

IN THE INCOME TAX APPELLATE TRIBUNAL

"A" BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.2023/Mum./2023
(Assessment Year : 2011-12)

ITA no.2022/Mum./2024
(Assessment Year : 2013-14)

Atul Shamji Bharani

Room No.5, 1st Floor,
Sharda Sadan, Plot No.7,
Swami Gyanjivandas Marg,
Dadar East, Mumbai - 400014
PAN – AAAPB 7262M

..... Appellant

v/s

DCIT, Central Circle-4(1)

1904, Air India Building,
Nariman Point,
Mumbai-400021

..... Respondent

Assessee by :Shri Vinod Kumar Bindal
Shri Satish Kumar

Revenue by :Shri Ajay Chandra

Date of Hearing – 13/05/2024

Date of Order –09/08/2024

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeals have been filed by the assessee challenging the separate impugned orders of even date 02/05/2023 passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals)-52, Mumbai, [*"learned CIT(A)"*], for the assessment years 2011-12 and 2013-14.

2. Since both appeals pertain to the same assessee and involve similar issues that arise out of a similar factual matrix, therefore, these appeals were heard together and are being decided by way of this consolidated order.

ITA No. 2023/Mum./2023
Assessee's appeal- A.Y. 2011-12

3. In this appeal, the assessee has raised the following revised grounds of appeal:-

"1. *The CIT(A) erred in law and on facts in confirming the validity of the impugned illegal and void ab initio assessment order passed u/s 147 of the Act because*

- (i) *the assessee himself was searched u/s 132 of the Act on 06/10/2017 and the relied upon information of the alleged escaped income for the relevant year was for more than Rs. 50 lakhs, duly represented by an asset as defined u/s 153A of the Act.*
- (ii) *the alleged information could only be considered for reassessment only u/s 153A of the Act as an extended assessment year within 4 assessment years prior to the six assessment years of the date of search.*
- (iii) *thus, the action of the AO in initiating the impugned reassessment proceedings u/s 148 of the Act based on the information received after the search and detected therein as mentioned in the assessment order itself, must be declared illegal void ab initio and the consequent assessment order be quashed as non est.*

2. *The CIT(A) erred in law in validating the illegal assessment order made u/s 143(3) r.w.s. 147 of the Act which must be quashed because:*

- i) *the approval of the PCIT was a mechanical approval without recording any independent reasons u/s 151 of the Act,*
- ii) *merely on a borrowed satisfaction on an information supplied by investigation wing with no independent application of mind, and preliminary verification of facts before issuing notice u/s 148 of the Act on 29.03.2018,*
- iii) *where the earlier assessment was made u/s 143(3) of the Act on 24.03.2014 accepting the LTCG on sale of shares of Shreenath Commercial and Finance Ltd. and D B (International) Stock Brokers Ltd and the impugned proceedings are merely based on change of opinion,*
- iv) *Without disposing the objections raised by the assessee by a speaking order.*

3. *The CIT(A) erred in law and on facts in confirming the action of AO making an addition of Rs. 1,85,09,348/- considering the LTCG u/s 10(38) of the*

Act on sale consideration of shares of Shreenath Commercials and Finance Ltd and DB (International) Stock Brokers Ltd

- (i) u/s 68 of the Act alleging the same to be bogus, though the said section is also not applicable;*
- (ii) without any basis and bringing on record any corroborative material indicating that the assessee paid any consideration or benefit in any form to the purchasers of those shares;*
- (iii) made on some uncorroborated / untested statements of some persons, without giving copies of the material gathered and relied upon by revenue and also without allowing an opportunity to cross examine them though specifically asked demanded.*
- (iv) Thus, the addition So made ignoring the principles of natural justice and proper opportunity should be deleted.*

4. The CIT(A) erred in law and on facts in confirming the action of the AO in confirming an addition of Rs.5,55,280/- u/s 69C of the Act on surmises and conjectures, being the commission paid @3% of the LTCG amount. Thus, the addition made on surmises must be deleted.

5. The appellant craves the leave to add, substitute, modify, delete or amend all or any ground of appeal either before or at the time of hearing."

4. During the hearing, at the outset, the learned Authorised Representative ("*learned AR*") wishes to argue the additional grounds raised vide application dated 05/09/2023 for admission of additional grounds of appeal. The learned AR submitted that the reassessment proceedings under section 147 of the Act were initiated on the basis of some incriminating material/information found during the search under section 132 of the Act and the statement recorded under section 132(4) of the Act of Mr. R.K. Kedia. Accordingly, the learned AR submitted that the only recourse available to the Assessing Officer ("*AO*"), in such circumstances, was under section 153C of the Act, and therefore, initiation of proceedings under section 147 of the Act and completion of assessment there under is completely erroneous and void ab initio. The assessee sought admission of the additional grounds of appeal in view of the

decision of the Hon'ble Supreme Court in NTPC v/s CIT, [1998] 229 ITR 383 (SC).

5. The additional grounds raised by the assessee vide application dated 05/09/2023, in respect of the aforesaid issue, are reproduced as follows:-

"Without prejudice, the appellant humbly submits that the following additional ground which is purely of legal nature may kindly be admitted.

The impugned reassessment order passed u/s 147 of the Act by initiating proceedings u/s 148 of the Act is void ab initio on account of:

(i) as the genesis of the same was some incriminating information found in a search u/s 132 of the Act on 06.10.2017 in the premises of assessee and the statements recorded u/s 132(4) of the Act of Mr. Atul Shamji Bharani, which was communicated to the AO of the assessee by the DDIT(Inv.) Unit 5(4), Mumbai and also on the basis of modus operandi of providing bogus accommodation entry of LTCG discussed in the investigation report of the Kolkata Directorate of Investigation Wing which was prepared after searches on various constituents.

(ii) as the same could only be assessed u/s 153A of the Act by taking recourse to mandatory non obstante provisions of the section 153C of the Act;

(iii) thus, the impugned assessment order must be declared as void ab initio by following the judgment of the Hon'ble Apex Court in Vikram Sujitkumar Bhatia (2023) 149 taxmann.com 123 (SC) dated 06/04/2023 and Nilesh Bharani in ITA 612/Mum/2020 dated 28/03/2023 r/w S.S. Con Build Pvt Ltd 2023-TIOL-65-SC-IT dated 04/05.2023 r/w Kanwar Singh Saini vs Delhi High Court 2012 4 SCC 307."

6. During the hearing, the learned AR by referring to the reasons recorded for reopening the assessment submitted that the reassessment proceedings under section 147 of the Act were initiated on the basis of the information received during the course of the search on another entity, therefore the AO was duty bound to initiate the proceedings under section 153C of the Act instead of issuing notice under section 148 of the Act, in view of the non-obstante clause in section 153C(1) of the Act. Accordingly, it was submitted that since the AO has initiated the assessment proceedings under incorrect

provision of the Act, therefore the entire assessment is vitiated and should be quashed being void ab initio. In support of its submission, the learned AR placed reliance upon the decision of the coordinate bench of the Tribunal in Mr. Nilesh Bharani v/s DCIT, in ITA No. 612/Mum./2020, for the assessment year 2011-12.

7. On the contrary, the learned Departmental Representative ("*learned DR*") submitted that the origin of the proceedings under section 153C of the Act lies either in the seized assets or the seized document pertaining to or information contained in the seized documents relating to person other than the person searched. However, in the instant case, admittedly there is no seized asset. The learned DR further submitted that there are no seized books of account or documents in the case of Mr. R.K. Kedia pertaining to the assessee or any information in the seized books of accounts or documents relating to the assessee. By referring to the statement of Mr. R.K. Kedia recorded under section 132(4) of the Act, the learned DR submitted that it does not contain any reference to any seized documents or books of accounts or information contained therein relating to the assessee. The DR submitted that there is no seized document or books of account revealing income in the form of assets amounting to Rs.50 lakhs or more for the year under consideration and the reasons recorded for reopening the assessment is only related to the accommodation entry of bogus long-term capital gains, which cannot be considered to be an "*asset*" within the meaning of Explanation-2 to section 153A(1) of the Act. Thus, it was submitted that proceedings under section 153C of the Act cannot be initiated beyond the 6 years.

8. We have considered the submissions of both sides and perused the material available on record. In the present case, the assessee is an individual and for the year under consideration filed its return of income on 06/01/2012 declaring a total income of Rs.67,47,150. The return filed by the assessee was selected for scrutiny and vide order dated 24/03/2014 passed under section 143(3) of the Act the total income was assessed at the returned income. Subsequently, information was received from the DDIT(Investigation), Unit-5(4), Mumbai that during the search and survey action conducted under section 132/133A of the Act in the case of M/s Sunshine Housing & Infrastructure Private Ltd, it was noticed that the assessee has taken accommodation entries of bogus long-term capital gain through sale of penny stocks, viz. M/s Shree Nath Commercial & Finance Ltd. and M/s D.B. (International) Stock Brokers Ltd., and claimed exemption under section 10(38) of the Act amounting to Rs.1,85,86,267. Accordingly, on the basis of aforesaid information, proceedings under section 147 of the Act were initiated and notice under section 148 of the Act was issued on 29/03/2018. The reasons recorded by the AO, while reopening the assessment for the year under consideration, are reproduced as follows:-

"Reasons to believe that income chargeable to Tax escaped assessment u/s 147 of the Income Tax Act:-

1. *Assessee filed return of income on 06.01.2012 declaring total income at Rs.67,47,150/-. The return was processed u/s 143(1) of the Income Tax Act, 1961. Subsequently, assessment u/s 145(3) was completed on 24.03.2014 at an assessed income of Rs.67,47,150/-.*

2. *Subsequently, in this case, information was received from the DDIT (Inv.) Unit-5(4) Mumbai vide letter dated 19.03.2018 that during the course of search/survey u/s 132/133A in the case of M/s.Sunshine Housing & Infrastructure Pvt. Ltd. and its group concern has been conducted on*

06.10.2017. During the proceedings, it was noticed that assessee had taken accommodation entries of bogus LTCG through sale of penny stocks viz. Shreenath and M/s. D B International during the F.Y. 2010-11 relevant to A. Y. 2011- 12. The assessee had received large sums of money by way of sale of shares of the penny stocks of M/s. Shreenath & M/s. DB International and claimed benefit of exemption u/s 10(38) of the Act amounting to Rs.1,85,86,267/-.

3. It is to mention here that assessee had taken accommodation bogus LTCG and claimed the same as exempt u/s 10(38) of the Act amounting to Rs. 1,85,86,267/- The Directorate of Income Tax (Inv.), Kolkata has undertaken the investigation regarding the issue of obtaining entries of bogus LTCG through sale of penny stock/scrips and M/s. Shreenath and M/s. D B International had also been identified as bogus scrip.

4. Further, I have also examined the information vis-à-vis the return of income of the assessee. After appraisal of the material on record, there is enough reason to believe that the assessee prima facie has taken the accommodation entry of bogus LTCG through sale of penny stock of scrip M/s. Shreenath and the assessee has clearly failed to disclose all material facts for determination of income.

5. Hence, I have reason to believe that income of Rs.1,85,86,267/- chargeable to tax, has escaped assessment by reason of the failure on part of assessee to disclose fully and truly all material facts necessary for its assessment for A.Y. 2011-12 within the meaning of the provisions of section 147 of the Income-tax Act, 1961."

9. It is the plea of the assessee that the reassessment proceedings under section 147 of the Act were initiated on the basis of the information received during the course of the search on another entity, and therefore instead of initiating proceedings under section 147 of the Act, the AO should have initiated the proceedings under section 153C of the Act, in view of the non-obstante clause in section 153C(1) of the Act. Since the issue raised by way of additional grounds of appeal is a legal issue, which goes to the root of the matter and can be decided on the basis of material available on record, therefore the same are admitted and taken up for adjudication along with the revised grounds of appeal in view of the ratio laid down by the Hon'ble Supreme Court in NTPC (supra).

10. At this stage, it is relevant to analyse the provisions of section 153C of the Act, as it existed during the relevant time, which reads as follows:-

"153C. (1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that,—

(a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or

(b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to,

a person other than the person referred to in section 153A, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person 2[for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and] for the relevant assessment year or years referred to in sub-section (1) of section 153A :

Provided that in case of such other person, the reference to the date of initiation of the search under section 132 or making of requisition under section 132A in the second proviso to sub-section (1) of section 153A shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person :

Provided further that the Central Government may by rules made by it and published in the Official Gazette, specify the class or classes of cases in respect of such other person, in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made 3[and for the relevant assessment year or years as referred to in sub-section (1) of section 153A] except in cases where any assessment or reassessment has abated."

11. From a plain reading of the aforesaid provisions, it is evident that for the applicability of the provision, and initiation of proceedings under section 153C of the Act the following conditions are required to be fulfilled:-

- (a) any money, bullion, jewellery or other valuable article or thing or books of account or documents are seized or requisitioned;
- (b) the AO is satisfied that the such assets or documents or books of account belongs or pertains or pertain to or any information contained therein relates to a person other than the person referred to in section 153A of the Act;
- (c) the seized or requisitioned assets or documents or books of account shall be handed over to the AO having jurisdiction over such other person;
- (d) the AO having jurisdiction over such other person is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person;
- (e) the AO having jurisdiction over such other person shall proceed against such other person and issue notice and assess or reassess income of such other person in accordance with the provisions of section 153A.

12. From a careful perusal of the reasons recorded for reopening the assessment, as mentioned in the foregoing paragraph, it is evident that reassessment proceedings were initiated on the basis of information received from the DDIT (Investigation), Unit-5(4), Mumbai regarding the search/survey action conducted under section 132/133A of the Act. It is further clearly evident that during the aforesaid search/survey action, it was noticed that the assessee has taken accommodation entries of bogus long-term capital gains through sale of penny stocks during the year under consideration. Further, it was noticed that the money received on sale of shares of M/s Shree Nath Commercial & Finance Ltd. and M/s D.B. (International) Stock Brokers Ltd. was claimed as exempt under section 10(38) of the Act. The reasons recorded

further refer to the investigation undertaken by the Directorate of Income Tax (Investigation), Kolkata regarding the issue of obtaining entries of bogus long-term capital gains through sale of penny stock, and during the investigation M/s Shree Nath Commercial & Finance Ltd. and M/s D.B. (International) Stock Brokers Ltd. were identified as bogus scrips. In para-5 of the reasons, the AO, after examination of the aforesaid information vis-à-vis the return of income filed by the assessee, recorded the reasons to believe that the assessee has prima facie taken accommodation entry of bogus long-term capital gains through sale of penny stock. Ultimately in para-6, the AO recorded his reasons to believe that the income of INR 1,85,86,267 chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the assessment year 2011-12 within the meaning of the provisions of section 147 of the Act.

13. Therefore, it is clearly discernible that the reasons recorded by the AO for reopening the assessment do not refer to any seized or requisitioned assets or documents or books of account, which belongs to/ pertains to the assessee or any information contained therein, which relates to the assessee. Even the statement recorded of Mr. R.K. Kedia on 13/06/2014 under section 132(4) of the Act, forming part of the paper book from pages 609-635, does not contain any reference to any seized documents or books of accounts or information contained therein relating to the assessee. We further find that there is no seized document or books of account revealing income in the form of assets amounting to Rs.50 lakhs or more for the year under consideration, and the

reasons recorded for reopening the assessment is only related to the accommodation entry of bogus long-term capital gains, which cannot be considered to be an "asset" within the meaning of Explanation-2 to section 153A(1) of the Act. Therefore, in view of the afore-noted factual position, we agree with the submissions of the Revenue, and find no merits in the submissions of the assessee. Since none of the preconditions for applicability of the provisions of section 153C of the Act are satisfied in the present case, we are of the considered view that the non-obstante clause in section 153C(1) has no significance to the facts of the instant case, and the AO has rightly invoked the provisions of section 148 of the Act for reopening the assessment under section 147 of the Act.

