricated, or fictitious, as also noted by the coordinate bench in the aforesaid decision. Rather, the AO placed reliance upon the statements of third-party, wherein there is no allegation that the assessee himself has participated in any price rigging of shares. Thus, in the facts of the present case reference to the preponderance of probabilities without refuting the direct evidence or finding fault in the same is not justified. Therefore, respectfully following the decision of the coordinate bench of the Tribunal cited supra, we find no infirmity in the impugned order deleting the additions made under section 68 and section 69C of the Act for the assessment years 2014-15 and 2015-16. Accordingly, the grounds raised by the Revenue in its appeal for the assessment years 2014-15 and 2015-16 are dismissed.

17. In the result, the appeals by the Revenue for the assessment years 2014-15 and 2015-16 are dismissed.

18. To sum up, the cross objections by the assessee for assessment years 2012-13 and 2013-14 are allowed, while the Revenue's appeals for the assessment years 2012-13 to 2015-16 are dismissed.

Order pronounced in the open Court on 30/06/2023

Sd/-	**Sd/-**
AMARJIT SINGH	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 30/06/2023

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The PCIT / CIT (Judicial);
(4) The DR, ITAT, Mumbai; and
(5) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai