Income Tax Appellate Tribunal - Jaipur

Assistant Commissioner Of Income ... vs M/S Hari Narain Parwal, Huf, ... on 24 February, 2022

vk;dj vihyh; vf/kdj.k] t;iqj U;k;ihB] t;iqj

IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" VC JAIPUR

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BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

vk;dj vihy la-@ITA No. 753/JP/2019
fu/kZkj.k o"kZ@Assessment Year : 2011-12.

Asstt. Commissioner of Income-tax, Central Circle-3, Jaipur. cuke Vs. Smt. Saroj Parwal, 376, Nahargarh Chandpole Bazar, Jaipur. Ro

LFkk;h ys[kk la-@thvkbZvkj la-@PAN/GIR No. ADYPP 8357N

vihykFkhZ@Appellant izR;FkhZ@Respondent

vk;dj vihy la-@ITA No. 748/JP/2019
fu/kZkj.k o"kZ@Assessment Year : 2011-12.

Asstt. Commissioner of Income-tax, Central Circle-3, Jaipur. cuke Vs. M/s. Hari Narain Parwal, HUF, 376, Nahargarh Road, Chandpole Bazar, Jaipur.

LFkk;h ys[kk la-@thvkbZvkj la-@PAN/GIR No. AABHH 6685K

vihykFkhZ@Appellant izR;FkhZ@Respondent

vk;dj vihy la-@ITA No. 750/JP/2019
fu/kZkj.k o"kZ@Assessment Year : 2011-12.

Asstt. Commissioner of Income-tax, Central Circle-3, Jaipur. cuke Vs. M/s. Bitthal Das Parwal, HUF 376, Nahargarh Road, Chandpole Bazar, Jaipur.

LFkk;h ys[kk la-@thvkbZvkj la-@PAN/GIR No. AACHB 8343P

vihykFkhZ@Appellant izR;FkhZ@Respondent

vk;dj vihy la-@ITA No. 150/JP/2020
fu/kZkj.k o"kZ@Assessment Year : 2014-15.

Deputy Commissioner of Income-tax, Central Circle-3, Jaipur. cuke Vs. Smt. Jyoti Falor, 3/90, Vidhyadhar Nagar, Jaipur.

LFkk;h ys[kk la-@thvkbZvkj la-@PAN/GIR No. AAEPF 6399K

vihykFkhZ@Appellant izR;FkhZ@Respondent

vk;dj vihy la-@ITA No. 149/JP/2020
fu/kZkj.k o"kZ@Assessment Year : 2012-13.

Deputy Commissioner of Income-tax, Central Circle-3, Jaipur. cuke Shri Jitendra Kumar Falor, Vs. 3/90, Vidhyadhar Nagar, Jaipur.
LFkk;h ys[kk la-@thvkbZvkj la-@PAN/GIR No. AABPF 8243K
vihykFkhZ@Appellant izR;FkhZ@Respondent

jktLo dh vksj ls@ Revenue by : Shri S. Najmi, (CIT D/R)
fu/kZkfjrh dh vksj l@
s Assessee by : Shri S.R. Sharma (CA) and Shri R.K. Bhatra, (CA)

lquokbZ dh rkjh[k@ Date of Hearing : 02/02/2022
mn?kks"k.kk dh rkjh[k@Date of Pronouncement: 24 /02/2021

vkns'k@ ORDER

PER: SANDEEP GOSAIN, J.M.

These five appeals by the revenue are directed against five separate orders of ld. CIT (A)-4, Jaipur for the assessment years 2011-12, 2012-13 & 2014-15 dated 26.03.2019 and 08.11.2019 passed under section 143(3) read with section 153A of the I.T. Act, 1961. These appeals are arising from a search and seizure action carried out on 07.01.2016 in case of Dilip Manihar Group, Jaipur under which all these five assessees are covered. Since common issues are involved in all these appeals (except in ITA No. 149/JP/2020 for the assessment year 2012-13 wherein facts in respect of Ground No. 2 is slightly different, which we will deal separately), therefore all these five appeals filed by the revenue are clubbed together for the purpose of hearing and disposal. For the sake of convenience, we take up the appeal in ITA No. 753/JP/2019 as a lead case for the purpose of recording the facts and

adjudication of the dispute and it will cover all the issues involved in the rest of the appeals. In ITA No. 753/JP/2019, the revenue has raised the following grounds :-

" 1. Whether on the facts and in the circumstances of the case the

CIT (A) was right in deleting the addition of Rs. 2,83,12,308/- u/s 68 of the I.T act, 1961 made by the AO on account of bogus LTCG which was claimed by the assessee as exempt income u/s 10(38) of the IT Act.

2. Whether on the facts and in the circumstances of the case the CIT (A) was right in deleting the addition of Rs. 2,83,123/- u/s 69C of the IT Act, 1961 made by the AO on account of unexplained commission expenditure for taking bogus accommodation entry in the form of LTCG.

3. Whether on the facts and in the circumstances of the case and in law that the CIT (A) was right in deleting the addition of Rs. 2,83,12,308/- made by the AO on the basis of incriminating documents and accepted n the statement u/s 132(4) and statement u/s 131, on account of investment in shares was made out of books.

4. Whether on the facts and in the circumstances of the case and in law, the CIT (A) was justified in holding that the statement recorded u/s 132(4) & 131 of the Income Tax Act, 1961 cannot be considered as an incriminating material found and seized during the search.

5. Whether on the facts and in the circumstances of the case and in law, the CIT (A) was justified in holding that the assessee filed retraction against the statement given u/s 132(4) during the search as well as post search proceedings, however the retraction was filed after 8 months without supporting evidences and also not reported during the search proceedings.

6. Whether on the facts and in the circumstances of the case and in law, the CIT (A) is was justified in allowing the appeal of the assessee holding that in absence of any incriminating material, the completed assessment can't be interfered with by the AO and completed assessment can be interfered with the AO while making assessment u/s 153A only on the basis of some incriminating material unearthed during the course of search which were not produced or not already disclosed.

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7. Whether on the facts and in the circumstances of the case and in law, the CIT (A) is right in not accepting the decision of Hon'ble High Court, Jaipur in the case of Shri Roshan Lal Sancheti, Bhilwara (Raj) wherein the Hon'ble Court as held that it must be held that statement recorded u/s 132(4) of the IT Act and later confirmed in statement recorded u/s 131 of the IT Act, can't be discarded simply by observing that the assessee has retracted the same because such retraction ought to have been generally made within reason able time or by filing complaint to superior authorities or otherwise brought to notice of the higher officials by filing duly sworn affidavit or statement supported by

convincing evidences.

8. The appellant crave, leave or reserving the right to amend modify, alter add or forego any ground(s) of appeal at any time before or during the hearing of this appeal."

2. The brief facts of the case are that the assessee is an Individual deriving income from house property, capital gain and other sources. The assessee filed her return of income under section 139(1) of the Income Tax Act, 1961 on 12.01.2012 declaring total income of Rs. 14,85,740/- and claimed an exempt income of Rs. 2,83,12,308/- under section 10(38) of the IT Act, 1961 being Long Term Capital Gain from sale of 10,000 equity shares having face value of Rs. 10/- each and 3,00,000 shares of face value of Rs. 1/- each of Splash Media & Infra Ltd. The assessee acquired the said 10,000 shares on 23.04.2009 on on-line transaction in recognized stock exchange through Marverik Share Brokers Pvt. Ltd. @ Rs. 70.65 per share plus STT and brokerage etc having total cost of Rs 7,07,535/-. The payment of above cost of shares amounting to Rs. 7,07,535/- was made through cheque encashment of which appears in bank statement of assessee. This total cost to assessee Rs. 7,07,535/- of the said shares was declared by assessee in the year of acquisition having shown the said investment in his books of accounts and in Balance Sheet as on 31.03.2010. These shares were dematerialized on 23.05.2009

and appear in Dmat Statement with Marverick Share Brokers Limited. The said company issued bonus shares on 30.12.2009 at 1:3 and thus assessee received 30,000 bonus shares which were credited in Dmat account of the assessee. The assessee first from dated 21.05.2010 to 12.06.2010 sold the 10,000 original shares for Rs. 69,78,881/- and deducting therefrom cost of Rs. 7,07,535/- earned Long Term Capital Gain amounting to Rs. 62,71,346/-. The balance 30,000 shares (recd bonus) of face value of Rs 10/- each were split by company on 02.08.2010 having

face value of Rs. 1/- each and thus assessee after split of shares held 3,00,000 shares of face value of Rs. 1/- each which were dematerialized on 02.08.2010 and credited in Dmat Account of assessee. These 3,00,000 shares were sold from 15.02.2011 to 08.03.2011 at total sale price of Rs. 2,20,40,962/- after payment of STT, brokerage etc., through Marverik Share Brokers Ltd. and sale proceeds were received by cheques duly encashed and are appearing in her bank account. Thus these transactions of sale and purchase in shares of Splash Media & Infra Ltd. resulted in gain of Rs. 2,83,12,308/- (Rs. 62,71,346 + Rs. 2,20,40,962/-) in financial year 2010-11 relevant to assessment year 2011-12, which assessee declared as Long Term Capital Gain exempt under section 10(38) in the return filed for this year. The return was processed under section 143(1) and no notice under section 143(2) was issued and hence assessment under section 143(1) completed.

2.1. Thereafter, there was a search and seizure action under section 132 of the Income Tax Act, 1961 carried out by the Department in the case of Dilip Manihar Group, Jaipur on 07.01.2016 in which the assessee along with other family members are covered. In the search action no incriminating document or any undisclosed cash, jewellery etc. were found with assessee and nothing was seized from assessee

nor any undisclosed income was found and admitted by assessee. During the course of search and seizure proceedings, the Authorized Officer found copies of Income-tax returns from Bitthal Das Parwal of himself, his wife Smt Saroj Parwal, the assessee and his HUF and questioned him about the Long Term Capital Gain earned on some scripts which was claimed exempt under section 10(38) of the IT Act, 1961 in some of the returns. In the scripts of Splash Media and First Financial Services Ltd. such gain was declared in those returns for which Authorized Officer suspected that these shares were purchased at a very low price and sold at very high price. The Authorized Officer further opined that looking to profits of these companies their

net worth are much less and therefore in such short term price of shares of these companies cannot jump so high and also apprised the assessee with information received from Income Tax Investigation Wing of Kolkata in relation to some share transactions as dubious and asked explanation from Shri Bitthal Das Parwal about high profit on sale of the above shares. Shri Bitthal Das Parwal in statement recorded in course of search gave his statement which is reproduced on page 3-5 of the assessment order wherein he admitted the said income from capital gain as his undisclosed income for current year from real estate transactions used in obtaining said LTCG exempt under section 10(38) and surrendered the same for tax stating the same is made voluntarily to buy peace of mind. The said averment was again reaffirmed by Shri Bitthal Das Parwal in proceedings under section 131 in statement recorded on 13.01.2016 and by filing affidavit by Bitthal Das Parwal on 20.04.2016. Thereafter assessee received notice under section 153 of the I T Act, 1961 issued by the AO on 23.08.2016, and in compliance to the notice, the assessee filed her return of income on 03.09.2016 for the assessment year 2011-12 declaring the same

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income of Rs. 14,85,740/- as declared in the original return of income. Shri Bitthal Das Parwal also while filing his return as well as return of income in case of Bitthal Das Parwal HUF retracted the said statement on the ground that same was obtained under duress and in state of his mental disturbance he was time and again pressurized to make such admission and as the transactions of sale and purchase of shares are genuine and are supported with all necessary documents of allotment of sale of shares, the said statement is not binding on him. The Assessing Officer in assessment of assessee HUF considered the said statement of Shri Bitthal Das Parwal and as per detailed discussion in assessment order held that LTCG of Rs. 2,83,12,308/- from sale of shares of M/s. Splash Media & Infra Ltd. claimed as

exempt u/s 10(38) by appellant is dubious share transaction meant to account for the undisclosed income in the garb of Long Term Capital Gain and assessed the said gain as 'undisclosed cash credit' under section 68 of the IT Act and included the same in income of appellant (taxable @ 30% as provided under section 115BE) and further included in income an amount of Rs. 2,83,123/- under section 69C as undisclosed expenditure alleging that appellant would have paid commission @ 1% to broker for obtaining said accommodation entry of said LTCG. The assessee challenged the action of the AO before ld. CIT (A) and submitted that there was no incriminating material found during the course of search and seizure. Therefore, in the absence of any incriminating material found during the course of search and seizure action, the addition made by the AO in the proceedings under section 153A is not sustainable in law. The assessee relied upon various judgments including the judgment of Hon'ble Jurisdictional High Court in case of Jai Steel (India) vs. ACIT, 259 CTR (Raj.) 281. The ld. CIT (A) after considering the facts as well as the

precedents on the point held that the addition made by the AO for the assessment year under consideration without any incriminating material found during the course of search and seizure action is not sustainable. The ld. CIT (A) considered the submissions of the assessee and after detailed discussion deleted the additions by allowing the appeal of the assessee on both legal as well as on merit, placing reliance on the judgments of Hon'ble Delhi High Court in case of Kabul Chawla vs ACIT, 380 ITTR 573 (Del.), Hon'ble Bombay High Court in case of All Cargo Global Logistic Ltd. vs. DCIT, orders of ITAT, Jaipur Bench in case of Kota Dal Mill vs. DCIT in ITA Nos. 997 to 1002/JP/2018 & 1119/JP/2018 and various other recent decisions. The ld. CIT (A) also placing reliance on various other judgments of Hon'ble Rajasthan High Courts in case of PCIT vs. Pamod Jain & Others in DBIT Appeal No. 209/2018 dated 24.07.2018 (Raj.) and CIT vs. Smt. Pooja Agarwal in

DBIT Appeal No. 385/2011 dated 11.09.2017 (Raj.) and CIT vs. Smt. Sumitra Devi, 102 DTR 0342 (Raj.) observed that the action of the AO in denying the claim of exemption under section 10(38) of the IT Act is not tenable, the addition is thus directed to be deleted. Aggrieved by the order of ld. CIT (A), the revenue has filed the present appeals before us.

3. Before us, the ld. CIT D/R submitted that the assessments were completed under section 153A of the IT Act in pursuant to the search and seizure action. The AO under section 153A shall assess or re-assess the income of the assessee for the six years as covered under the search. Therefore, it is not the intention of the legislatures that in the proceedings under section 153A the AO cannot make the addition in the absence of incriminating material found during the course of search and seizure action. He has further submitted that the AO is competent to assess the

income of the assessee based on the other material noticed during the course of assessment proceedings. Therefore, any statement made during the course of search by the assessee is a valuable piece of evidence in order to invoke section 153A of the IT Act. He has further contended that once the assessment proceedings are initiated under section 153A of the IT Act, the same can be concluded against interest of the assessee by making addition even without any incriminating material being available against the assessee in search under section 132 on the basis of which notice under section 153A was issued. The AO can frame the assessment under section 153A relying on some information not unearthed during the search and the assessment order passed under section 153A is in accordance with the law. Thus the ld. CIT D/R has submitted that when the assessee himself has stated in the statement recorded during the course of search and post search enquiry that the Long Term Capital Gains shown by him as well as by other family members are

bogus accommodation entries availed by the assessee and his family members, the said statement itself is an incriminating material sufficient for framing the assessment under section 153A of the Act. The ld. CIT D/R placed reliance on the judgment of Hon'ble Supreme Court in the case of B. Kishore Kumar vs. DCIT 234 Taxman 771 (SC), and judgments of Hon'ble Jurisdictional High Court in the case of Principal CIT vs. Roshan Lal Sancheti in DB IT No. 47/2018 dated 30.10.2018 and M/s. Banna Lal Jat Constructions Pvt. Ltd. vs. ACIT in DB IT No. 140/2018 dated 31.08.2018 and submitted that income is to be assessed on the basis of statement of the assessee without scrutinizing the documents.

4. On the other hand, the submissions of the ld. A/R are as under :

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4.1 In respect of Ground Nos. 3 to 7, the ld. A/R submitted that on the facts and circumstances of the case the Ld. Assessing officer has grossly erred in law in completing assessment u/s 153A r.w.s. 143 (3) of the I. T. Act, 1961 even when no incriminating material whatsoever found in course of search which could suggest any undisclosed income so as to initiate proceedings u/s 153A of the Act. In this regard, it is submitted that no document/loose paper was found / seized during the course of search at the business / residential premises of the assessee indicating any on money receipt/investment/advances made and any unexplained/overstated expenditure etc. in its books of account pertaining to the year under appeal thus the mode and manner of the additions made in the orders passed u/s 153A deserves to be held bad in law. The reading of provisions of section 153A would reveal that the time limit for issuance of notice u/s 143 (2) stood expired for the year under appeal and therefore, no assessment was pending at the time when search was conducted in this case and therefore additions, if any, to be made via assessment u/s 153A would be restricted to incriminating documents found during the course of search.

In other words, no routine additions would be permitted to be made having no

nexus with documents found in search. This position has been settled by a number

of judicial pronouncements, few of which are reproduced herewith:

All Cargo Global Logistic Ltd. Vs. DCIT 137 ITD 287 (Mum)(SB) - Upheld by Bombay High Court.

Relevant extracts:
Para 58 of SB decisions: Thus, question No. 1 before us is answered as under:

(a) In assessments that are abated, the A.O. retains the original jurisdiction a as jurisdiction conferred on him u/s 153A for which assessments shall be mad for each of the six assessment years separately :

(b) In other cases, in addition to the income that has already been assessed, the assessment u/s 153A will be made on the basis of incriminating material,

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which in the context of relevant provisions means - (i) books of account , other documents, found in the course of search but not produced in the course of original assessment, and (ii) Undisclosed income or property discovered in the course of search.

CIT vs Kabul Chawla Delhi High reported in (2016) 380 ITR 5733 (Delhi) vide ITA Nos. 707/2014 and others, dated 28.8.2015, (SLP dismissed by Hon'ble Supreme Court on 7-12-2015) wherein the Hon'ble Delhi High Court has reiterated the above settled legal proposition that since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed .....

Rajasthan HighCourt in the case of Jai Steel (India) vs ACIT reported in 259 CTR (Raj.) 281

"..... The requirement of assessment or reassessment under the said section has to be read in the context of sections 132 or 132A, in as much as, in case nothing incriminating is found on account of such search or requisition, then the question of reassessment of the concluded assessments does not arise, which would require more reiteration and it is only in the context of the abated assessment under second proviso which is required to be assessed.
.....

.....

Para 26 of the Judgement: The plea raised on behalf of the assessee that as the first proviso provides for assessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess' have been used at more than one place in the Section

and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word 'assess' has been used in the context of an abated proceedings and word "reasons" has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents.

There are various recent decisions on the issue that there can be no addition in respect to completed assessment if no incriminating material found during the course of search namely : -

> Jai Lokenath Oil Extraction P. Ltd. Vs. DCIT (2017) 166 ITD 161 (Kol - ITAT).
>
> CIT Vs. Deepak Kumar Agarwal (2017) 251 Taxman 22 (Bombay H.C.). Ratan Kumar Sharma Vs. DCIT (ITAT - JPR ITA No. 797/JP/2014 order dated 25-7-1).

Recently Hon'ble Supreme Court vide order dated 02-07-2018 in Meeta Gutgutia Vs Pr. CIT (96 Taxmann.Com 468) have held that Invocation of section 153A to re-

open concluded assessments years earlier to year of serach was not justified in absence of incriminating material found during search qua each such earlier assessment year. The head note of the judgment is as under:

> Section 153A of the I T Act, 1961- Search and seizure (General Principles)- Assessment Years 2001-02 to 2003-04 and 2004-05 - High court in impugned order held that invocation of sectipn 153A to re-open concluded assessments of assessment years earlier to year of search was not justified in absence of incriminating material found during the search qua each such earlier assessment year - Whether SLP against said decision was to be dismissed - Held, Yes [Para 2] [In favour of assessee] To summarize the Ld. AO based his addition primarily on the following points in the assessment order :
>
> - A report prepared on as a result of survey action at the premises of Sh. Anuj Agarwal (One of entry operator) where in his statement on 31-03-2015 he has admitted that script of penny stock was manipulated to provide accommodation entries in the form of LTCG.
>
> - That appellant has made a statement u/s 132(4) dated 07-01-2016 the relevant text of which is reproduced in the assessment order on pages 3 to 5.
>
> - The above statement was followed by an affidavit dated 20-04- 2016 in which affirmed the surrender.
>
> - The AO has pin pointed the report of SEBI wherein the trading activity of the company was restricted for a short period of time.

> - The AO has pin pointed the movement in share price, which according to him is abnormal...
>
> The Ld. A.O. in assessment proceedings put much stress on the statement recorded in course of search from assessee to support said additions made in assessment of assessee. In case of Pr. CIT Vs. Best Infrastructure (2017) 397 ITR 82 (Delhi.) the Hon'ble Delhi High Court held that even statement recorded in course of search u/s 132 (4) do not by themselves constitute incriminating material and unless there is incriminating material for each of assessment years in which addition are made the A.O. could not proceed u/s 153A. Thus the assumption of jurisdiction by Ld. A.O. u/s 153A to make addition on the basis of statement of assessee is not sustainable in law.

4.2. In this connection it is also submitted that it has been held in many judgments that mere statement u/s 132(4) or u/s 131 is not sufficient to make an addition. A statement made must be relatable to incriminating material found during the course of search or the statement must be relatable to material by subsequent inquiry/investigations. The Hon'ble Rajsthan High Court in the case of Mantri Share Brokers P Ltd. (96 Taxmann.Com 279) have held as under:-

> Section 69B of the I T Act, 1961- Undisclosed Investment (burden of proof)- Whether where except statement of Director of assessee company offering additional income during survey in his premises, there was no other material either in form of cash, bullion, jewellery, or documents or in any other form to conclude that statement made was supported by some other documentary evidence, said sum could not be added in hands of assessee as undisclosed investments- Held, Yes [Paras 10-

11] [In favour of assessee] The Hon'ble ITAT, Jaipur Bench, Jaipur in the case of M/s Kota Dal Mill Vs DCIT, CC-

Kota in appeal no. ITYA 997 to 1002/JP/2018 & 1119/JP/2018 (Order dated 31-12-

2018) the aspect of search and survey on the entry operators based in Kolkata and the addition based on the statement of entry operators is dealt with and decided elaborately. (The facts of the said case are very similar to assessee's case). In this judgment Hon'ble ITAT Jaipur has discussed all the decisions very elaborately. In this case the appellant was subjected to search u/s 132(1) of the Act & the date of search the assessment stood completed. The additions made by theAO on the basis of statement of alleged entry operator, Shri Anand Sharma, recorded prior to the search were directed to be deleted. The relevant para of Hon'ble ITAT Jaipur is para 6 at page 12 onwards, the same is reproduced herein below:-

> "In the case in hand, the transactions of unsecured loans as well as introduction of capital by the partners were duly recorded in the books of account and available with the AO. Further, during the course of search under section 132 of the Act on 2nd July 2015 no material much less incriminating material was either found or seized to disclose any undisclosed income on account of unsecured loans or partners' capital

received by the assessee firm. The AO has proposed to make the addition on account of unsecured loans and partners' capital under section 68 being unexplained cash credit solely on the basis of the information received from Investigation Wing Kolkata. It is pertinent to note that the said information was available with the AO prior to the search conducted under section 132 of the Act in case of the assessee on 2nd July, 2015. Therefore, even the sole basis of assessments framed under section 153A of the Act is the information received from Investigation Wing Kolkata and statement of one Shri Anand Sharma, who is stated to be an entry operator and managed various concerns/companies including M/s.Royal Crystal Dealers, one of the loan creditors of the assessee. Except the said statement and report of the Investigation Wing Kolkata, the AO has neither referred to or was having in possession of any material to indicate that the unsecured loans shown in the books of accounts as well as partners' capital received by the assessee are nothing but assessee's own unaccounted and undisclosed income routed back in the garb of unsecured loans and partners' capital. There is no dispute that these transactions of unsecured loans and partners' capital contribution are duly recorded in the books of accounts and disclosed in the return of income which were already completed as the assessments for these four assessment years were not pending on the date of search, therefore, it is manifest from the record that during the course of search and seizure under section 132 of the Act in the case of the assessee no material much less the incriminating material was unearthed or any undisclosed income which was not disclosed in the books of accounts was detected or found. The only incriminating material which was referred by the AO is pages 21 to 26 of Annexure AS-1 in respect of long term capital gain earned by Shri Rajendra Agarwal and his family members. The said long term capital gain was disclosed by Shri Rajendra Agarwal in his statement under section 132(4) and, therefore, it was surrendered and offered to tax by Shri Rajendra Agarwal and his family members in the year of search. The AO himself has not made any addition in the hand of the assessee on account of long term capital gain which was found during the course of search and seizure. Thus, except the material disclosing the long term capital gain in the hand of Shri Rajendra Agarwal, no other incriminating material either found or referred or is the basis of the addition made by the AO while framing the assessment under section 153A of the Act for the assessment years 2010-11 to 13-14. It is appropriate to refer relevant part of the assessment order in para 12 pages 48 to 50, para 19 page 83 and para 22 page 86 as under:-

(para 12/page 48 to 50, para 19/page 83 7 para 22 page 86 not reproduced for the sake of brevity) The entire finding of the AO is based in the information received from the Investigation Wing Kolkata and statement of Shri Anand Sharma The Ld. CIT(A) thought has not disputed the legal proposition on this issue, however, the contention of the assessee was turned down merely on the ground that the SLPs filed by the revenue in the cases of Kabul Chawla (supra) and M/s All Cargo Global Logistics (supra) etc. have been admitted for decision by the hon'ble Supreme Court. The relevant part of the finding the Ld. CIT(A) in para 3.2.2 and 3.2.4 at pages 35 and 36 are as under:-"

"Therefore, neither in the assessment order nor in the order of the ld. CIT (A) there is any mention or finding that the additions have been made by the AO on the basis of any incriminating material found during the course of search and seizure in the case of the assessee. The AO has solely relied upon the report of the Investigation Wing Kolkata and statement of one Shri Anand Sharma recorded by the Investigation Wing during the survey under section 133A of the Act. Therefore, even if the information/report of the Investigation Wing Kolkata is considered as a relevant evidence, the same cannot be regarded as incriminating material unearthed during the course of search and seizure under section 132 of the IT Act in case of the assessee. The requirement for making the addition under section 153A in the assessment years where the assessment was not pending on the date of search and the proceedings are in the nature of reassessment is essentially the incriminating material disclosing undisclosed income which was not disclosed by the assessee. In the case in hand, the AO himself has not claimed any incriminating material found during the search and seizure in the case of the assessee. Accordingly, in the facts and circumstances of the case and in view of the binding precedents on this issue in which the SLP filed by the revenue was also dismissed by the Hon'ble Supreme Court, the additions made by the AO while passing the assessment orders under section 153A for the assessment years 2010-11 to 13-14 are not sustainable and accordingly the same are liable to be deleted. We order accordingly.

Thus the crux of the above decision is that in case of completed assessment as on the date of search u/s 132(1) of the act no addition can be made unless there is 'incriminating seized material found & seized during the course of search'. The statement of entry operator cannot be considered as incriminating seized material found during the course of search."