14. In reaching the aforesaid conclusion, we also gainfully refer to the decision in Asst. CIT v/s M/s Cheryl Advisory Private Limited, in ITA No. 2063/Mum./2023, wherein while deciding a similar issue as to under which section of the Act reassessment proceedings should have been initiated, whether it should be under section 147 of the Act or under section 153C of the Act, the coordinate bench of the Tribunal, vide order dated 31/01/2024, held that in terms of the provisions of section 153C of the Act, the AO of the other person can invoke the provisions of the section only in case of handing over of the seized material by the AO of the searched person after recording the satisfaction note that the said material pertains to the other person. However, in the case information has been forwarded to the AO by the Investigation Wing, the required condition for invoking section 153C of the Act is not fulfilled, and thus the AO of the other person was not authorised to invoke

section 153C of the Act. The coordinate bench further held that the word "pertains" in section 153C of the Act is wider than the word "belongs to", but still there has to be connection of the document with the other person. Accordingly, the coordinate bench came to the conclusion that the AO has correctly invoked the reassessment proceedings under section 147 of the Act, wherein on the basis of the information supplied by the Investigation Wing of the Income Tax Department, reason to believe that income has escaped assessment was recorded. The relevant findings of the coordinate bench, in the aforesaid decision, are reproduced as follows:-

"6.4 We have heard rival submission of the parties and perused the relevant material on record. In the case the dispute is whether the proceedings u/s 153C of the Act or proceedings u/s 147 of the Act should have been initiated in the hands of the assessee on receipt to the information by the AO, which was supplied by the investigation wing of income-tax department. Under the amended provisions, there are three steps for initiating action under section 153C of the Act. Firstly, the Assessing Officer of the searched person is required to record satisfaction as to whether the books of accounts or documents pertain to the other person or information contained therein relates to the other person. Secondly, after recording satisfaction, he shall hand over the relevant books of account or documents to the Assessing officer of other person. Thirdly, the Assessing Officer of the other person shall also record satisfaction to the effect that said books of accounts or documents (i.e. which pertain to the other person) have a bearing on the determination of total income of such other person. After recording such satisfaction only, the Assessing officer of third person shall initiate proceedings u/s 153C of the Act by way of issuing notice u/s 153C read with section 153A of the Act.

6.4.1 Under the amended provisions of section 153C of the Act, the material found during the course of search of the searched person has been divided into two categories. The first category is of assets like any money, bullion, jewellery or other valuable articles. In this category of material, if same belongs to third person then only the Assessing Officer of searched person shall record satisfaction note and handover said material to the Assessing Officer of other person for taking action u/s 153C of the Act. In second category of the material i.e. books of accounts or documents, same should pertain to the third person or any information contained therein i.e. books of accounts or documents pertaining to third person, should relates to such third person, then only proceedings u/s 153C could have been initiated by the Assessing Officer of the third person on being satisfaction recorded by the AO of the searched person and after handing over of such material.

6.4.2 Thus, in terms of section 153C of the Act, the Assessing Officer of the other person can invoke provisions of section 153C of the Act only in case of handing over of the seized material by the Assessing Officer of the searched person after recording satisfaction note that said material pertains to the other person. In the case information has been forwarded to the Assessing Officer by the Investigation Wing and therefore the required condition for invoking u/s 153C of the Act is not fulfilled and thus the Assessing Officer of the assessee was not authorised to invoke section 153C of the Act. 6.4.3 Further, in the case in hand, the condition of documents pertaining to the other person i.e. the assessee, has been disputed by the assessee. The assessee has asserted that the computer document found from the premises of Shri Sanjay Shah pertains to the assessee or the information contained therein is related to the assessee, therefore, action should have been taken invoking section 153C only. We are of opinion that though the word 'pertains' is wider than the word 'belongs to' but still there has to some connection of the document with the third person or some monetary or financial interest of the third person should reflect from the document. Since in the document seized there was reference of several persons and particular reference in the case of assessee, which has been reproduced in the reasons recorded, is of certain payments made by the assessee through banking channel and thus document can't be said to be as pertaining to the assessee and it pertains to Shri Sanjay Shah only. Since, the information contained therein 'means' information in the document pertaining to the third person but in the instant case the pertaining relationship is lacking. The document should pertain to the assessee in hand i.e. other person, because it is the Assessing officer of third person, who has to record satisfaction whether said document is having any bearing on the determination of the income of the assessee i.e. other person. Thus the second condition of section 153C(1)(b) i.e. any information contained therein, also does not apply in the case of the assessee. In such circumstances provisions of section 153C of the Act cannot be invoked in the case of the assessee. Thus, the Assessing Officer has correctly invoked reassessment proceedings u/s 147 of the Act wherein on the basis of information supplied by the Investigation Wing of income-tax department, he recorded 'reason to believe' that income escaped assessment.

6.4.4 In view of above discussion, we set aside the finding of the Ld. CIT(A) on the issue in dispute and uphold the validity of reassessment u/s 147 of the Act. The ground No. 1 of the appeal of the Revenue is accordingly allowed."

15. Undisputedly, in the present case, the information was received from the Investigation Wing and not from the AO of the searched entity. Further, as noted above, the statement recorded of Mr. R.K. Kedia on 13/06/2014 under section 132(4) of the Act does not contain any reference to any seized documents or books of accounts or information contained therein relating to the assessee. It is pertinent to note that the report of the Directorate of Income Tax (Investigation), Kolkata also does not have any reference to the

assessee. Therefore, concurring with the findings of the coordinate bench in the aforesaid decision, we are of the considered view that in the present case, the AO has correctly initiated the reassessment proceedings under section 148 of the Act.

16. As regards the decision of the coordinate bench of the Tribunal in Mr. Nilesh Bharani (supra) relied upon by the learned AR, we at the outset are of the considered view that same is factually distinguishable, as the issue in that case was whether the AO has rightly initiated the proceedings under section 147 instead of section 153A of the Act. However, in the present case, the assessee has challenged the initiation of proceedings under section 147 as against section 153C of the Act, and as noted above section 153C of the Act is more restrictive and can be initiated only on the basis of the seized or requisitioned documents or books of accounts or information contained therein relating to the assessee. Further, from the perusal of the reasons recorded for reopening the assessment in the case of Mr. Nilesh Bharani (supra), as noted on pages 12-15 of the decision, we find that the AO also considered the undisclosed loan granted by the taxpayer as the income escaping assessment under section 147 of the Act, and such income was considered to be an "asset" within the meaning of Explanation-2 to section 153A(1) of the Act by the coordinate bench of the Tribunal. Thus, upon careful perusal of the aforesaid decision in Mr. Nilesh Bharani (supra), we are of the considered view that the same has been rendered in a completely different factual matrix, and therefore the reliance placed upon the same by the assessee is completely misplaced.

17. In view of our aforesaid findings, the additional grounds of appeal raised by the assessee are dismissed.

18. The issue arising in ground no.1 raised in assessee's appeal is also dismissed in view of our findings rendered in respect of additional grounds raised by the assessee.

19. During the hearing, the learned AR wishes not to press ground no. 2, raised in assessee's appeal, therefore the same is left open.

20. The issue arising in grounds no.3 and 4, raised in assessee's appeal pertains to the disallowance of exemption of long-term capital gains claimed under section 10(38) of the Act and corresponding addition under section 68 and 69C of the Act.

21. We have considered the submissions of both sides and perused the material available on record. During the year under consideration, the assessee earned capital gains of Rs. 1,87,21,321 from the sale of shares of M/s Shree Nath Commercial & Finance Ltd. and M/s D.B. (International) Stock Brokers Ltd., which was claimed as exempt under section 10(38) of the Act. The AO on the basis of the information received from the DDIT(Inv.), Mumbai and the information received from Directorate of Income Tax (Investigation), Kolkata initiated reassessment proceedings under section 147 of the Act and issued notice under section 148 of the Act. In response to the aforesaid notice, the assessee filed his return of income and statutory notices under section 143(2) as well as section 142(1) of the Act were issued and served on the assessee. The AO vide order dated 28/12/2018 passed under section 143(3)

r/w section 147 of the Act by placing reliance upon the investigation carried out by the Directorate of Investigation, Kolkata in relation to penny stocks, the financial position of the Companies in whose shares assessee has transacted and fluctuation in the share rates in a short span of time concluded that the assessee has earned bogus long-term capital gains from the sale of penny stocks. Accordingly, the AO disallowed the exemption of long-term capital gains claimed under section 10(38) of the Act and added the sales proceeds of Rs. 1,85,09,348 under section 68 of the Act. Further, the AO made an addition of Rs. 9,25,467, i.e. 5% of Rs. 1,85,09,348, under section 69C of the Act being the commission paid for providing accommodation entry.

22. The learned CIT(A), vide impugned order, upheld the addition made by the AO observing as follows:-

"5.5. I have considered the facts of the case. The appellant had acquired 75,000 shares of M/s DB International (Stock Broker) Ltd on 12.10.2009 @ Rs. 7.25 which was split into 3,75,000 shares. The cost price per share was Rs. 5.8 only. It is also note worthy that the entire purchase was made through offline basis. A perusal of the chart filed by the appellant shows that this was acquired by way of preferential allotment from the company. This being the case, the onus was certainly much more on the appellant to demonstrate as to how and on what basis he has acquired such shares, the persons he was in touch with in the company and the future prospects. However, I find that no such information or evidence has been furnished by the appellant before the AO or before the under signed. The onus is on the appellant to adequately explain how it had acquired shares on preferential basis. No evidence related to allotment of M/s DB International (Stock Broker) Ltd @ Rs. 29 and no correspondence with the said entity has been furnished by the appellant. No evidence of the appellant having made any financial analysis has been submitted. No evidence related to application for share allotment has been submitted. Thus, it cannot be held that the appellant has discharged the onus placed on it.

5.6. It is also seen that from the contract note for sale that each of the sale transaction has taken place in round quantity. For example, on the trade date of 04.03.2011, 20,000 shares of DB International (Stock Brokers) Ltd. have claimed to be sold. They are all seem to be sold in round quantities of 6000, 5000, 3000, 900, 1000, etc. This is very unusual and indicates that the transactions for the counter party were pre-arranged. Similar information is

also seen, for example for sale on 11.07.2011, 50000 shares are stated to be sold with bulk of them being in round quantities. On 11.07.2011, the total volume of traded shares in BSE was 1,65,305 out of which the appellant alone has accounted for 50,000 i.e. 30%. And it is more surprising that all such transactions have taken place in round quantities, which is extremely unusual. In the normal transactions of true price discovery, the transactions get executed at different lot sizes, which is not the case here indicating that the transactions have been pre-arranged. The AO adequately brought out the facts supporting his claim.

5.7. The appellant is stated to have received 4,00,000 shares of Shree Nath Commercial & Finance Ltd. from his brother Sh. Ashok Shamji Bharani on 09.02.2011. These shares were stated to be costing at Rs. 8,00,000/- in the hands of the donor. The perusal of the chart filed by the appellant shows that these shares were originally acquired by Sh. Ashok Shamji Bharani by way of preferential allotment@ 20 per share on 30.11.2009. The shares were subsequently split from Rs. 20 to Rs. 2 on 30.09.2010 and were received by the appellant as gift on 09.02.2011. It is noted that the selling was made by the appellant immediately thereafter on 17.02.2011 and subsequent dates. It is seen from the contract notes that several of these shares have been sold in bulk. For examples, in the transaction done on 18.02.2011, 50,000 shares are stated to be sold in mere 8 trades. The direct allotment of shares on preferential basis, subsequent split and search rally in price of shares are typical of such scrips. Thus, there are ample evidences to demonstrate that the transactions are pre-arranged. Even otherwise, since the appellant has received these shares only on 09.02.2011, they would not qualify as LTCG and would remain taxable.

5.8. In the case of *Hersh W Chadah V. DDIT, 43 SOT 544*, the Hon'ble ITAT has held that:-

"6.14 It will also be worthwhile to consider the nature of burden of proof on the Assessing Officer for proving a fact or circumstance in the income-tax proceedings. The questions raised about the tax liability by the Assessing Officer are to be answered by the assessee by furnishing reasonable and plausible explanations. If assessee is not forthcoming with proper or complete facts or his statement or explanation is contradictory, drawing of suitable inferences and estimation of facts is inevitable. Courts generally will not interfere with such estimate of facts, unless the inferences or estimates are perverse or capricious."

5.9. It was also held that unlike criminal proceedings where the charge has to be proved beyond doubt, income-tax proceedings are quasi-judicial. Tax liability in cases of suspicious transactions has to be assessed on the basis of the material available on record, surrounding circumstances, human conduct and preponderance of probabilities. Rules of evidence do not govern income tax proceedings and the AO is not fettered or bound by technical rules contained in the Indian Evidence Act and is entitled to act on material which may not be accepted as evidence in a court of law.

5.10. In the case of *PCIT v. Swati Bajaj and Ors, 446 ITR 56*, the Hon'ble Calcutta High Court adjudicated the issue of penny stock in its order dt. 04.06.2022 in a very elaborate fashion. The Hon'ble High Court rejected the

contentions of the parties that non-furnishing of report would vitiate the proceedings. The Hon'ble High Court has held as follows:-

"69. Thus, the legal principle which can be culled out from the above decision is that to prove the allegations, against the assessee, can be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and levelled and when direct evidence is not available, it is the duty of the Court to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded so as to reach a reasonable conclusion and the test would be what inferential process that a reasonable/prudent man would apply to arrive at a conclusion. Further proximity and time and prior meeting of minds is also a very important factor especially when the income tax department has been able to point out that there has been a unnatural rise in the price of the scrips of very little known companies. Furthermore, in all the cases, there were minimum of two brokers who have been involved in the transaction. It would be very difficult to gather direct proof of the meeting of minds of those brokers or sub-brokers or middlemen or entry operators and therefore, the test to be applied is the test of preponderance of probabilities to ascertain as to whether there has been violation of the provisions of the Income-tax Act. In such a circumstance, the conclusion has to be gathered from various circumstances like the volume from trade, period of persistence in trading in the particular scrips, particulars of buy and sell orders and the volume thereof and proximity of time between the two which are relevant factors. Therefore, in our considered view the methodology adopted by the department cannot be faulted."

"73. It is very rare and difficult to get direct information or evidence with regard to the prior meeting of minds of the persons involved in the manipulative activities of price rigging and insider trading. We can draw a parallel in cases of adulteration of food stuff, more than often action is initiated under the relevant Act after the adulteration takes place, the users of adulterated products get affected etc. Therefore, a holistic approach is required to be made and the test of preponderance of probabilities have to be applied and while doing so, we cannot loose sight of the fact that the shares of very little known companies with insignificant business had a steep rise in the share prices within the period of little over a year. The Income-tax department was not privy to such peculiar trading activities as they appear to have been done through the various stock exchanges and it is only when the assessee made claim for a LTCG/STCL, the investigation commenced. As pointed out the investigation did not commence from the assessee but had commenced from the companies and the persons who were involved in the trading of the shares of these companies which are all classified as penny stocks companies. Therefore, the argument of the assessee that the copy of the investigation report has not been furnished, the persons from whom statements have been recorded have not been produced for cross examination are all contention which has to necessarily fail for several reasons which we have set out in the proceedings paragraphs. To reiterate, the assessee we not named in the report and when the

assessee makes the claim for exemption the onus of proof is on the assessee to prove the genuinity. Unfortunately, the assesseees have been harping upon the transactions done by them and by relying upon the documents in their hands to contend that the transactions done were genuine. Unfortunately, the test of genuinity needs to be established otherwise, the assesseees are lawfully bound to prove the huge LTCG claims to be genuine. In other words if there is information and data available of unreasonable rise in the price of the shares of these penny stock companies over a short period of time of little more than one year, the genuinity of such steep rise in the prices of shares needs to be established and the onus is on the assessee to do so as mandated in Section 68 of the Act. Thus, the assesseees cannot be permitted to contend that the assessments were based on surmises and conjectures or presumptions or assumptions. The assessee does not and cannot dispute the fact that the shares of the companies which they have dealt with were insignificant in value prior to their trading. If such is the situation, it is the assessee who has to establish that the price rise was genuine and consequently they are entitled to claim LTCG on their transaction. Until and unless the initial burden cast upon the assessee is discharged, the onus does not shift to the revenue to prove otherwise."