Regarding statement of alleged entry operator Shri Anuj Aggarwal, it is submitted that nowhere in the statement Anuj Aggarwal has given specifically name of appellant nor has stated specifically that the cash from appellant was given to him or equivalent amount of cash was given which was rotated/routed and given in the form of accommodation entries in the form of LTCG. The statement of Anuj Agarwal was merely a piece of information. Further even the discussion by the AO about dubious financials of the penny stock company or reference to the report of SIT extracts of which forms part of the assessment order are indicative and are of the nature of information. The AO has also referred to the interim order of SEBI where some adverse observation about trading pattern of the penny stock company. Even by the own admission of AO, further the SEBI in the final order in no way passed adverse judgment of the trading by the appellant. In this connection may add that SEBI report is related to the stock market regulations & its order is not in assistance to the revenue. Thus, statement of entry operator, dubious financial of the penny stock company, report of the SEBI & SIT are pieces of information and the AO was expected to convert it into evidences by further enquiry which would comprehensively prove that its appellant alleged cash which was routed and came back to appellant in the form of LTCG. Mere the statement of 3rd Party is not enough to make the addition in hands of the appellant.

4.3. The ld. A/R further submitted that the cases relied on by the Revenue in the case of B. Kishore Kumar vs. DCIT 234 Taxman 771 (SC), Principal CIT vs. Roshan Lal Sancheti in DB IT No. 47/2018 dated 30.10.2018 and M/s. Banna Lal Jat Constructions Pvt. Ltd. vs. ACIT in DB IT No. 140/2018 dated 31.08.2018 are not applicable in these cases. He submitted that in the cases mentioned above,

during the course of search certain incriminating documents were found and seized.

Accordingly the Hon'ble Court held that the statement based on the incriminating material is binding on the assessee. However, in the case of assessee no such incriminating documents were found except the summary statement recorded during the course of search. Accordingly the facts of the said cases relied upon by the ld.

D/R are distinguishable in assessee's case.

4.4. The ld. A/R thus submitted that in view of above position of law, since no incriminating documents were found as a result of search and no assessment was abated, addition made by A.O. is not justified and deserves to be deleted. The assessment made by Ld. A.O. is wrong and bad in law and without jurisdiction deserves to be set aside.

5. In respect of Ground No. 1, the ld. A/R submitted that the acquisition of shares in question were duly recorded in the books of account and the transaction of purchase was supported by the documentary evidence of bills, transfer of shares in the name of the assessee and the payment of purchase consideration by the assessee through banking channel. All the payments were made by the assessee through banking channel and there is no payment in cash. Further, the shares were dematerialized in the Demat account of the assessee and therefore, holding of the shares by the assessee since the year 2009 cannot be disputed. The evidences produced by the assessee are not the documents prepared by the assessee but all these evidences are third party evidence including the bank statement and Demat account. Therefore, once the assessee has produced the evidence in support of the claim of genuineness of the transaction then in the absence of any contrary evidence to disprove the documentary evidence produced by the assessee, the AO cannot treat these transactions as bogus accommodation entries merely on the basis of some statements recorded by the Investigation Wing of the Department of the alleged persons involved in providing accommodation entries. The ld. A/R has further submitted that these are not penny stocks but the initial purchases of shares of M/s. Splash Media & Infra Ltd. were made by the assessee against the consideration of Rs. 70.65 per share. During the course of assessment proceedings the assessee submitted the complete detail of chain along with supporting documents with regard to acquisition of shares to sales of shares which undoubtedly proves that the capital gain so earned by the assessee was genuine. However, the AO did not accept such capital gain as genuine, real and treated the same as undisclosed income of the assessee. The AO treated such capital gain as taxable income of the assessee and added to such capital gain u/s 68 of the IT Act, 1961.

The AO made further addition on account of alleged commission paid for acquiring the bogus capital gain.

5.1. The ld. A/R submitted that the shares were purchased by assessee in an on-

line transaction with recognized stock exchange through a recognized Stock Broker.

The shares purchased were transferred in Demat account with M/s. Marverik Share Brokers Pvt. Ltd. the assessee held the shares of M/s. Splash Media & Infra Ltd. for a period of more than 12 months in her Dmat account. The shares of M/s. Splash Media & Infra Ltd. were sold in recognized stock exchange through registered stock broker M/s. Marverik Share Brokers Pvt. Ltd. The details of sale of shares, number of share sold and the sale rate are on record. The sale consideration of these shares was received through account payee cheque and was credited in bank account of the assessee.

5.2. The ld. A/R further submitted that the assessee filed all the above required documentary evidence for verification of long term capital gain Rs. 2,83,09,544/- on sale of STT paid listed shares before A.O. in assessment proceedings for the assessment year under consideration. Thus the long term capital gain income earned by the assessee is completely verifiable from the above said documents and the exemption clamed is also as per provisions of I. T. Act, 1961. For ready reference and sake of convenience the relevant provisions of section 10 (38) of I. T.

Act, 1961 regarding capital gain income are submitted herein below : -

> Section 10 (38): Exempted Income: - any income arising from the transfer of a long term capital asset, being an equity share in a company or a unit of an equity oriented fund (or a unit of a business trust) where -
>
> (a) the transaction of sale of such equity share or unit is entered into on or after the date on which Chapter VII of the Finance (No.2) Act, 2004 comes into force, and
>
> (b) such transaction is chargeable to securities transaction tax under that Chapter;
>
> (c) For claiming the benefit of exemption u/s 10(38) of Act three requirement needs to be fulfilled. First the share should be held for more than 1 years. Secondly it should be listed and sold on recognized stock exchange and thirdly on the said sale necessary security transaction tax (STT) has been paid. In support of fulfillment of all ingredients please find copy of bills and ledger copy as per Expenses- 'E' for your honour's perusal and consideration.
>
> As per above provisions of law for claiming the benefit of exemption u/s 10(38) of I. T. Act, 1961 following three requirement needs to be fulfilled.
>
> First - The shares should be held for more than 1 year.
>
> Secondly - It should be listed and sold on recognized stock exchange and Third - On sale of shares necessary security Tax (STT) has been paid.

The fulfillment of all the above three ingredients in assessee's case are verifiable from the above said documents filed before your honours.

5.3. The ld. A/R further submitted that Finance Act, 2017 amended section 10 (38) of the Income-tax Act, 1961 w.e.f. 1-4-2018 (A.Y. 2018-19) stating that long term capital gains from transfer of listed equity shares acquired on or after 01 October, 2004, would be exempt from tax under section 10 (38) of the Act only if the Securities transaction Tax (STT) was paid at the time of acquisition of such shares. Previously, to claim the exemption u/s 10 (38) only the requirement was the transaction of sale is undertaken on or after 01 October, 2004 and is chargeable to STT under Chapter VII of the Finance (No.2) Act, 2004, means irrespective of manner of acquisition, the exemption u/s 10 (38) was allowed with only condition that the transaction of sale is undertaken on or after 01 October, 2004 and is chargeable to STT. However, Department noticed that exemption provided under section 10(38) is being misused by certain persons for declaring their unaccounted income as exempt long-term capital gains by entering into sham transactions. Many judgments of various courts were also pronounced in favour of assessee on account of long term capital gain on penny stocks. With a view to prevent this abuse, the Government amended section 10 (38) to provide that exemption under this section for income arising on transfer of equity share acquired or on after 1st day of October, 2004 shall be available only if the acquisition of share is chargeable to STT under Chapter VII of the Finance (No.2) Act, 2004. So, now to claim the exemption u/s 10 (38), it is also mandatory that the transaction of acquisition of shares is carried through recognize stock exchange and STT should have been paid on such acquisition subject to notified transaction without STT listed in Notification No. 1789 (E) dated 05-06-2017. In the case of assessee the STT was paid on the shares purchased and accordingly the capital gain on sale of shares sold during the year under consideration is exempt from tax under section 10(38) of the I.T. Act, 1961 as claimed in ITR.

5.4. It is further submitted that when there is no allegation by Ld. A.O. that assessee ever approached any broker or entry operator for any bogus entry for long term capital gain or he has provided any entry to the assessee then, the Ld. A.O. is not justified on drawing adverse inference against the assessee on the basis of the price of the shares quoted in the stock exchange. The reliance is placed upon the decision of Hon'ble Supreme Court in case of Lalchand Bhagat Ambika Ram vs. CIT 37 ITR 288, CIT vs. East Coast Commercial Co. Ltd. (1967) 63 ITR and it is submitted that the Hon'ble Supreme Court has held that the suspicion or presumption howsoever strong it may appear to be to true needs to be corroborated by some evidence to establish a link that the assessee has brought back his unaccounted income in form of Long Term Capital Gain. The reliance is also placed upon the decision of ITAT Mumbai Special Bench in case of GTC Industries Vs. ACIT 164 ITD 1. These principals enunciated by the Apex Court/High Courts have been followed by various Tribunals. In this regard the notable cases are DN Kamani (HUF) v. Dy. CIT [1999] 70 ITD 77 (Pat.) (TM), Pooja Bhatt v. Asstt. CIT [2000] 73 ITD 205 (Mum.) and Aishwarya K. Rai v. Dy. CIT [2007] 104 ITD 166 (Mum.) (TM). Thus it is contended that in case of the assessee, there is no direct evidence brought on record by the A.O. to hold that the assessee introduced his own unaccounted money by way of bogus long term capital gain and also there is no evidence whatsoever on record that assessee paid cash to obtain LTCG.

5.5. The ld. A/R submitted that the Ld. A.O. only on the basis of report of Investigation Wing of department at Kolkata is holding the transaction of sale of said shares of Splash Media & Infra Ltd. as bogus and also on suspicion of high rise in price of shares in stock market on online trading. The speculation on part of the department is with the intent to implicate everyone who has ever traded

with this company M/s. Splash Media & Infra Ltd. to their investigation. No details / statement were recorded which may reflect any wrong doing on the part of assessee and hence all the generalized report gathered is being extrapolated to all the share holders of this company without any corroborative material. The assessee is not a party reported in the alleged dubious dealings, if any, she has no nexus with the company whose shares purchased nor with its directors or operators. She is not connected with the activity of Broker who handled transaction of sale of shares.

Thus the assessee having invested in shares of said company which gave huge capital gain in a short period does not mean that the transaction is bogus as all the documents and evidences have been produced. So unless the assessing officer list out all traders, buyers sellers and their share brokers of the mentioned shares and further links them with the assessee or his share broker or the person who bought the shares she sold, there is no evidence brought on record that cash has been deposited in the account of purchaser of shares before issue of cheque and they were also not examined by Ld. A.O. and truthfulness of documents also not examined/verified by A.O. Thus it cannot be held only on suspicion or doubt that the transactions made by assessee were non-genuine.

5.6. The ld. A/R submitted that as regards the reports of SEBI and STT, these are general reports about Stock Exchange and of shares transactions to a HUF person or persons. The Courts/Tribunals have held that orders passed by the SEBI have different objectives such as orderly conduct of share markets and investors protection. Such orders cannot be held conclusive as regards the genuineness of the transactions under the IT Law. In this regard, it may be noted that stock market operations are subject to different regulations and the interest of general public is protected by prohibiting the market intermediaries from indulging in unfair trade practices like rigging the price of a particular scrip in collaborated manner. It has also been held that such orders cannot be of any assistance to the cause of the Revenue. Thus such reports of SEBI or STT cannot be attributed to assessee without any material or evidence that assessee also followed the same modus operandi.

Therefore, merely on the basis of SEBI orders, share transactions cannot be considered as ingenuine/sham and, therefore, the sale proceeds of such share transactions cannot be taxed under section 68 of the Act.

5.7. It is settled rule of law that any malpractice, like that of selling by short measures (Hira Bai Vs. CIT 4 ITR 95) or charging price in excess of the controlled price (Sivan Vs. CIT 34 ITR 328, CAG. IT Vs. Cherian 117 ITR 371) or selling smuggled goods (Lal Chand Vs. CIT 37 ITR 288 (SC) etc. cannot be attributed in general to the assessee that he followed such practice. The ordinary presumption of law is that apparent state of affairs is real unless the contrary is proved (Kalva Vs. Union of India 49 ITR 165 (SC), CIT Vs. Daulat Ram 87 ITR 349, 360-61 (SC). The presumption is in favour of good faith and non-concealment of income and the initial burden of finding some material in support of finding of concealed income is on department (CIT Vs. Swami 241 ITR 363).

5.8. Further in course of assessment proceedings assessee specifically made a request to A.O. for cross examination of concerned persons who have admitted on oath before different authorities of the department on the entire scheme of providing accommodation entries in the form of bogus LTCG as stated in assessment order which the ld. A.O. not allowed.

5.9. It is submitted as now it is settled law on the issue that no adverse inference can be drawn against the assessee without providing cross examination opportunity to the concerned assessee against whom an adverse inference is to be drawn by the department on the basis of third party statement. Andaman Timber Industries Vs. CCE -Kolkata - II (2016) 55 Taxworld (SC)."

5.10. The assessee submits that the right to cross examine the third party whose statement is relied by department is principle of natural justice and its denial is violation thereof. The Hon'ble Apex Court in case of Shree Ram Durga Prasad (RB) Vs. Settlement Commission (1989) 176 169,174 (SC) held that any order made in violation of principle of natural justice is void and nullity. As regards the non grant of opportunity to cross examine, the Hon'ble Supreme Court in case of Andaman Timber Industries vs. CCE 127 DTR 241(SC) while dealing with the issue has held in para 5 to 8 as under:

> "5. We have heard Mrs. Kavin Gulati, learned senior counsel appearing for the assessee, and Mr. K. Radhakrishnan, learned senior counsel who appeared for the Revenue.
>
> 6. According to us, not allowing the assessee to cross- examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity in as much as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee.
>
> However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their expenses-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.
>
> 7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit either testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for

> the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.
>
> 8. In view of the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice."

The Hon'ble ITAT Jaipur Bench, recently in case of Pramod Jain, Jaipur vs DCIT, Cir-

3, Jaipur and other connected cases vide its order dated 31-01-2018 (ITA No.(s) 368 to 372/JP/17) following the judgment of Hon'ble Supreme Court in case of Andman Timber Industries held that without giving opportunity of cross examination the assessment completed is a nullity. Therefore, the statement of witness cannot be sole basis of the assessment without giving an opportunity of cross examination and consequently it is a serious flaw which renders the order a nullity.