5.11. In view of the above, the addition made by the AO stands CONFIRMED and these grounds stand DISMISSED."

23. Further, the learned CIT(A) granted partial relief to the assessee, and restricted the addition on account of payment of commission to 3%. Being aggrieved by the findings of the learned CIT(A), the assessee is in appeal before us.

24. As per the assessee, he purchased 75,000 shares of M/s D.B. (International) Stock Brokers Ltd., during the period relevant to the assessment year 2010-11, off-market on preferential allotment basis as investment. The shares were split into 3,75,000 shares. Further, 4,00,000 shares of M/s Shree Nath Commercial & Finance Ltd. were purchased off-market on the basis of preferential allotment by Mr. Ashok Bharani, brother of the assessee, vide allotment letter dated 09/12/2009, which were later gifted to the assessee. The assessee also received the bonus shares of M/s Shree Nath Commercial & Finance Ltd. The shares were transferred in the Demat

account of the assessee and were sold by the assessee from his Demat account through his broker. The shares were duly recorded and entered in the preceding year and the source of purchase of such shares was not challenged by the Revenue. The assessee sold 1,10,000 shares of M/s D.B. (International) Stock Brokers Ltd. through his stock broker, resulting in long-term capital gains of Rs.68,90,610. Further, the assessee sold 4,00,000 shares of M/s Shree Nath Commercial & Finance Ltd. through his stock broker, resulting in long-term capital gains of Rs.1,03,30,728, during the year under consideration. The assessee submitted that the transaction in the said shares was subjected to STT levy, and consideration of sale and purchase of the scrips was routed through normal banking channel. It is the plea of the assessee that he had requested the Revenue to summon the broker M/s Kedia Shares and Stock Brokers Ltd and Magnum Equity Broking Ltd, who had executed the sale transaction, the bank through whom the consideration was paid by the assessee, the bank through whom the consideration was received by the assessee, and depository participant to whom the shares were credited to the account of the assessee at the time of purchase of shares and thereafter debit of the shares. However, it is evident from the record that no steps in this regard were taken by the Revenue. It is further the plea of the assessee that the shares of M/s Shree Nath Commercial & Finance Ltd. and M/s D.B. (International) Stock Brokers Ltd. are actively traded on the stock exchange at present also, and apart from the above scrips, the assessee also traded in shares of other listed companies and earned long-term capital gains. The assessee has also placed on record the application filed under RTI Act seeking information received from the Investigation Wing, statements of the persons

recorded, etc. However, the said application seeking information from the AO was rejected not only on the basis that the information sought is general and vague, but also on the basis that providing information received from the Investigation Wing will impede the process of investigation and prosecution, if any, found fit in due course of assessment proceedings. In support of its contention, the assessee has furnished the summary of purchase and sale of shares of M/s Shree Nath Commercial & Finance Ltd. and M/s D.B. (International) Stock Brokers Ltd., the copy of bank statements showing details of payment made for purchase of shares of M/s D.B. (International) Stock Brokers Ltd., issue and allotment of equity shares on preferential basis, gift deed in respect of shares of M/s Shree Nath Commercial & Finance Ltd. received from Mr. Ashok Bharani, letter issuing bonus shares in M/s Shree Nath Commercial & Finance Ltd., copy of contract notes for the sale of shares by the assessee, copy of Demat account of the assessee with ING Vysya Bank showing shares of M/s Shree Nath Commercial & Finance Ltd. and M/s D.B. (International) Stock Brokers Ltd.

25. We find that the aforesaid documentary evidences were also furnished by the assessee vide letter dated 25/04/2018 during the assessment proceedings in response to the show cause notice. However, the AO without commenting on any of the evidence submitted by the assessee placed reliance upon the report of the Investigation Wing, Kolkata, and the price fluctuation of shares of the entities in which the assessee has transacted. The findings of the Investigation Wing and analysis of transactions, as noted on pages 7-9 of the assessment order, appears to be mere general findings of the investigation

without any adverse observation regarding the assessee. Further, the Revenue has failed to prove as to how the said findings have any relevance to the present case, apart from the fact that scrip of M/s Shree Nath Commercial & Finance Ltd. is part of 84 companies investigated by the Investigation Wing, Kolkata. The price fluctuation of shares of the entities in which the assessee has transacted also does not support the case of the Revenue, as no material has been brought on record to show that the assessee was involved in such price manipulation even after selling the shares on the stock exchange through a SEBI registered stock-broker. We find that the Hon'ble jurisdictional High Court in CIT v/s Smt. Jamnadevi Agrawal, [2010] 328 ITR 656 (Bom.) held that the transaction of purchase and sale of shares cannot be considered to be bogus and sham, especially when documentary evidence was produced to establish the genuineness of the claim. Thus, reliance placed by the AO on the report of the Investigation Wing without further corroboration based on cogent material does not justify the conclusion that the impugned transaction as bogus, sham and part of racket of accommodation entries. The material relied upon by the AO also does not prove that the assessee has carried out the impugned transaction of purchase and sale of shares in connivance with the people who were involved in alleged rigging of share prices. In absence of any material proving any involvement of the assessee on the alleged bogus transaction of accommodation entry, we are of the considered view that the addition made pertaining to receipt of sale consideration of the impugned transaction cannot be sustained.

26. During the hearing, the learned DR by referring to the contract notes submitted that in respect of certain trades the difference between order time and trade time is very less. From the perusal of the contract notes forming part of the paper book from pages 56-173, we find that out of the entire sale transactions, such instances are very few. Further, it is pertinent to note that the share sale transactions undertaken by the assessee are on the online digital trading platform of stock exchange of BSE, which is regulated market under the supervision of SEBI.

27. We find that the learned CIT(A) as well as the learned DR has placed reliance upon the decision of the Hon'ble Calcutta High Court in PCIT v/s Swati Bajaj, [2022] 139 taxmann.com 352 (Cal). The perusal of the aforesaid decision of the Hon'ble Calcutta High Court we find that the same was rendered in the peculiar facts, wherein a batch of appeals of different assessee's were disposed of by the Tribunal vide single consolidated order. Apart from the above, the Hon'ble High Court noted that the taxpayer had never mentioned before the AO that he wanted the copy of investigation report of statements of the brokers/entry operators, and therefore the assessee's plea regarding non-availability of relevant material or denial of cross examination claim was rejected. However, in the present case, as noted above a specific request was made for a copy of investigation report as well as copies of statement recorded of different persons. On the facts involved in the present case as noted above are distinguishable from the above case. It is pertinent to note that the Hon'ble Calcutta High Court has not disturbed the settled principle that circumstantial evidences can be looked into only when

direct evidences are not available. In the present case, the assessee has furnished direct evidences, which were completely ignored by the AO to refer to the circumstantial evidences. Further, in the present case, there is not even a reference to any evidence contrary to the claim of the assessee, which is based on detailed documentary evidence. Therefore, we are of the considered view that the decision of the Hon'ble Calcutta High Court cited supra is factually distinguishable, and thus not applicable to the present case, more so in light of the binding decisions of the Hon'ble jurisdictional High Court in favour of the assessee.

28. Therefore, in view of the facts and evidence placed on the record by the assessee, we find no merits in the impugned order upholding the addition made under section 68 of the Act and disallowing the exemption of long-term capital gains claimed by the assessee. Similarly, we also do not find any merit in the disallowance made by the AO under section 69C of the Act. Accordingly, the grounds no.3 and 4 raised in assessee's appeal are allowed.

29. In the result, the appeal by the assessee for the assessment year 2011-12 is partly allowed.

ITA No. 2022/Mum./2023
Assessee's appeal- A.Y. 2013-14

30. In this appeal, the assessee has raised the following revised grounds of appeal:-

"1 (i) *"The impugned assessment order is bad in law ab initio, passed without a valid jurisdiction and on facts primarily on the basis of modus operandi of providing bogus accommodation entry of LTCG discussed in the investigation report of the Kolkata-Directorate of Investigation Wing which was prepared after searches on various constituents;*

(ii) as the same could only be assessed u/s 153A of the Act by taking recourse to the mandatory non obstante provisions of the section 153C of the Act;

(iii) thus, the impugned assessment order must be declared as void ab initio by following the judgment of the Hon'ble Apex Court in *Vikram Sujitkumar Bhatia (2023) 149 taxmann.com 123 (SC) dated 06/04/2023* and *Nilesh Bharani in ITA 612/Mum/2020 dated 28/03/2023 r/w S.S. Con Build Pvt Ltd 2023-TIOL-65-SC -IT dated 04/05.2023 r/w Kanwar Singh Saini vs Delhi High Court 2012 4 SCC 307.*

2. The impugned assessment order u/s 153A/143(3) of the Act is required to be treated as 'invalid and shall be deemed to have never been issued' in absence of any Document Identification Number (DIN) or for lack of computer-generated Document Identification Number (DIN) thereon which was required to be generated and duly quoted in the body of such communication as has been ordered by the CBDT vide Circular No. 19 /2019 dated 14/08/2019 and reiterated vide the circular number 27/2019 dated 26/09/2019.

3. The CIT(A) erred in law and on facts in confirming the action of the AO making an addition of Rs. 1,71,72,844/- considering the LTCG u/s 10(38) of the Act on sale consideration of shares of Shreenath Commercials and Finance Ltd and D B (International) Stock Brokers Ltd without considering the submissions of assessee:

(i) u/s 68 of the Act alleging the same to be bogus, though the said section is also not applicable;

(ii) without any basis and bringing on record any corroborative material indicating that the assessee paid any consideration or benefit in any form to the purchasers of those shares;

(iii) made on some uncorroborated / untested statements of some persons, without giving copies of the material gathered and relied upon by revenue and also without allowing an opportunity to cross examine them though specifically asked demanded.

(iv) no incriminating material was found during the course of search in the premises of assessee.

(v) Thus, the addition so made ignoring the principles of natural justice and proper opportunity should be deleted.

4. The CIT(A) erred in law and on facts in confirming the estimated addition of Rs.5,15,185/- made u/s 69C of the Act alleging commission paid in cash for the alleged LTCG on equity shares; though no incriminating material at all was found during the search in the premises of the assessee. Thus, the same must be deleted.

5. The appellant craves the leave to add, substitute, modify, delete or amend all or any ground of appeal either before or at the time of hearing."

31. The additional grounds raised by the assessee vide application dated 05/09/2023, are reproduced as follows:-

"Without prejudice, the appellant humbly submits that the following additional ground which is purely of legal nature may kindly be admitted.

i. The impugned assessment order is bad in law ab initio, passed without a valid jurisdiction and on facts primarily on the basis of modus operandi of providing bogus accommodation entry of LTCC discussed in the investigation report of the Kolkata- Directorate of Investigation Wing which was prepared after searches on various constituents.

ii. As the same could only be assessed u/s 153A of the Act by taking recourse to mandatory non obstante provisions of the section 153C of the Act.

iii. Thus, the impugned assessment order must be declared as void ab initio by following the judgment of the Hon'ble Apex Court in Vikram Sujitkumar Bhatia (2023) 149 taxmann.com 123 (SC) dated 06/04/2023 and Nilesh Bharani in ITA 612/Mum/2020 dated 28/03/2023 r/w S S Con Build Pvt Ltd 2023-TIOL-65-SC-IT dated 04/05.2023 r/w Kanwar Singh Saini vs Delhi High Court 2012 4 SCC 307."

32. Since the issue raised by way of additional grounds of appeal is a legal issue, which goes to the root of the matter and can be decided on the basis of material available on record, therefore the same are admitted and taken up for adjudication along with the revised grounds of appeal in view of the ratio laid down by the Hon'ble Supreme Court in NTPC v/s CIT, [1998] 229 ITR 383 (SC).

33. The brief facts of the case are that in the year under consideration, the assessee filed its return of income on 15/02/2014 declaring a total income at Rs.86,56,750. The return was selected for scrutiny and vide order dated 29/12/2017 passed under section 143(3) of the Act the total income of the assessee was assessed at the returned income. Subsequently, on 06/10/2017 search and survey action under section 132/133A of the Act was carried out in the case of Sunshine Group, M/s Sabari Developers LLP, and M/s Evergreen

Enterprises and other entities and the officers, branches, and residences of the main persons and the employees.

34. During the year under consideration, the assessee in his return of income claimed to have earned long-term capital gains out of sale of shares of M/s Shree Nath Commercial & Finance Ltd. and M/s D.B. (International) Stock Brokers Ltd., and claimed the same as exempt under section 10(38) of the Act. The relevant details as per computation of income are tabulated as follows:-

<i>Name of the scrip treated</i>	<i>Quantity of shares purchased</i>	<i>Acquisition year (F.Y.)</i>	<i>Cost of acquisition (Rs.)</i>	<i>Year of sale (F.Y.)</i>	<i>Sale consideration</i>	<i>Gain/Loss</i>
<i>M/s D.B. (International) Stock Brokers Ltd.</i>	<i>1,56,170</i>	<i>2009-10</i>	<i>9,05,786</i>	<i>2012-13</i>	<i>1,49,59,817</i>	<i>1,38,74,404</i>
<i>M/s Shree Nath Commercial & Finance Ltd.</i>	<i>27,991</i>	<i>2010-11</i>	<i>3,56,646</i>	<i>2012-13</i>	<i>22,13,037</i>	<i>17,88,162</i>

35. The AO vide order dated 29/12/2019 passed under section 143(3) read with section 153A of the Act after referring to the report of the Investigation Wing, Kolkata, modus operandi for providing bogus accommodation entry of long term capital gain/short term capital loss, price fluctuation in the shares of M/s Shree Nath Commercial & Finance Ltd. and M/s D.B. (International) Stock Brokers Ltd., statements of entry providers recorded under section 132(4) of the Act, came to the conclusion that the long-term capital gains booked by the assessee in his books to be a pre-arranged method to evade taxes and launder money. Accordingly, the AO denied the claim of exemption under section 10(38) of the Act on the sale of shares of M/s Shree Nath Commercial & Finance Ltd. and M/s D.B. (International) Stock Brokers Ltd. and added an

amount of Rs.1,71,72,844 under section 68 of the Act being the sale consideration received by the assessee. Further, the AO made an addition under section 69C of the Act by considering 3% of the sale consideration as the commission paid for obtaining bogus accommodation entry.

36. The learned CIT(A), vide impugned order, following its decision rendered in assessee's own case for the assessment year 2011-12 dismissed the grounds raised by the assessee, and upheld the addition made by the AO under section 68 and 69C of the Act, after noting that the facts of the current year are similar to the assessment year 2011-12. Being aggrieved, the assessee is in appeal before us.

37. During the hearing, the learned AR submitted that since the search at the premises of the assessee was conducted on 06/10/2017 and the scrutiny assessment proceedings were concluded vide order dated 29/12/2017, therefore, the year under consideration is an abated year within the meaning of second proviso to section 153A of the Act. The learned AR further submitted that no incriminating material was found in respect of the addition made under section 68 and 69C of the Act during the course of search at the premises of the assessee. The learned AR submitted that the AO has made the addition by relying on some material found during the course of search in the case of some other persons at different premises, and therefore the assessment should have been done under section 153C of the Act instead of assessment order being passed under section 153A of the Act.

38. On the contrary, the learned DR submitted that since the year under consideration is an abated assessment year, therefore, the AO has rightly completed the assessment under section 153A of the Act by using all the information in his possession relating to accommodation entry of bogus long-term capital gains. The learned DR further submitted that operation under section 153C of the Act does not override the provisions of section 153A of the Act, and the non-obstante clause in section 153C does not extend to section 153A of the Act.