5.11. The ld. A/R submitted that as regards to statement of assessee recorded in course of search and post search proceedings which was subsequently retracted by him as obtained under pressure, duress and in disturbed medical condition on which the A.O. has placed heavy reliance. In this connection it is submitted that in the statement Shri Bitthal Das Parwal stated that he earned cash income of Rs.

7,32,86,297/- from real estate transactions which was used in taking entry of Long Term Capital Gain in different names including assessee. It is submitted that in course of massive search carried out at residential and business premises of assessee and his family members no document, loose paper, diary or evidence or any writing could not found for such precise huge real estate transaction generating said income and nor any document, loose paper, diary or any evidence was found for obtaining those un-genuine LTCG. This makes it abundantly clear and evident that there were no real estate transactions which earned income to him and that was used in taking entry of long term capital and his statement u/s 132 (4) and statement in post search proceedings was obtained under pressure and duress in mental disturbed condition to which assessee admitted just to buy peace and avoid litigation even though when all the necessary and proper documents in support of transaction(s) of LTCG were available and transaction was properly done in accordance with law and through banking channel. The CBDT vide instruction No. F.

286/2/2003 - IT Inv. Dated March 10, 2003 issued instructions reiterating 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 and no attempt should be made to obtain confession as to the undisclosed income as this does not serve any useful purpose since such confessions, if not based upon credible evidence, are later retracted by the concerned assesses while

filing returns of income.

5.12. It is settled law that the assessee has right to retract the statement given if it remains unproved from any cogent material and is rather not supported with corroborative material and evidences. Where there is a specific ground taken for retracting a statement, that it was made under pressure, such a statement cannot be the sole basis, unless corroborated. Gajjam Chand Yellappa v I.T.O. (2015) 370 ITR 671 (T&AP).In the case of CTI v Naresh Kumar Agarwal (2014) 369 ITR 171 (T&AP) it was held that, where the assessee retracts the statement admitting undisclosed income on the plea that it was recorded under threat or coercion, with no evidence to support the admitted income, the burden of proof is on the Assessing officer to establish his conclusion. A statement which is not substantiated cannot be taken as binding on the assessee. CIT v Balasubramanian (P) (2013) 354 ITR 116 (Mad.). Therefore reliance made by A.O. on such statement is uncalled for.

5.13. The assessee has furnished all the evidences in support of its claim showing the investment in the shares and purchases of the shares has been accepted by the A.O. in the year of its acquisition and thereafter, until the same were sold. It is submitted that the assessee has shown the shares in the balance sheet as on 31.03.2010 which were not doubted by the A.O. and only when the same were sold, the Assessing officer has raised the suspicion of genuineness of the transactions.

The assessee is investing in the shares as can be seen from the various shares appearing in his balance sheet and in the Demat account. The transactions of purchase and sale are all through account payee cheque and the same is reflected in the Demat account. The sale of shares suffered STT, brokerages, etc. and therefore eligible for exemption u/s 10 (38) of the Income Tax Act. The reliance is also placed upon the decision of Hon'ble jurisdiction High Court in case of CIT vs. Smt. Pooja Agarwal in DBIT appeal No. 385/2011 dated 11.09.2017 as well as decision of Hon'ble Madras High Court dated 11.08.2017 in case of M/s Lalitha Jewellery Mart P. Ltd. vs. DCIT.

5.14. Therefore, when the Assessing officer has not brought any material on record to show that the assessee has paid over and above the purchase consideration as claimed and evident from the bank account then, in the absence of any evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. The Hon'ble Jurisdiction High Court in case of CIT vs. Smt. Pooja Agarwal (supra) has upheld the finding of the Tribunal on this issue in para 12 as under: -

> "12. However, counsel for the respondent has taken us to the order of CIT (A) and also to the order of Tribunal and contended that in view of the finding reached, which was done through Stock Exchange and taking into consideration the revenue transactions, the addition made was deleted by the Tribunal observing as under: -
>
> "Contention of the AR is considered. One of the main reasons for not accepting the genuineness of the transactions declared by the appellant that at the time of survey the appellant in his statement denied having made any transactions in shares. However, subsequently the facts came on record that the appellant had transacted not only in the shares which are disputed but shares of various other companies like

> Satyam Computers, HCL, IPCL, BPCL and Tata Tea etc. Regarding the transactions in question various details like copy of contract note regarding purchase and sale of shares of Limtex and Konark Commerce & Ind. Ltd., assessee's account with P. K. Agarwal & Co. share broker, company's master details from registrar of companies, Kolkata were filed.

Copy of depository a/c or demat account with ALankrit Assignment Ltd., a subsidiary of NSDL was also filed which shows that the transactions were made through demat A/c. When the relevant documents are available the fact of transactions entered into cannot be denied simply on the ground that in his statement the appellant denied having made any transactions in shares. The payments and receipts are made through a/c payee cheques and the transactions are routed through Kolkata Stock Exchange. There is no evidence that the cash has gone back in appellant's account. Prima facie the transaction which are supported by documents appear to be genuine transactions. The A.O. has discussed modus operandi in some sham transactions which were detected in the search case of B.c. Purohit Group. The A.O. has also stated in the assessment order itself while discussing the modus operandi that accommodation entries of long term capital gain were purchased as long term capital gain either was exempted from tax or wastaxable at a lower rate. As the appellant's case is of short term capital gain, it does not exactly fall under that category of accommodation transactions. Further as per the report of DCIT, Central Circle-3 Sh. P.K. Agarwal was found to be an entry provider as stated by Sh. Pawan Purohit of B.C. Purohit and Co. group. The AR made submission before the A.O.

that the fact was not correct as in the statement of Sh.

Pawan Purohit there is no mention of Sh. P.K. Agarwal.

It was also submitted that there was no mention of Sh.

P. K. Agarwal in the order of Settlement Commission in the case of Sh. Sushil Kumar Purohit. Copy of the order of settlement commission was submitted. The A.O. has failed to counter the objections raised by the appellant during the assessment proceedings. Simply mentioning that these findings are in the appraisal report and appraisal report is made by the Investing Wing after considering all the material facts available on record does not help much. The A.O. has failed to prove through any independent inquiry or relying on some material that the transactions made by the appellant through share broker P.K. Agarwal were non-genuine or there was any adverse mention about the transaction in question in statement of Sh. Pawan Purohit. Simply because in the sham transactions bank a/c were opened with HDFC bank and the appellant has also received short term capital gain in his account with HDFC bank does not establish the transactions made by the appellant were non genuine. Considering all these facts the share transactions made through Shri P.K. Agarwal cannot be held as non-genuine. Consequently denying the claim of short term capital gain made by he appellant before the A.O. is not approved. The A.O. is therefore, directed to accept claim of short term capital gain as shown by the appellant."

5.15. The Hon'ble Jurisdictional High Court of Rajasthan and Hon'ble ITAT, Jaipur have given judgment in the case of PCIT Vs. Pramod Kumar Jain & Others (DB Appeal No. 209/2018 dated 24-07-2018 (Raj) which are directly on the issue. In this case the Hon'ble ITAT after relying on the decision of Hon'ble Rajasthan High Court in case of CIT Vs Smt. Pooja Agarwal and various other decisions deleted the addition made by the AO by holding as under:-

> " In view of the above facts and circumstances of the case , we are of the considered opinion that the addition made by the AO is based on mere suspicion and surmises without any cogent material to show that the assessee has brought back his unaccounted income in the shape of long term capital gain. On the other hand, the assessee has brought back all the relevant material to substantiate its claim that transactions of the purchase and sale of shares are genuine. Even otherwise the holding of the shares by the assessee at the time of allotment subsequent to the amalgamation/merger is not in doubt, therefore, the transaction cannot be held as bogus. Accordingly, we delete the addition made by the AO on this account. "

The Delhi High Court of Delhi in a very recent decision of PCIT Vs Smt. Krishna Devi (ITA No. 125/2020 Dated 15-01-2021) held that:-

> "On a perusal of the record, it is easily discernible that in the instant case, the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites, the AO observes that the quantum leap in the share price is not justified; the trade pattern of the aforesaid company did not move along with the Sensex; and the financials of the company did not show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an agreement to convert unaccounted money by claiming fictitious LTCG, which is exempt under Section 10(38), in a pre-planned manner to evade taxes. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income Tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of https://itatonline.org ITA 125/2020 and connected matters Page 8 of 10 providing entries of bogus LTCG.

However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued under Sections 133(6)/131 of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh.

Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from de-mat account and the consideration has been received through banking channels." The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the Page 9 of 10 ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material that could support the case put forth by the Appellant, the additions cannot be sustained.

12. Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent. With regard to the claim that observations made by the CIT(A) were in conflict with the Impugned Order, we may only note that the said observations are general in nature and later in the order, the CIT(A) itself notes that the broker did not respond to the notices. Be that as it may, the CIT(A) has only approved the order of the AO, following the same reasoning, and relying upon the report of the Investigation Wing. Lastly, reliance placed by the Revenue on Suman Poddar v. ITO (supra) and Sumati Dayal v. CIT (supra) is of no assistance. Upon examining the judgment of Suman Poddar (supra) at length, we find that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. On such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the factual matrix at hand. Similarly, the case of SumatiDayal v. CIT (supra) too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue.

13. The learned ITAT, being the last fact-finding authority, on the basis of the evidence brought on record, has rightly come to the conclusion that the lower tax authorities are not able to sustain the addition without any cogent material on record. We thus find no perversity in the Impugned Order.

The ld. A/R also placed reliance on the following judgments on the issue.

1. The jurisdiction High Court in case of CIT Vs. Sumitra Devi (2014) 49 taxmann.com 37 (Raj.) held that since the A.O. had failed to show that material documents placed on record by assessee like brokers note, contract not, relevant extract of cash book, copies of share certificates, demat statements etc. were false, fabricated or fictitious, transaction of purchase and sale of shares could not be treated as non-genuine.

2. The decisions of the Hon'bleCalcutta High Court in the case of CIT - Vs Carbo Industrial Holdigns Ltd. (244 ITR 422) and CIT - Vs - Emerald Commercial Ltd. (250 ITR 549) are relevant to the issue where the Hon'ble High Court has held that where the payments are made by Account Payee Cheques and the existence of the brokers is not disputed share transactions cannot be held to be bogus.

3. Findings in Bhagwati Prasad Agarwal - Exchange shows that the name of the assessee is not appearing in respect of the transactions-in- question. The tribunal found that the chain of transaction entered into by the assessee have been proved, accounted for, documented and supported by evidence. The assessee produced before the Commissioner of Income Tax (Appeal) the contract notes, details of his DEMAT account and, also, produced documents showing that all payments were received by the assessee through bank. We do not, therefore, think that this appeal involves any substantial question of law requiring interference by this court under section 260A of the Income Tax Act, 1961. The appeal is, therefore, summarily dismissed.

4. Hon'ble Kolkata ITAT in the case of Dolarrai Hemani vs. I.T.O. (I.T.A. No. 19/Kol/2014) (A.Y. 2005-06) (Dt. of pronouncement 02.12.2016) wherein it has been stated that -

"We find that the similar issue had been adjudicated by the co- ordinate bench of this tribunal in the case of DCIT vs Sunita Khemka in ITA Nos. 714 to 718/Kol/2011 dated 28.10.2015 and in the case of I.T.O. vs Rajkumar Agarwal in ITA No. 1330 (Kol) of 2007 dated 10.8.2007 wherein it was held that when purchase and sale of shares were supported by proper contract notes, deliveries of shares were received through demat accounts maintained with various agencies, the shares were purchased and sold through recognized broker and the sale considerations were received by account payee cheques, the transactions cannot be treated as bogus and the income so disclosed was assessable as LTCG.We find that in the instant case, the addition has been made only on the basis of the suspicion that the difference in purchase and sale price of these shares is unusually high. The revenue had not brought any material on record to support its finding that there has been collusion / connivance between the broker and the assessee for the introduction of its unaccounted money."

5. Roshan Raja (ITAT Mumbai) 2016 TaxPub (DT) 2777 (Mum Trib) Held: Where assessee claimed the income from long term capital gain on sale of listed equity shares and subject to STT as exempt under section 10 (38), no adverse finding had been rendered in respect of the direct material evidence placed on record in respect of its transactions. The addition under section 68 was not justified and therefore, A.O. was directed to accept the LTCG income shown as exempt under section 10 (38).

6. In the case of Pavillion Commercial Pvt. Limited Vs. I.T.O. Ward 5(2)/Kolkata ITA No. 935/Kol/2012 date of pronouncement 12/08/2016 held that we find that the transactions were complete in terms of documentation and there was no defect in the papers submitted by the assessee in support of the transactions. We also find that there wre entries for the sale purchase of the shares in the bank statements, contract notes, demat account of the assessee. In our considered view we find that the assessee has proved the transaction on the basis of documents and therefore the suspension of the broker by SEBI will not hold the transaction invalid.

7. I.T.O. vs. Indravadan Jain (HUF) (ITAT Mumbai) - 27/05/2016 Held: merely because the investigation was done by SEBI against broker or his activity, assessee cannot be said to have entered into ingenuine transaction, in so far as assessee is not concerned with the activity of the broker and have no control over the same.

8. The Hon'ble jurisdiction ITAT, Jaipur Bench, Jaipur in case of Pramod Jain Vs. DCIT and others vide order dated 31-01-2018 (ITA No. 368 - 372/JP/2017) upheld the same legal view and deleted the addition u/s 68 by treating it as unexplained credit by holding LTCG exempt u/s 10 (38) claimed by assessee as bogus by holding "In view of the above facts and circumstances of the case, we are of the considered opinion that the addition made by the A.O. is based on mere suspicion and surmises without any cogent material to show that the assessee has brought back his unaccounted income in the shape of long term capital gain. On the other hand, the assessee has brought all the relevant material to substantiate its claim that transactions of the purchase and sale of shares are genuine. Even otherwise the holding of the shares by the assessee at the time of allotment is not in doubt, therefore, the transaction cannot be held as bogus. Accordingly we delete the addition made by the A.O. on this account."