39. We have considered the submissions of both sides and perused the material available on record. In the present case, undisputedly the addition is made under section 68 and section 69C of the Act on account of alleged accommodation entries of bogus long-term capital gain. From the perusal of the assessment order, it is discernible that the said addition is not based on any material or document found during the course of search/survey action under section 132/133A of the Act conducted at the residential premises of the assessee. It is further evident that the AO has placed reliance upon the findings of the Investigation Wing, Kolkata, wherein the scrip M/s Shree Nath Commercial & Finance Ltd. was included in the list of 84 companies whose share prices were manipulated by a syndicate of entry operators. The AO from pages 4-12 of the assessment order discussed the findings of the Investigation Wing, Kolkata, wherein the modus operandi of providing bogus accommodation entry, players on the scheme, role of the operator, role of the promoters of the penny stock companies, role of shareholders and exit providers has been discussed. From pages 12-19, the AO analysed the price

fluctuation, the history of the company, and the financials of the scrip M/s D.B. (International) Stock Brokers Ltd. From pages 18-27, the AO has analysed the statements of the entry providers in the scrip of M/s D.B. (International) Stock Brokers Ltd. It is pertinent to note that these statements were recorded under section 132(4) of the Act on 13/06/2014 during the course of the search action at their premises. Thus, it is worth noting that none of the statements were pursuant to search/survey action under section 132/133A of the Act conducted at the residential premises of the assessee on 06/10/2017 and are much prior to the search in the case of the assessee. From the perusal of the statements, it is further pertinent to note that though the entry operator has agreed that they have arranged investments in the shares in M/s D.B. (International) Stock Brokers Ltd. on behalf of some of the beneficiaries, however there is no allegation against the assessee. Similarly, from pages 27-36, the AO analysed the financials and price fluctuation in the scrip M/s Shree Nath Commercial & Finance Ltd. Identical to M/s D.B. (International) Stock Brokers Ltd., the statement of entry operators relied upon by the AO, who admitted to have provided accommodation entry in M/s Shree Nath Commercial & Finance Ltd., were recorded in the year 2015, i.e. much prior to the search/survey conducted at the residential premises of the assessee. Therefore, from aforementioned factual position, it is evident that the entire addition is based on the information received during the search carried out in case of some other persons. Further, from para-7.10 of the assessment order, it is also evident that the statement of the assessee was also recorded under section 132(4) of the Act pursuant to the information received during the search carried out in case of some other persons. In view of the aforesaid peculiar factual matrix of

the present case, it is the plea of the assessee that the assessment should have been done under section 153C of the Act instead of the assessment order being passed under section 153A of the Act.

40. We find that a similar controversy came up for consideration before the coordinate bench of the Tribunal in Anoop Kumar Gupta v/s ACIT, in ITA no. 454/Del./2020, for the assessment year 2015-16, wherein despite the large no. of incriminating documents being found and impounded during the search, no addition was made by the AO in the assessment proceedings, as the AO was convinced with the explanation given by the taxpayer for those documents. However, in another search based on any independent warrant of authorisation, certain incriminating documents were found. Accordingly, the issue arose that whether the taxpayer needs to be questioned based on those incriminating documents only by taking recourse to section 153C of the Act and not under section 153A of the Act irrespective of the fact whether the assessment is abated or not. The coordinate bench of the Tribunal while deciding this issue in favour of the assessee, vide order dated 05/10/2023, held that any addition on the basis of some incriminating material found elsewhere could not be assessed in the assessment order passed under section 153A of the Act, but it could be considered only in a separate assessment order by taking recourse to the mandatory and special non obstante provisions of section 153C of the Act and then to pass a separate assessment order under section 153A r/w section 153C of the Act. The relevant findings of the coordinate bench, in the aforesaid decision, are reproduced as follows:-

"23. It is pertinent to note that though the Id. AO had stated that large number of incriminating documents were found and impounded during the search, we find that ultimately no addition was made based on the same by the Id. AO in the assessment proceedings, as the Id. AO was convinced with the explanations given by the assessee for those documents. The fact of assessee claiming exemption u/s 10(38) of the Act for sale of shares of MARL was duly disclosed in the return of income filed on 29.11.2015 prior to the search itself. No document whatsoever was found and seized from the premises of the assessee during his search representing any incriminating document qua the issue of claim of exemption u/s 10(38) of the Act. The only document which fall within the ambit of incriminating nature is the forged signature of Shri Koteshwar Rao in the documents pertaining to allotment of preferential shares submitted to Ministry of Corporate Affairs (MCA), which was also not seized from the premises of the assessee. The investigation wing of Income Tax Department had gathered those informations from MCA and had confronted Shri Koteshwar Rao during the course of search. Shri Koteshwar Rao denied having affixed his signature thereon as he had resigned from the post of Director of MARL in the year 2012. However, from the statements recorded by the investigation wing of income tax department from various persons involved , it is evident that the signature of Shri Koteshwar Rao was indeed forged in the documents pertaining to allotment of preference shares to various persons including the assessee and his family members. At this juncture, it would be relevant to note that both Shri Koteshwar Rao as well as the assessee in their individual sworn statements had categorically denied having known each other. Hence it becomes evident that assessee was never involved in any of the forgery acts that had been carried out in the allotment of preference shares of MARL. But we find that the assessee was confronted by the revenue with those very same forged signed documents in order to draw adverse inference on the claim of exemption u/s 10(38) of the Act on the assessee. Hence the said forged signed documents become incriminating documents found during the course of search of third parties (which include MARL and Shri Koteshwar Rao). Accordingly, if at all the assessee need to be questioned based on those incriminating documents, as per the scheme of provisions of Chapter XIV (sections 153A to 153C) of the Act , it could be done only by taking recourse to section 153C of the Act and not u/s 153A of the Act irrespective of the fact whether the assessment is abated or not. This is so because , the provisions of Sections 153A and 153C of the Act are special provisions starting with non-obstante clause thereon which had been introduced in the statute only for the limited purpose of framing assessments pursuant to search actions carried out and information / materials surfaced therein.

24. We find that the assessment for this assessment year was not completed as the time limit to issue any notice u/s 143(2) of the Act was still available to the Id. AO and undoubtedly, as per the law as existed then, no addition in an assessment order passed u/s 153A of the Act in the case of the assessee was possible on the basis of some alleged incriminating information/ material seized / statements from / of the alleged entry providers as no incriminating material in any manner at all depicting bogus LTCG was found during the course of search in the premises of the assessee or on the strength of any search warrant in the name of the assessee in any premises anywhere. Thus, the only course available to the revenue was to initiate proceedings u/s 153C of the Act as has been held by the Hon'ble Supreme Court in Vikram Sujitkumar Bhatia vs ITO reported in 149 taxmann.com 123 (SC). We find that the Hon'ble Supreme

Court in the case of *Abhisar Buildwell Pvt Ltd* reported in 149 taxmann.com 399 (SC) had not overruled / could not at all overrule the special provisions u/s 153C of the Act mandated by the legislature for the purpose. The directions therein by the Hon'ble Apex Court to consider material available with the Id. AO in pending assessments which was gathered by the Id. AO in normal course and not flowing from any search action for which the mandatory recourse is the route provided in section 153C of the Act only and there could be several assessments of the same assessee in addition to the single assessment u/s 153A of the Act for the relevant period on search on him. This is so because the cause of action u/s 153C of the Act can arise upto 10 years when some incriminating information pertaining to the assessee is detected in searches elsewhere at different times which were not accessible to the revenue earlier. The assessment procedures under the two specific situations have, therefore, been categorically mandated by the legislature without any fetters and need to be followed by all the courts including the Hon'ble Supreme Court being a jurisdictional issue as has been held by the Hon'ble Supreme Court in *S S Con Build Pvt Ltd* reported in 293 Taxman 491 (SC) dated 4.5.2023 by following the earlier Apex Court judgment in *Kanwar Singh Saini vs High Court of Delhi* reported in (2012) 4 SCC 307. We find that undisputedly section 153C of the Act starts with a non obstante clause and both the AOs involved were bound to act as per this provision as term deployed therein is "shall". Accordingly, as per the law, no addition in an assessment order passed u/s 153A of the Act without following the mandatory route of section 153C of the Act in the case of the assessee was possible on the basis of some alleged material seized / statements from / of the alleged entry providers as no incriminating material in any manner at all depicting bogus LTCG was found during the course of search in the premises of the assessee or on the strength of any search warrant in the name of the assessee in any premises anywhere. Thus, the only course available for the revenue was to initiate proceedings u/s 153C of the Act on the assessee whereby the AO of the entry provider was statutorily required, (and not the officers of the investigation unit of the department under any circumstance on the basis of the seized material) if he was satisfied that the seized material/information from the searched entry provider had some bearing etc. on the determination of the assessable income of the assessee by sending the same to the AO of the assessee and then the AO of the assessee should have proceeded to assess the same by a separate assessment order u/s 153A read with the section 153C of the Act. Undisputedly, section 153C of the Act is a non obstante section and a complete code by itself and both the AOs involved were bound to act as per this provision as term deployed therein is "shall". No option was available with the AOs to act otherwise overruling the law at their whims. Therefore, if the material found and seized from an entry provider 'pertains or pertain to, or any information contained therein, relates to the assessee, then the Id. AO of the said entry provider must have initiated the assessment process u/s 153C of the Act. It is in his exclusive domain to be satisfied whether 'pertains or pertain to, or any information contained therein, relates to' or not and the statute in an unambiguous language has not bestowed this power on any other authority, which admittedly here has been completely misunderstood to be with the Investigation Unit of the income-tax department by the Id. AO while completing the assessment.