9. Hon'ble Kolkata ITAT in the case of Vipul Patel Vs. ITO-Ward 45(4), vide order dated 07-08-2019 held that:-

Assessee had purchased 1,10,000 equity shares of company KAFL from SEPL - Later on, 96,001 shares were sold by assessee which resulted in long term capital gain (LTCG) which was claimed as exempt under section 10(38) - Assessing Officer received a report from Investigation Wing stating that bogus long term capital gain transactions were provided to several clients - On basis of same, he alleged that transactions in scrip of KAFL were manipulated by entry operators and share prices were hiked artificially to earn LTCG, thus, he treated said LTCG as bogus under section 68 and, accordingly, made additions to income of assessee - It was noted that assessee had paid amount to SEPL for purchase of shares through account payee cheque - Purchase bill and copy of bank statement showing payments made for purchase of shares were available on record - Further, assessee had sold shares in recognized stock exchange through a registered share and stock broker and received sale consideration by account payee cheque - Copies of contract notes in respect of sale of shares, copy of bank statements showing receipts against sale of shares were also available on record - Whether once assessee produced all relevant evidence to substantiate transaction of purchase, dematerialization and sale of shares, same could not be held as bogus LTCG transactions merely on basis of report of Investigation Wing, wherein there was a general statement of providing bogus long term capital gain transactions to clients without stating anything specifically about

transaction of purchase and sale of shares by assessee - Held, yes [Paras 8 and 10] [In favour of assessee]

10. Hon'ble Delhi ITAT in the case of Smt. Karuna Garg Vs ITO- 39(4), Delhi held that where assessee declared long term capital gain on sale of shares but Assessing Officer made section 68 addition in hands of assessee on basis of investigation wing report that assessee was beneficiary of accommodation entries, without conducting separate and independent enquiry, since shares were dematerialized and sales had been routed from de-mat account and consideration had been received through banking channels, assessee had successfully discharged onus cast upon him by provisions of section 68.

11. The Hon'ble jurisdiction ITAT, Jaipur Bench, Jaipur in case of Meghraj Singh Shekhawat Vs DCIT 443 & 444/JP/2017 dated 07-03-2018 "Brief facts are that the assessee is an individual and engaged in the business of retail sale of IMFL/Beer. During the assessment proceeding the AO noted that the assessee has shown long term capital gain of Rs. 1,32,56,113/- which is claimed as exempt u/s 10(38) of the Act on saleof shares of M/s Rutron International Ltd. The AO received information from Investigation Wing, Kolkata that during the search conducted u/s 132 of the Act on 12.04.2015 at the business premises of one Shri Anil Agarwal Group it was found that Shri Anil Agarwal isone of the promoters of M/s Rutron International Ltd. The shares were sold by the assessee from his D-mat account through the broker M/s Anand Rathi Share and Stock Brokers Ltd. and therefore, the assessee denied any involvement of availing the bogus of long term capital gain. Consequently the AO made an addition of Rs. 1,32,56,113/- to the total income of the assessee u/s 68 of the Act. The ld. AR has submitted that the assessee was allotted 3,50,000/- equity shares by M/s Rutron International Ltd. on 01.03.2012 vide allotment letter dated 08.03.2012. The shares were allotted by the company at face value of Rs. 10/- each without charging any premium under preferential issue. The assessee paid the purchase consideration/ share application money vide cheque on 29.02.2012 the payment made by the assessee is duly reflected in the back statement of the assessee. The shares were dematerialized on 18.06.2012 and thereafter the shares were sold from 13.03.2013 onwards on various dates through M/s Anand Rathi Shares & Stock Brokers Ltd. The assessee has produced all the relevant evidence to show the allotment of shares, payment of consideration through cheque at the time of allotment of shares dematerialization ofthe shares and thereafter, sale of shares from the D-mat account. The Assessing Officer has not produced any material or record to controvert the evidence produce by the assessee.Considering all these facts the Hon'ble ITAT held that the order of the Assessing officer treating the long term capital gains bogus and consequential addition made to the total income of the assessee is not sustainable & deleted the same."

12. The Hon'ble jurisdiction ITAT, Jaipur Bench, Jaipur in case of Vivek Agarwal Vs ITO (2017) 292/JP/2017 dated 06-04-2018.

"The brief facts of the case are that the assessee is an individual & has claimed exempt income of Rs. 4,78,38,157/- under the head Long Term Capital Gains on account of shares. The AO while passing the assessment order under section 143(3) has held that the long term capital gains claimed by the assessee is bogus as the assessee has arranged the accommodation entries from the persons who are engaged in providing bogus accommodation entries of capital gains. The Hon'ble ITAT held that the

facts of the present case acquiring of shares M/s. Paridhi Properties Ltd. under private placement directly from the company and Subsequently on merger of the said company with M/s. Luminaire Technologies Ltd. The shares of the new entity were allotted to the assessee which were duly dematerialized and then sold from the Demat account are identical to the case of Shri Pramod Jain & Others vs. DCIT & others. In view of the finding of the Coordinate Bench on the identical issue it was found that when the payment of purchase consideration paid through cheque directly to the company and the subsequent merger of the company as per the scheme of merger approved by the High Court, then the transaction and sale of shares in question cannot be held as bogus. The AO has passed the impugned order on the basis of the statement of Shri Deepak Patwari which is identical as in the case of Shri Pramod Jain & others vs. DCIT. Accordingly following the order of the Coordinate Bench of this Tribunal, we hold that the addition made by the AO is merely based on suspicion and surmises without any cogent material to controvert the evidence filed by the assessee in support the claim. Further, the AO has also failed to establish that the assessee has brought back his unaccounted income in the shape of long term capital gain. Hence we delete the addition made by the AO on this account."

5.16. The ld. A/R also placed reliance on recent order of the Chandigarh Bench of the Tribunal passed in ITA Nos. 708, 710, 711, 714, 716, 717/Chd/2018 for the assessment years 2011-12, 13-14 and 2014-15, ITA Nos. 718 & 719/Chd/2018 for the A.Y. 2013-14 and 14-15 and ITA No. 705/Chd/2018 dated 20.09.2021 wherein after taking into consideration and discussing various case laws in respect of LTCG, upheld the order of the ld. CIT (A) and deleted the additions made by the AO.

5.17. The ld. A/R submitted that in view of above facts and position of law, the Ld.

A.O. is wrong in holding that alleged unaccounted income of Rs. 2,83,12,308/-

routed back to assessee during the year under consideration, camouflaged as long term capital gain which has been proved a bogus entry and thereby making an addition of Rs. 2,83,12,308/- u/s 68 in the assessment order. The same deserves to be deleted. In view of the order of CIT (A) which is correct on facts of the case and in law and accordingly the ground(s) of appeal raised by department has no merit and deserves to be dismissed.

6. In respect of Ground No. 2, the ld. A/R submitted that the addition of Rs.

2,83,123/- made u/s 69C for alleged commission is wrong in law. The addition u/s 69C of the Act can be made if expenditure is actually incurred and evidence of incurring such expenditure is available on record. No addition u/s 69C can be made notionally alleging expenses would have been made. There is no material or evidence of paying any commission by assessee nor there is any evidence to whom the same was paid and hence addition made u/s 69C is wrong and bad in law. The assessee contends that LTCG earned is a genuine transaction and brokerage paid to Share Broker for the transactions are recorded. The addition is thus wrong and deserves to be deleted.

7. We have heard and considered the rival submissions as well as the relevant material on record. After the search and seizure action under section 132 of the IT Act, 1961 carried out on 07.01.2016 in the case of Dilip Manihar Group in which the assessee was also covered, the AO issued notice under section 153A of the IT Act on 23.08.2016 requiring the assessee to file return of income. In response the assessee filed the return of income on 03.09.2016 declaring total income of Rs.

14,85,740/- as originally returned. In the assessment proceedings, the main issue considered by the AO is only regarding the Long Term Capital Gain declared by the assessee in the original return of income filed under section 139(1) of the IT Act on 12.01.2012 as well as the return of income filed in response to notice under section 153A and claimed the same as exempt under section 10(38) of the IT Act which was questioned by the AO on its genuineness and proposed to treat the same as bogus accommodation entries availed by the assessee. The only basis of questioning the genuineness and treatment of the said amount as accommodation entries is the statement of the assessee recorded under section 132(4) as well as reconfirmed by the assessee under section 131 of the IT Act by the Investigation Wing of the Department, during the search and seizure action and post search enquiry. It is pertinent to note that during the course of search and seizure action except the statements of the assessee recorded under section 132(4), no other material much less the incriminating material was either found by the department or revealed by the assessee. The transactions of purchase of shares are duly recorded in the books of account and also disclosed in the return of income filed under section 139(1) of the IT Act prior to the search and seizure action. Further the assessment for the assessment year under appeal was not pending as on the date of search. Hence the assessment for the assessment year was obtained by virtue of search. We note that neither in the post search enquiry nor in the assessment proceedings the AO has confronted those statements recorded by the Department to the assessee though the statement of the assessee was recorded by the AO under section 131 of the IT Act on 31.03.2015. It is clear and manifest from the assessment record that the statements of other person relied upon by the AO to support his finding were recorded at the back of the assessee and the same were not contronted to the assessee in the course of assessment proceedings even at the time of recording the statement of the assessee under section 131 of the IT Act. Thus we find that the assessment framed by the AO for this assessment year is solely based on the statement of the assessee recorded under section 132(4), confirmed under section 131 of the IT Act and the statement recorded by the Kolkata Investigation Wing of the Department of third party. Though the AO has made reference to the financial status of these companies as well as share price movement over the period, however, these shares were purchased and sold by the assessee on on-line through recognized stock exchange and due STT etc. were paid on purchases and sales of the shares. Thus the said shares are listed in the Stock Exchange and the share prices of these shares are available in the public domain and particularly at the record of the Stock Exchange. Thus nothing has been detected or found by the AO by conducting any enquiry but these facts are matter of record available in the public domain. Therefore, except the statements as referred by the AO, there is no other material or incriminating material either found during the search or received by the AO even at the time of assessment proceedings. Hence the assessment framed for the assessment year 2011-12 which was not pending at the time of search is falling in the category of reassessment. Therefore, the AO cannot make any addition in the absence of any incriminating material found during the course of search while completing the assessment under section 153A of the IT Act except to reiterate or re-assert the assessment already completed. The

Hon'ble Jurisdictional High Court in case of Jai Steel (India) vs. ACIT (supra) while considering an identical issue has held in para 15 to 20 as under :-

> "15. A plain reading of the above provision would reveal that if a search or requisition is initiated after 31.05.2003, the AO is under an obligation to issue notice to such person, who has been subjected to search/requisition to furnish the return of income of six years immediately preceding the year of search. The AO is then required to assess or reassess total income of the said six years and, out of the six years, if any assessment or reassessment is pending on the date of initiation of the search, the same would abate i.e. pending proceedings qua the said assessment year shall not proceed thereafter and the assessment has to be made under Section 153A(1)(b) of the Act read with the first proviso thereunder.
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> 16. Further provisions have been made contemplating a situation where an assessment made under sub-section (1) is annulled in appeal or other legal proceedings. The Section starts with a non obstante clause, which removes the restrictions upon the AO from assuming jurisdiction to reopen the assessment under Sections 147, 148 and 151 etc.
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> 17. Prior to introduction of Sections 153A to 153C, Chapter XIVB of the Act took care of the assessments to be made in cases of search and seizure, which were called 'block assessment', whereby, a single assessment was required to be in respect of a period of block of ten years prior to the assessment year, in which, the search was made. After the introduction of Sections 153A to 153C, a single block assessment concept has been given a go bye and now the AO has been given the power to assess or reassess the 'total income' of the six years in question in separate assessment orders.
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> 18. To consider the rival submissions made at the Bar in the context of the present case and the substantial question of law framed, the scope of 'assessment and reassessment of total income' under Section 153A(1)(b) and the first and second proviso have to be considered. Further, for answering the above issues, guidance will have to be sought from Section 132(1) of the Act, as Section 153A of the Act cannot be read in isolation, inasmuch as, the same is triggered only on account of any search/requisition under Sections 132 or 132A of the Act. If any books of account or other documents relevant to the assessment had not been produced in the course of original assessment and, found in the course of search, such books of account or other documents have to be taken into consideration while assessing or reassessing the total income under the provisions of Section 153A of the Act. Even in a case where undisclosed income or undisclosed property has been found as a consequence of the search, the same would also be taken into consideration. The requirement of assessment or reassessment under the said section has to be read in the context of Sections 132 or 132A of the Act, inasmuch as, in case nothing incriminating is found on account of such search or requisition, then the question of reassessment of the concluded assessments does not arise, which would require more reiteration and it is

only in the context of the abated assessment under second proviso which is required to be assessed.

19. The underline purpose of making assessment of total income under Section 153A of the Act is, therefore, to assess income which was not disclosed or would not have been disclosed. The purpose of second proviso is also very clear, inasmuch as, once a assessment or reassessment is 'pending' on the date of initiation of search or requisition and in terms of Section 153A a return is filed and the AO is required to assess the same, there cannot be two assessment orders determining the total income of the assessee for the said assessment year and, therefore, the proviso provides for abatement of such pending assessment and reassessment proceedings and it is only the assessment made under Section 153A of the Act would be the assessment for the said year.

20. The necessary corollary of the above second proviso is that the assessment or reassessment proceedings, which have already been 'completed' and assessment orders have been passed determining the assessee's total income and, such orders are subsisting at the time when the search or the requisition is made, there is no question of any abatement since no proceedings are pending. In such cases, where the assessments already stands completed, the AO can reopen the assessments or reassessments already made without following the provisions of Sections 147, 148 and 151 of the Act and determine the total income of the assessee."