25. For the sake of convenience, the provisions of section 153C of the Act as it stood at the relevant point of time are reproduced hereunder:-

"Assessment of income of any other person u/s 153C of the Act

153C. (1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that,—

- (a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or
- (b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to, a person other than the person referred to in section 153A, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person for the relevant assessment year or years referred to in sub-section (1) of section 153A:

Provided that in case of such other person, the reference to the date of initiation of the search under section 132 or making of requisition under section 132A in the second proviso to sub-section (1) of section 153A shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person:

Provided further that the Central Government may by rules made by it and published in the Official Gazette, specify the class or classes of cases in respect of such other person, in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made except in cases where any assessment or reassessment has abated.

(2) Where books of account or documents or assets seized or requisitioned as referred to in sub-section (1) has or have been received by the Assessing Officer having jurisdiction over such other person after the due date for furnishing the return of income for the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A and in respect of such assessment year—

- (a) no return of income has been furnished by such other person and no notice under sub-section (1) of section 142 has been issued to him, or
- (b) a return of income has been furnished by such other person but no notice under sub-section (2) of section 143 has been served and limitation of serving the notice under sub-section (2) of section 143 has expired, or
- (c) assessment or reassessment, if any, has been made, before the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person, such Assessing Officer shall issue the notice and assess or reassess total income of such other person of such assessment year in the manner provided in section 153A.”

(emphasis supplied by us)

26. It would not be out of place to refer to the Notes on Clauses of the Finance Bill 2015 when the legislature thought it fit to amend the provisions of section 153C of the Act w.e.f. 01.06.2015.

"Clause 36 of the Bill seeks to amend section 153C of the Income-tax Act relating to assessment of income of any other person.

The existing provisions contained in section 153C provide that in the course of an assessment proceeding, in the case of a person in whose case search action under section 132 or action under section 132A have been conducted, and whether the Assessing Officer is satisfied that the assets or books of account or documents seized belong to another person, then, the assets or books of account or documents seized shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against such other person, if he is satisfied that the books of accounts or documents or assets seized have a bearing on determination on the total income of such other person.

It is proposed to amend sub-section (1) of the said section so as to provide that where the Assessing Officer is satisfied that,

(a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or

(b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to,

a person other than the person referred to in section 153A, then, the books of account or documents or assets, seized or requisitioned, shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if that Assessing Officer is satisfied that the books of account or documents or assets, seized or requisitioned, have a bearing on the determination of the total income of such other person for the relevant assessment year or years referred to in sub-section (1) of section 153A.

This amendment will take effect from 1st June, 2015."

27. *On perusal of the above provision read with relevant Notes on Clause to the Finance Bill 2015, it is clear that any information or entry found in any document seized pertaining / relating to a person other than the person searched from the searched premises as was referred u/s 153A of the Act was to be handed over by the investigation wing to the AO of such other person (searched) and then that AO of the searched person shall handover the same to the AO of the person not searched who thereafter was to proceed against such other non-person by issuing a notice u/s 153C of the Act and then to assess / re-assess income of such other not searched person.*

28. *Further on perusal of the proviso to section 153C of the Act, it is very clear that the first proviso as it existed then, the deemed date of search for initiation of proceeding u/s 153C of the Act in the case of a non-searched person (assessee here) was the date of receiving the documents by the AO of the assessee. It is pertinent to note that the panchanama was finally closed in the hands of the assessee on 31.3.2016 at 8.40 P.M. The case of the assessee got centralised only on 5.9.2016, which means the AO could have received any information relating to bogus LTCG based on entry operators statements only on or after 5.9.2016 and certainly not before that date. This is so because absolutely no documents of incriminating nature was found and seized in the premises of the assessee during the course of search on 30.3.2016 which got concluded on 31.3.2016 at 8.40 P.M. Hence even if 5.9.2016 is construed as the date of receipt of information by the AO of the assessee, then that would become the date of search on the assessee in order to proceed on the assessee*

in terms of section 153C of the Act. This view of ours is fortified by the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs RRJ Securities Ltd reported in 380 ITR 612 (Del) followed in Pr. CIT vs Raj Buildworth (P) Ltd reported in 113 taxmann.com 600 (Delhi) and the SLP of the revenue dismissed by the Hon'ble Apex Court which is reported in 113 taxmann.com 601 (SC). Consequently, the period relevant to the Asst Year 2015-16 herein, when the impugned incriminating material was found in a search of a third person, got shifted from the scope of an assessment u/s 153A of the Act to the provisions of the sections 153C of the Act being one of the six assessment year preceding the date of search in the case of the other person.

29. Thus, it could be safely concluded that in addition to the assessment order passed u/s 153A of the Act on the basis of an income-tax search conducted on the assessee, the impugned amount assessed in this assessment order as undisclosed / unexplained income, allegedly based on some incriminating material found elsewhere, with respect to the long term capital gain already declared in the return of income filed on 29/11/2015 could not be assessed in the said assessment order passed u/s 153A of the Act but it could be considered for the purpose only and only in a separate assessment order by taking recourse to the mandatory and special non obstante provisions of the section 153C of the Act and then to pass a separate assessment order u/s 153A r.w.s. 153C of the Act. Had recourse to section 153C of the Act been adopted by the revenue, then it would be in accordance with the decision of the Hon'ble Supreme Court in the case of ITO vs Vikram Sujitkumar Bhatia (supra). Hence the consideration of denial of exemption u/s 10(38) of the Act for the long term capital gain on sale of shares of MARL could not be done by the revenue legally in the proceedings u/s 153A of the Act on the assessee.

41. Therefore, respectfully following the aforesaid decision of the coordinate bench of the Tribunal, we are of the considered view that any addition under section 68 and section 69C of the Act in the facts of the present case cannot be done by taking recourse to the provisions of section 153A of the Act. Accordingly, the additional grounds and ground no. 1 raised by the assessee are allowed.

42. Ground No. 2 raised in assessee's appeal was not pressed during the hearing. Accordingly, the same is kept open.

43. Insofar as the merits of the additions made under section 68 and section 69C of the Act by the AO and upheld by the learned CIT(A) are concerned,

since it is an admitted position that facts of the instant case are similar to the facts for the assessment year 2011-12, therefore our findings rendered in assessee's appeal for the assessment year 2011-12 shall apply *mutatis mutandis* to the present appeal. Accordingly, grounds no. 3 and 4 raised in assessee's appeal are allowed.

44. In the result, appeal by the assessee for the assessment year 2013-14 is allowed.

45. To sum up, appeal by the assessee for the assessment year 2011-12 is partly allowed, while the appeal by the assessee for the assessment year 2013-14 is allowed.

Order pronounced in the open Court on 09/08/2024.

Sd/-
NARENDRA KUMAR BILLAIYA
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 09/08/2024

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.

By Order

Assistant Registrar
ITAT, Mumbai