Thus the Hon'ble Jurisdictional High Court has held that the reassessment of total income of the completed assessment have to be made taking note of undisclosed income, if any, unearthed during the search and income that escaped assessment are required to be clubbed together with the total income determined in the original assessment and assessed as total income. The determination of undisclosed income under Chapter XIVB has to be read in the context of second proviso only which deals with pending assessment/reassessment proceedings. The necessary corollary of second proviso is that the assessment or reassessment proceedings which have already been completed and assessment orders have been passed determining the assessee's total income and such orders are subsisting at the time when search or requisition is made, there is no question of any abatement since no proceedings are pending. In such cases where the assessment already stands completed, the AO cannot reopen the assessment or reassessment already made without following the provisions of section 147, 148 and 151 of the IT Act determining the total income of the assessee. Hence it is held that in the proceedings under section 153A in as much as in case nothing incriminating is found on account of search or requisition, then the question of reassessment of concluded assessment does not arise which require more reiteration and it is only in the context of abated assessment under second proviso which is required to be assessed. Following this judgment of the Hon'ble Jurisdictional High Court, the Hon'ble Delhi High Court in case of CIT vs. Kabul Chawla, 380 ITR 573 (Del.) has held that in the absence of any incriminating material the completed assessment can be reiterated and the abated assessment or reassessment can be made. There are series of decisions on this point wherein this view as taken by the Hon'ble Jurisdictional High Court in case of M/s. Jai Steel (India) vs. ACIT (Supra) is reiterated and reaffirmed. Without multiplying the precedents to

avoid the over-burdening of this order, we may refer the decision of Coordinate Bench of this Tribunal in case of Kota Dall Mills vs. DCIT (supra) wherein this Tribunal has dealt with this issue exhaustively in para 6 as under :-

> " 6. We have considered the rival submissions as well as the relevant material on record. Undisputedly, the assessments for the assessment years 2010-11 to 13-14 were not pending on the date of search on 2nd July, 2015. Even in some of the assessment years orders under section 143(3) were passed and in other cases the assessment was completed under section 143(1) of the Act. Thus the assessments for the assessment years 2010-11 to 13-14 were not got abated by virtue of search under section 132 on 2nd July, 2015 and the AO would reassess the total income of the assessee as per the provisions of section 153A in respect of these four assessment years i.e. 2010-11 to 13-14. The proceedings under section 153A in respect of these four assessment years would be in the nature of reassessment and not in the nature of assessment as in the cases of the remaining two assessment years i.e. 2014-15 and 15-16 those were got abated by virtue of search and seizure action under section 132 of the Act on 2nd July, 2015. It is a settled proposition of law that the assessment or reassessment under section 153A in respect of the assessment years which have already been completed and assessment orders have been passed determining the assessee's total income, the addition to the income that has already been assessed can be made only on the basis of incriminating material. In the absence of any incriminating material the completed assessment can only be reiterated. The provisions of section 132 read with section 153A of the Act stipulate two types of situations - one where the assessment of any assessment year falling within six assessment years is pending on the date of initiation of search under section 132 or making of requisition under section 132A of the Act. Therefore, the assessment under section 153A in respect of those assessment years which stand abated due to the reason of pending on the date of initiation of search or requisition shall be the original/first assessment. In the second category where the assessment or reassessment has already been completed on the date of initiation of search or making of requisition as the case may be, the assessment under section 153A would be in the nature of reassessment. The Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla while analyzing the provisions of section 153A read with section 132 of the Act has observed in para 37 and 38 as under :-
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> "37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. Once a search takes place under Section 132 of the Act, notice under Section 153 A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place. ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

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

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

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

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

Conclusion

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

Thus the Hon'ble High Court has held that in the absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The Hon'ble High Court has also referred the term used in section 153A as "assess" which is relatable to abated proceedings and the word "reassess" related to completed assessment proceedings. Therefore, the completed assessments can be interfered with by the AO while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of document or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment. The Hon'ble Delhi High Court has reiterated its view in case of Principal CIT vs. Kurele Paper Mills (supra) in para 1 to 3 as under :-

"1. The Revenue has filed the appeal against an order dated 14.11.2014 passed by the Income Tax Appellate Tribunal (ITAT) in 3761/Del/2011 pertaining to the Assessment Year 2002-03. The question was whether the learned CIT (Appeals) had erred in law and on the facts in deleting the addition of Rs. 89 lacs made by the Assessing Officer under Section 68 of the Income Tax Act, 1961 ('ACT') on bogus share capital. But, the issue was whether there was any incriminating material whatsoever found during the search to justify initiation of proceedings under Section 153A of the Act.

2. The Court finds that the order of the CIT(Appeals) reveals that there is a factual finding that "no incriminating evidence related to share capital issued was found during the course of search as is manifest from the order of the AO." Consequently, it was held that the AO was not justified in invoking Section 68 of the Act for the purposes of making additions on account of share capital.

3. As far as the above facts are concerned, there is nothing shown to the court to persuade and hold that the above factual determination is perverse. Consequently, after considering all the facts and circumstances of the case, the Court is of the opinion that no substantial question of law arises in the impugned order of the ITAT which requires examination."

The SLP filed by the revenue against the said decision of Hon'ble Delhi High Court was dismissed by the Hon'ble Supreme Court vide order dated 7th December, 2015. In a subsequent decision, the Hon'ble Delhi High Court in the case of Principal CIT vs. Meeta Gutgutia has again analyzed this issue in para 55 to 71 as under :-

> "55. On the legal aspect of invocation of Section 153A in relation to AYs 2000-01 to 2003-04, the central plank of the Revenue's submission is the decision of this Court in Smt. Dayawanti Gupta (supra). Before beginning to examine the said decision, it is necessary to revisit the legal landscape in light of the elaborate arguments advanced by the Revenue.
>
> 56. Section 153A of the Act is titled "Assessment in case of search or requisition". It is connected to Section 132 which deals with 'search and seizure'. Both these provisions, therefore, have to be read together. Section 153A is indeed an extremely potent power which enables the Revenue to re- open at least six years of assessments earlier to the year of search. It is not to be exercised lightly. It is only if during the course of search under Section 132 incriminating material justifying the re-opening of the assessments for six previous years is found that the invocation of Section 153A qua each of the AYs would be justified.
>
> 57. The question whether unearthing of incriminating material relating to any one of the AYs could justify the re-opening of the assessment for all the earlier AYs was considered both in Anil Kumar Bhatia (supra) and Chetan Das Lachman Das (supra). Incidentally, both these decisions were discussed threadbare in the decision of this Court in Kabul Chawla(supra). As far as Anil Kumar Bhatia (supra) was concerned, the Court in paragraph 24 of that decision noted that "we are not concerned with a

case where no incriminating material was found during the search conducted under Section 132 of the Act. We therefore express no opinion as to whether Section 153A can be invoked even under such situation". That question was, therefore, left open. As far as Chetan Das Lachman Das (supra) is concerned, in para 11 of the decision it was observed:

"11. Section 153A (1) (b) provides for the assessment or reassessment of the total income of the six assessment years immediately preceding the assessment year relevant to the previous year in which the search took place. To repeat, there is no condition in this Section that additions should be strictly made on the basis of evidence found in the course of the search or other post-search material or Information available with the Assessing Officer which can be related to the evidence found. This, however, does not mean that the assessment under Section 153A can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

58. In Kabul Chawla (supra), the Court discussed the decision in Filatex India Ltd. (supra) as well as the above two decisions and observed as under: "31. What distinguishes the decisions both in CIT v. Chetan Das Lachman Das (supra), and Filatex India Ltd. v. CIT-IV (supra) in their application to the present case is that in both the said cases there was some material unearthed during the search, whereas in the present case there admittedly was none. Secondly, it is plain from a careful reading of the said two . decisions that they do not hold that additions can be validly made to income forming the subject matter of completed assessments prior to the search even if no incriminating material whatsoever was unearthed during the search.

32. Recently by its order dated 6th July 2015 in ITA No. 369 of 2015 (Pr. Commissioner of Income Tax v. Kurele Paper Mills P. Ltd.), this Court declined to frame a question of law in a case where, in the absence of any incriminating material being found during the search under Section 132 of the Act, the Revenue sought to justify initiation of proceedings under Section 153A of the Act and make an addition under Section 68 of the Act on bogus share capital gain. The order of the CIT (A), affirmed by the ITAT, deleting the addition, was not interfered with."

59. In Kabul Chawla (supra), the Court referred to the decision of the Rajasthan High Court in Jai Steel (India) v. Asstt. CIT [2013] 36 taxmann.com 523/219 Taxman 223. The said part of the decision in Kabul Chawla (supra) in paras 33 and 34 reads as under:

'33. The decision of the Rajasthan High Court in Jai Steel (India), Jodhpur v. ACIT (supra) involved a case where certain books of accounts and other documents that had not been produced in the course of original assessment were found in the course of search. It was held where undisclosed income or undisclosed property has been

found as a consequence of the search, the same would also be taken into consideration while computing the total income under Section 153A of the Act. The Court then explained as under:

"22. In the firm opinion of this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:

(a) the assessments or reassessments, which stand abated in terms of II proviso to Section 153A of the Act, the AO acts under his original jurisdiction, for which, assessments have to be made;

(b) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material; and

(c) in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made."

34. The argument of the Revenue that the AO was free to disturb income de hors the incriminating material while making assessment under Section 153A of the Act was specifically rejected by the Court on the ground that it was "not borne out from the scheme of the said provision" which was in the context of search and/or requisition. The Court also explained the purport of the words "assess" and "reassess", which have been found at more than one place in Section 153A of the Act as under:

"26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess'-have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word assess has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents.'"

60. In Kabul Chawla (supra), the Court also took note of the decision of the Bombay High Court in CIT v. Continental Warehousing Corpn (Nhava Sheva) Ltd. [2015] 58 taxmann.com 78/232 Taxman 270/374 ITR 645 (Bom.) which accepted the plea that if no incriminating material was found during the course of search in respect of an issue, then no additions in respect of any issue can be made to the assessment under Section 153A and 153C of the Act. The legal position was thereafter summarized in Kabul Chawla (supra) as under:

> "37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:
>
> i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

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

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

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

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

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

> 61. It appears that a number of High Courts have concurred with the decision of this Court in Kabul Chawla (supra) beginning with the Gujarat High Court in Saumya Construction (P.) Ltd. (supra). There, a search and seizure operation was carried out on 7th October, 2009 and an assessment came to be framed under Section 143(3)

read with Section 153A(1)(b) in determining the total income of the Assessee of Rs. 14.5 crores against declared income of Rs. 3.44 crores. The ITAT deleted the additions on the ground that it was not based on any incriminating material found during the course of the search in respect of AYs under consideration i.e., AY 2006-07. The Gujarat High Court referred to the decision in Kabul Chawla (supra), of the Rajasthan High Court in Jai Steel (India) (supra) and one earlier decision of the Gujarat High Court itself. It explained in para 15 and 16 as under:

'15. On a plain reading of section 153A of the Act, it is evident that the trigger point for exercise of powers thereunder is a search under section 132 or a requisition under section 132A of the Act. Once a search or requisition is made, a mandate is cast upon the Assessing Officer to issue notice under section 153A of the Act to the person, requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Since the assessment under section 153A of the Act is linked with search and requisition under sections 132 and 132A of the Act, it is evident that the object of the section is to bring to tax the undisclosed income which is found during the course of or pursuant to the search or requisition. However, instead of the earlier regime of block assessment whereby, it was only the undisclosed income of the block period that was assessed, section 153A of the Act seeks to assess the total income for the assessment year, which is clear from the first proviso thereto which provides that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso makes the intention of the Legislature clear as the same provides that assessment or reassessment, if any, relating to the six assessment years referred to in the sub-section pending on the date of initiation of search under section 132 or requisition under section 132A, as the case may be, shall abate. Sub-section (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso thereto says that such revival shall cease to have effect if such order of annulment is set aside. Thus, any proceeding of assessment or reassessment falling within the six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to be determined under section 153A of the Act. Similarly, sub-section (2) provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of the Act is annulled in appeal or any other proceeding.

16. Section 153A bears the heading "Assessment in case of search or requisition". It is "well settled as held by the Supreme Court in a catena of decisions that the heading or the Section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of section 153. the intention of the Legislature is clear, viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment In case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition, in other words, the assessment should connected With something round during the search or requisition viz., incriminating material which reveals

undisclosed income. Thus, while in view of the mandate of sub-section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition' or disallowance can be made only on the basis of material collected during the search or requisition, in case no incriminating material is found, as held by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT(supra), the earlier assessment would have to be reiterated, in case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns, if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In case where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the Assessing Officer could have passed under section 147 of the Act as well as under section 153A of the Act.

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19. On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of an the six assessment years. In the opinion of this court, the said contention does not merit acceptance, inasmuch as. the assessment in respect of each of the six assessment years is a separate and distinct assessment. Under section 153A of the Act, assessment has to be made in relation to the search or requisition, namely, in relation to material disclosed during the search or requisition. If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra). Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court In the case of CIT v. Jayaben Ratilal Sorathia (supra) wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years ; however, there must be some incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year.'

62. Subsequently, in Devangi alias Rupa (supra), another Bench of the Gujarat High Court reiterated the above legal position following its earlier decision in Saumya Construction (P.) Ltd. (supra) and of this Court in Kabul Chawla(supra). As far as Karnataka High Court is concerned, it has in IBC Knowledge Park (P.) Ltd. (supra) followed the decision of this Court in Kabul Chawla (supra) and held that there had to be incriminating material qua each of the AYs in which additions were sought to be made pursuant to search and seizure operation. The Calcutta High Court in Salasar Stock Broking Ltd. (supra), too, followed the decision of this Court in Kabul Chawla (supra). In Gurinder Singh Bawa(supra), the Bombay High Court held that:

> "6. . . . . once an assessment has attained finality for a particular year, i.e., it is not pending then the same cannot be subject to tax in proceedings under section 153A of the Act. This of course would not apply if incriminating materials are gathered in the course of search or during proceedings under section 153A of the Act which are contrary to and/or not disclosed during the regular assessment proceedings."

63. Even this Court has in Mahesh Kumar Gupta (supra) and Ram Avtar Verma (supra) followed the decision in Kabul Chawla (supra). The decision of this Court in Kurele Paper Mills (P.) Ltd. (supra) which was referred to in Kabul Chawla (supra) has been affirmed by the Supreme Court by the dismissal of the Revenue's SLP on 7th December, 2015.

The decision in Dayawanti Gupta

64. That brings us to the decision in Smt. Dayawanti Gupta (supra). As rightly pointed out by Mr. Kaushik, learned counsel appearing for the Respondent, that there are several distinguishing features in that case which makes its ratio inapplicable to the facts of the present case. In the first place, the Assessees there were engaged in the business of Pan Masala and Gutkha etc. The answers given to questions posed to the Assessee in the course of search and survey proceedings in that case bring out the points of distinction. In the first place, it was stated that the statement recorded was under Section 132(4) and not under Section 133A. It was a statement by the Assessee himself. In response to question no. 7 whether all the purchases made by the family firms, were entered in the regular books of account, the answer was:

> "We and our family firms namely M/s. Assam Supari Traders and M/s. Balaji Perfumes generally try to record the transactions made in respect of purchase, manufacturing and sales in our regular books of accounts but it is also fact that some time due to some factors like inability of accountant, our busy schedule and some family problems, various purchases and sales of Supari, Gutka and other items dealt by our firms is not entered and shown in the regular books of accounts maintained by our firms."

65. Therefore, there was a clear admission by the Assessees in Smt. Dayawanti Gupta (supra) there that they were not maintaining regular books of accounts and the transactions were not recorded therein.

66. Further, in answer to Question No. 11, the Assessee in Smt. Dayawanti Gupta (supra) was confronted with certain documents seized during the search. The answer was categorical and reads thus:

> "Ans:- I hereby admit that these papers also contend details of various transactions include purchase/sales/manufacturing trading of Gutkha, Supari made in cash outside Books of accounts and these are actually unaccounted transactions made by our two firms namely M/s. Asom Trading and M/s. Balaji Perfumes."

67. By contrast, there is no such statement in the present case which can be said to constitute an admission by the Assessee of a failure to record any transaction in the accounts of the Assessee for the AYs in question. On the contrary, the Assessee herein stated that, he is regularly maintaining the books of accounts. The disclosure made in the sum of Rs. 1.10 crores was only for the year of search and not for the earlier years. As already noticed, the books of accounts maintained by the Assessee in the present case have been accepted by the AO. In response to question No. 16 posed to Mr. Pawan Gadia, he stated that there was no possibility of manipulation of the accounts. In Smt. Dayawanti Gupta(supra), by contrast, there was a chart prepared confirming that there had been a year-wise non-recording of transactions. In Smt. Dayawanti Gupta (supra), on the basis of material recovered during search, the additions which were made for all the years whereas additions in the present case were made by the AO only for AY 2004-05 and not any of the other years. Even the additions made for AYs 2004-05 were subsequently deleted by the CIT (A), which order was affirmed by the ITAT. Even the Revenue has challenged only two of such deletions in ITA No. 306/2017.

68. In para 23 of the decision in Smt. Dayawanti Gupta (supra), it was observed as under:

> "23. This court is of opinion that the ITAT's findings do not reveal any fundamental error, calling for correction. The inferences drawn in respect of undeclared income were premised on the materials found as well as the statements recorded by the assessees. These additions therefore were not baseless. Given that the assessing authorities in such cases have to draw inferences, because of the nature of the materials - since they could be scanty (as one habitually concealing income or indulging in clandestine operations can hardly be expected to maintain meticulous books or records for long and in all probability be anxious to do away with such evidence at the shortest possibility) the element of guess work is to have some reasonable nexus with the statements recorded and documents seized. In tills case, the differences of opinion between the CIT (A) on the one hand and the AO and ITAT on the other cannot be the sole basis for disagreeing with what is essentially a factual surmise that is logical and plausible. These findings do not call for interference. The second question of law is answered again in favour of the revenue and against the assessee."

69. What weighed with the Court in the above decision was the "habitual concealing of income and indulging in clandestine operations" and that a person indulging in such activities "can hardly be accepted to maintain meticulous books or records for long." These factors are absent in the present case. There was no justification at all for the AO to proceed on surmises and estimates without there being any incriminating material qua the AY for which he sought to make additions of franchisee commission.

70. The above distinguishing factors in Smt. Dayawanti Gupta (supra), therefore, do not detract from the settled legal position in Kabul Chawla (supra) which has been followed not only by this Court in its subsequent decisions but also by several other High Courts.

71. For all of the aforementioned reasons, the Court is of the view that the ITAT was justified in holding that the invocation of Section 153A by the Revenue for the AYs 2000-01 to 2003-04 was without any legal basis as there was no incriminating material qua each of those AYs."

The Hon'ble Delhi High Court has concurred with the view as taken in case of Kabul Chawla (supra) as well as the decision of Hon'ble Jurisdictional High Court in the case of M/s. Jai Steel India Ltd. vs. ACIT (supra). Even on the issue of addition made by the AO in the proceedings under section 153A in respect of the assessment year which was already completed on the date of search, the Hon'ble High Court has held that in the absence of any material which was subsequently unearthed during the search and was not already available to the AO, the additions made by the AO on account of security deposits were rightly deleted by the ld. CIT (A). The relevant observations of the Hon'ble High Court in case of Principal CIT vs. Meeta Gutgutia (supra) are in para 53 as under :-

> "53. At this stage, it is also to be noticed that an elaborate argument was made by Mr. Manchanda on the aspect of the security deposits accepted by the Assessee. These were of two kinds - one was of refundable security deposits and the other for non-refundable security deposits. As far as the refundable security deposits were concerned, the AO himself in his remand report accepted them as having been disclosed. This has been noticed by the CIT (A) in para 7.2.1 of his order for AY 2004-05. As regards non-refundable security deposit, the CIT (A) accepted the AO's findings that treating the sum as 'goodwill written off on deferred basis' was not correct, hence the addition of Rs. 5,09,343 was held to be justified and correct. It was duly accounted for under 'liabilities' and transferred to income in a phased manner. This was not done by manipulating the account books of the Assessee as alleged by the Revenue. This would have been evident had the return been picked up for scrutiny under Section 143(3) of the Act. This, therefore, was not material which was subsequently unearthed during the search which was not already available to the AO. Consequently, the additions sought to be made by the AO on account of security deposits were rightly deleted by the CIT (A)."

Thus the essential corollary of these decisions is that no addition can be made in the proceedings under section 153A in respect of the assessments which were completed prior to the date of search except based on some incriminating material unearthed during the search which was not already available to the AO. It is pertinent to note that the SLP filed by the revenue against the decision of Hon'ble Delhi High Court in case of Principal CIT vs. Meeta Gutgutia was dismissed vide order dated 2nd July, 2018. There are series of decisions on this issue including the decision of Hon'ble Jurisdictional High Court in case of M/s. Jai Steel India vs. ACIT (supra) wherein the Hon'ble High Court has held in para 23 to 30 as under :-

"23. The reliance placed by the counsel for the appellant on the case of Anil Kumar Bhatia (supra) also does not help the case of the assessee. The relevant extract of the said judgment reads as under:--

> "19. Under the provisions of Section 153A, as we have already noticed, the Assessing Officer is bound to issue notice to the assessee to furnish returns for each assessment year falling within the six assessment years immediately preceding the assessment year relevant to the previous year in which the search or requisition was made. Another significant feature of this Section is that the Assessing Officer is empowered to assess or reassess the "total income" of the aforesaid years. This is a significant departure from the earlier block assessment scheme in which the block assessment roped in only the undisclosed income and the regular assessment proceedings were preserved, resulting in multiple assessments. Under Section 153A, however, the Assessing Officer has been given the power to assess or reassess the 'total income' of the six assessment years in question in separate assessment orders.

This means that there can be only one assessment order in respect of each of the six assessment years, in which both the disclosed and the undisclosed income would be brought to tax.

20. A question may arise as to how this is sought to be achieved where an assessment order had already been passed in respect of all or any of those six assessment years, either under Section 143(1)(a) or Section 143(3) of the Act. If such an order is already in existence, having obviously been passed prior to the initiation of the search/requisition, the Assessing Officer is empowered to reopen those proceedings and reassess the total income, taking note to the undisclosed income, if any, unearthed during the search. For this purpose, the fetters imposed upon the Assessing Officer by the strict procedure to assume jurisdiction to reopen the assessment under Sections 147 and 148, have been removed by the non obstante clause with which sub-section (1) of Section 153A opens. The time-limit within which the notice under Section 148 can be issued, as provided in Section 149 has also been made inapplicable by the non obstante clause. Section 151 which requires sanction to be obtained by the Assessing Officer by issue of notice to reopen the assessment under Section 148 has also been excluded in a case covered by Section 153A. The time-limit prescribed for completion of an assessment or reassessment by Section 153 has also been done away with in a case covered by Section 153A. With all the stops having been pulled out, the Assessing Officer under Section 153A has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters, if need be.

21. Now there can be cases where at the time when the search is initiated or requisition is made, the assessment or reassessment proceedings relating to any assessment year falling within the period of the six assessment years mentioned above, may be pending. In such a case, the second proviso to sub- section (1) of Section 153A says that such proceedings "shall abate". The reason is not far to seek. Under Section 153A, there is no room for multiple assessment orders in respect of any of the six assessment years under consideration. That is because the Assessing Officer has to determine not merely the undisclosed income of the assessee, but also the 'total income' of the assessee in whose case a search or requisition has been initiated. Obviously there cannot be several orders for the same assessment year determining the total income of the assessee. In order to ensure this state of affairs namely, that in respect of the six assessment years preceding the assessment year relevant to the year in which the search took place there is only one determination of the total income, it has been provided in the second proviso of sub-Section (1) of Section 153A that any proceedings for

assessment or reassessment of the assessee which are pending on the date of initiation of the search or making requisition "shall abate". Once those proceedings abate, the decks are cleared, for the Assessing Officer to pass assessment orders for each of those six years determining the total income of the assessee which would include both the income declared in the returns, if any, furnished by the assessee as well as the undisclosed income, if any, unearthed during the search or requisition. The position thus emerging is that the search is initiated or requisition is made, they will abate making way for the Assessing Officer to determine the total income of the assessee in which the undisclosed income would also be included, but in case where the assessment or reassessment proceedings have already been completed and assessment orders have been passed determining the assessee's total income and such orders subsisting at the time when the search or the requisition is made, there is no question of any abatement since no proceedings are pending. In this latter situation, the Assessing Officer will reopen the assessments or reassessments already made (without having the need to follow the strict provisions or complying with the strict conditions of Sections 147, 148 and 151) and determine the total income of the assessee. Such determination in the orders passed under Section 153A would be similar to the orders passed in any reassessment, where the total income determined in the original assessment order and the income that escaped assessment are clubbed together and assessed as the total income. In such a case, to reiterate, there is no question of any abatement of the earlier proceedings for the simple reason that no proceedings for assessment or reassessment were pending since they had already culminated in assessment or reassessment orders when the search was initiated or the requisition was made." (Emphasis supplied)

24. The said judgment also in no uncertain terms holds that the reassessment of the total income of the completed assessments have to be made taking note of the undisclosed income, if any, unearthed during the search and the income that escaped assessments are required to be clubbed together with the total income determined in the original assessment and assessed as the total income. The observations made in the judgment contrasting the provisions of determination of undisclosed income under Chapter XIVB with determination of total income under Sections 153A to 153C of the Act have to be read in the context of second proviso only, which deals with the pending assessment/reassessment proceedings. The further observations made in the context of de novo assessment proceedings also have to be read in context that irrespective of the fact whether any incriminating material is found during the course of search, the notice and consequential assessment under Section 153A have to be undertaken.

25. The argument of the learned counsel that the AO is also free to disturb income, expenditure or deduction de hors the incriminating material, while making assessment under Section 153A of the Act is also not borne out from the scheme of the said provision which as noticed above is essentially in context of search and/or requisition. The provisions of Sections 153A to 153C cannot be interpreted to be a further innings for the AO and/or assessee beyond provisions of Sections 139 (return of income), 139(5) (revised return of income), 147 (income escaping assessment) and 263 (revision of orders) of the Act.

26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section.

The words 'assess' or 'reassess' have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word 'assess' has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents.

27. The Allahabad High Court in Smt. Shaila Agarwal's (supra) has held as under:--

> "19. The second proviso to Section 153A of the Act, refers to abatement of the pending assessment or re-assessment proceedings. The word 'pending' does not operate any such interpretation, that wherever the appeal against such assessment or reassessment is pending, the same along with assessment or reassessment proceedings is liable to be abated. The principles of interpretation of taxing statutes do not permit the Court to interpret the Second Proviso to Section 153A in a manner that where the assessment or reassessment proceedings are complete, and the matter is pending in appeal in the Tribunal, the entire proceedings will abate.

20. There is another aspect to the matter, namely that the abatement of any proceedings has serious causes and effect in as much as the abatement of the proceedings, takes away all the consequences that arise thereafter. In the present case after deducting bogus gifts in the regular assessment proceedings, the proceedings for penalty were drawn under Section 271(1)(c) of the Act. The material found in the search may be a ground for notice and assessment under Section 153A of the Act but that would not efface or terminate all the consequence, which has arisen out of the regular assessment or reassessment resulting into the demand or proceedings of penalty." (Emphasis supplied) The said judgment which essentially deals with second proviso to Section 153A of the Act also supports the conclusion, which we have reached hereinbefore.

28. It has been observed by the Hon'ble Supreme Court in K.P. Varghese v. ITO [1981] 131 ITR 597/7 Taxman 13 that "it is well recognized rule of construction that a statutory provision must be so construed, if possible that absurdity and mischief may be avoided."

29. The argument of the counsel for the appellant if taken to its logical end would mean that even in cases where the appeal arising out of the completed assessment has been decided by the CIT(A), ITAT and the High Court, on a notice issued under Section 153A of the Act, the AO would have power to undo what has been concluded up to the High Court. Any interpretation which leads to such conclusion has to be repelled and/or avoided as held by the Hon'ble Supreme Court in the case of K.P. Varghese (supra).

30. Consequently, it is held that it is not open for the assessee to seek deduction or claim expenditure which has not been claimed in the original assessment, which assessment already stands completed, only because a assessment under Section 153A of the Act in pursuance of search or requisition is required to be made."

In the case in hand, the transactions of unsecured loans as well as introduction of capital by the partners were duly recorded in the books of account and available with the AO. Further, during the course of search under section 132 of the Act on 2nd July 2015 no material much less incriminating material was either found or seized to disclose any undisclosed income on account of unsecured loans or partners' capital received by the assessee firm. The AO has proposed to make the addition on account of unsecured loans and partners' capital under section 68 being unexplained cash credit solely on the basis of the information received from Investigation Wing Kolkata. It is pertinent to note that the said information was available with the AO prior to the search conducted under section 132 of the Act in case of the assessee on 2nd July, 2015. Therefore, even the sole basis of assessments framed under section 153A of the Act is the information received from Investigation Wing Kolkata and statement of one Shri Anand Sharma, who is stated to be an entry operator and managed various concerns/companies including M/s.Royal Crystal Dealers, one of the loan creditors of the assessee. Except the said statement and report of the Investigation Wing Kolkata, the AO has neither referred to or was having in possession of any material to indicate that the unsecured loans shown in the books of accounts as well as partners' capital received by the assessee are nothing but assessee's own unaccounted and undisclosed income routed back in the garb of unsecured loans and partners' capital. There is no dispute that these transactions of unsecured loans and partners' capital contribution are duly recorded in the books of accounts and disclosed in the return of income which were already completed as the assessments for these four assessment years were not pending on the date of search, therefore, it is manifest from the record that during the course of search and seizure under section 132 of the Act in the case of the assessee no material much less the incriminating material was unearthed or any undisclosed income which was not disclosed in the books of accounts was detected or found. The only incriminating material which was referred by the AO is pages 21 to 26 of Annexure AS-1 in respect of long term capital gain earned by Shri Rajendra Agarwal and his family members. The said long term capital gain was disclosed by Shri Rajendra Agarwal in his statement under section 132(4) and, therefore, it was surrendered and offered to tax by Shri Rajendra Agarwal and his family members in the year of search. The AO himself has not made any addition in the hand of the assessee on account of long term capital gain which was found during the course of search and seizure. Thus, except the material disclosing the long term capital gain in the hand of Shri Rajendra Agarwal, no other incriminating material either found or referred or is the basis of the addition made by the AO while framing the assessment under section 153A of the Act for the assessment years 2010-11 to 13-14. It is appropriate to refer relevant part of the assessment order in para 12 pages 48 to 50, para 19 page 83 and para 22 page 86 as under :-

" 12. Submissions made on behalf of the assessee firm have been duly considered. However, even the very elaborate and case laws loaded submissions of the assessee are totally off the mark. Against the self- speaking facts of the very nature of the activities of the so called partner's providing huge partner's capital in the most uninterested manner and providing huge unsecured loans without any collateral or other security, the emphasis of the assessee firm in its submissions has been on seeking protection under various judicial decisions even without having any fact coherence. The submissions made by the assessee are completely devoid of merit in the light of the following facts and circumstances;

a. The department has very sound basis to treat, the receipts of unsecured loan and partner's capital from the above mentioned companies as bogus and in genuine. The findings of this office and Investigation report of the Investigation Directorate Kolkata are not based on any presumption, assumption, guess or bare suspicion. Where the nature and source of a receipt, whether it be of money or other property, cannot be satisfactorily explained by the assessee, it is open for the revenue to hold that it is the income of the assessee and no further burden lies on the revenue to show that the income is from any particular source as enumerated the Hon'ble Supreme Court in the case of Roshan Di Hatti v. CIT (1977) 107 ITR 938 (SC) and Kale Khan Mohammad Hanif v. CIT (1963) 50 ITR 1 (SC).

Prima facie onus is always on the assessee to prove the cash credit entry found in the books of account of the assessee. In land mark cases like Kale Khan Mohammad Hanif v CIT (1963) 50 ITR 1 (SC), Roshan Di Hatti v CIT (1977) 107 ITR (SC) it has been held that the law is well settled that the onus of proving the source of a sum of money found to have been received by an assessee, is on him. Where the nature and source thereof cannot be explained satisfactorily, it is open to the revenue to hold that it is the income of the assessee and no further burden is on the revenue to show that the income is from any particular source. It may also be pointed out that the burden of proof is fluid for the purposes of Section 68. Once assessee has submitted basic documents relating to identity, genuineness of transaction and creditworthiness then AO must do some inquiry to call for more details to invoke Section 68.

b. The assessee firm has filed confirmation letters and this office has carried out further enquiry to examine the reality of the transactions. An enquiry was sent to the Investigation Directorate Kolkata and it has been established that these investor or lender Companies are controlled by the entry operators. The statements of various entry operators are sufficient evide4nces to show that the unsecured loan and partner's capital are assessee's own undisclosed income brought into the books of the assessee under the garb of unsecured loan and partner's capital. c. The department has carried out search over the assessee group and during the course of search action u/s 132 of the I.T. Act, 1961, the incriminating documents seized during search proceedings vide pg no. 21 to 26 of Annexure AS-1 of Party B-1, wherein the details of year-wise LTCG earned by Shri Rajendra Agrawal and his family members, is maintained, which during search action has been accepted to be bogus by all family members in their respective statements."

"19. In view of above facts of the case and in the light of above judicial decision, it is established that genuineness of the transaction has not been proved. Section 68 of the I.T. Act provides for charging to income tax on any sum credited in the books of the assessee maintained for any previous year if the assessee offers no explanation about the nature and source thereof or the explanation offered is not, in the opinion of the Assessing Officer, satisfactory. It places no duty upon the Assessing Officer to point to the source from which the money was received by the assessee. Where an assessee fails to prove satisfactorily the source and the nature of certain amount of credit during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipt are of an assessable nature. Thus, the assessee is unable to discharge its burden of proof by failing to establish lender's identity, forget the genuineness of transactions and creditworthiness of the lender. Hence, the unsecured loans and partner's capital shown to have been received from various Kolkata Based Companies and

other Companies remained unexplained. In the circumstances, I am left with no option than to tax the entire unexplained credits by way of partner's capital and Unsecured loans received from the persons mentioned in para 5 above as unexplained cash credits u/s 68 of the Income Tax Act, chargeable to tax as income of the assessee firm for the respective assessment years." " 22. After examination of the information and details placed on record and discussion with the assessee, the total income of the assessee is computed as under :-

Returned income as per ITR u/s 153A of the Act. Rs. 2,82,83,460/-

Additions | Unexplained cash credits u/s 68 of the Act in the form of unsecured loan and partner's capital Rs. 67,20,14,999/-

Assessed income Rs. 70,02,98,459/-

R/o Rs. 70,02,98,459/-

The total income of the assessee in the status of Firm for Assessment Year 2010-11 relevant to Previous Year 2009-10 is assessed at Rs. 70,02,98,459/- u/s 153A read with section 143(3) of I.T. Act, 1961. The form ITNS-150 showing calculation of tax and interest chargeable, if any, is attached herewith and forms a part of this Order. A notice of demand u/s 156 of the Act and challan for payment of tax, if payable, is hereby issued. Penalty notice u/s 274 rws 271(1)(c) is issued separately."

The entire finding of the AO is based on the information received from the Investigation Wing Kolkata and statement of Shri Anand Sharma. The ld. CIT (A) though has not disputed the legal proposition on this issue, however, the contention of the assessee was turned down merely on the ground that the SLPs filed by the revenue in the cases of Kabul Chawla (supra) and M/s. All Cargo Global Logistics (supra) etc. have been admitted for decision by the Hon'ble Supreme Court. The relevant part of the finding of the ld. CIT (A) in para 3.2.2 and 3.2.4 at pages 35 and 36 are as under :-

"3.2.2 As per the provisions of this section where a search is initiated u/s 132 of the Act, the A.O shall issue a notice requiring the person searched to furnish his return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made.

Once such returns are filed, the AO has to assess or reassess the total income of such six assessment years.(emphasis supplied by me). (The decisive words used in the provisions are to 'assessee or reassess the total income'). The A.O. is thus duty bound to determine the 'total income' of the assessee for such six assessment years and it is obvious that 'total income' refers to the sum total of income in respect of which a person is assessable. The total income therefore will cover not only the income emanating from declared sources or any material placed before the Assessing Officer

> but from all sources including the undisclosed ones, or based on the unplaced material before the AO.
>
> 3.2.3 The concept of 'assess or reassess' and 'shall abate' as contemplated u/s 153A is under hot judicial debate. I find that legally, this issue is very contentious in view of the divergent views of the various authorities. The appellant has tried to highlight most of them. However, it is equally pertinent to mention here that the Department has not accepted the decisions of Hon'ble Mumbai High Court in the case of M/s All Cargo Global Logistics as well as Continental Warehousing (Nhava Sheva) Ltd., and SLP has been filed before the Hon'ble Supreme Court. The Hon'ble Supreme Court has granted leave vide order dated 12.10.2015 as reported in 64 taxmann.com 34 (S.C.). Similarly, in the case of Kabul Chawla SLP has also been filed. 3.2.4 In view of SLPs admitted in case of Kabul Chawla, M/s All Cargo Global Logistics as well as Continental Warehousing (Nhava Sheva) Ltd., (supra), assessee's contention cannot be accepted. Moreover, in any case, the additions are to be adjudicated on merits as per relevant ground of appeal, the issue raised in this ground for present remains for academic discussion only. Accordingly, issue raised in ground no. 12 is dismissed."

The ld. A/R has drawn our attention to the recent decision of the Chandigarh Bench of the Tribunal passed in IT Appeal nos. 708, 710, 711, 714, 716, 717/Chd/2018 for the assessment years 2011-12, 13-14 and 2014-15, ITA Nos. 718 & 719/Chd/2018 for the A.Y. 2013-14 and 14-15 and ITA No. 705/Chd/2018 dated 20.09.2021 involving the similar issue as in the case of present assessee. We find support from the order of the Chandigarh Bench, wherein after taking into consideration and discussing various case laws, CBDT Circular bearing no. 286/2003 dated 10.03.2003 which has been further explained in the subsequent circulars in respect of disclosure of LTCG, upheld the order of the ld. CIT (A) and deleted the additions made by the AO.

7.1. Therefore, neither in the assessment order nor in the order of the ld. CIT (A) there is any mention or finding that the additions have been made by the AO on the basis of any incriminating material found during the course of search and seizure in the case of the assessee. The AO has solely relied upon the report of the Investigation Wing and statement of one Shri Anuj Agarwal recorded by the Investigation Wing during the survey under section 133A of the Act. Therefore, even if the information/report of the Investigation Wing Kolkata is considered as a relevant evidence, the same cannot be regarded as incriminating material unearthed during the course of search and seizure under section 132 of the IT Act in case of the assessee. The requirement for making the addition under section 153A in the assessment years where the assessment was not pending on the date of search and the proceedings are in the nature of reassessment is essentially the incriminating material disclosing undisclosed income which was not disclosed by the assessee. In the case in hand, the AO himself has not claimed any incriminating material found during the search and seizure in the case of the assessee. Accordingly, in the facts and circumstances of the case and in view of the binding precedents on this issue in which the SLP filed by the revenue was also dismissed by the Hon'ble Supreme Court, the additions made by the AO while passing the assessment order under section 153A for the assessment year 2010-11 are not sustainable and accordingly the same are liable to be deleted. We order accordingly.

Now on merits :

8. On merits of the addition made under section 68 of the IT Act, the AO made the addition of the entire amount of Rs. 2,83,12,308/- for the assessment year 2011-12 considering the statement of Shri Bitthal Das Parwal in the case of HUF, that LTCG of Rs. 2,83,12,308/- from sale of shares of Splash Media & Infra Ltd.

claimed as exempt u/s 10(38) by assessee is dubious share transaction meant to account for the undisclosed income in the garb of Long Term Capital Gain and assessed the said gain as 'undisclosed cash credit' u/s 68 of the IT Act. The AO further made an addition of Rs. 2,83,123/- under section 69C as undisclosed expenditure alleging that assessee would have paid commission @ 1% to broker for obtaining the accommodation entry of said LTCG. On appeal, the ld. CIT (A) has deleted the additions made by the AO on the ground that the AO was not having any documentary evidence or even statement of the persons who have allegedly provided the accommodation entries to the assessee through the other companies/concerns. Thus the revenue is aggrieved by the order of the ld. CIT (A) on the merits of the addition and filed these appeals.

9. The ld. CIT D/R relied on the order of the A.O. and reiterated his submissions as made herein above in para 3.

10. On the other hand the ld. A/R submitted that the assessee purchased and sold the shares of the listed companies through recognized Stock Exchange and paid the STT thereon. All the transactions are through banking channel and copies of purchase and sales, broker's note, STT paid evidence and bank account were filed by the assessee during the course of assessment proceedings. Thus the transaction of Long Term Capital Gain is fully verifiable from the documentary evidences.

Further, the Legislature has also made amendment in section 10(38) with effect from 01.04.2018 (A.Y. 2018-19) stating that long term capital gains from transfer of listed equity shares acquired on or after 01 October, 2004, would be exempt from tax under section 10(38) of the IT Act only if the Securities transaction Tax (STT) was paid at the time of acquisition of such shares.

10.1. Previously, to claim the exemption u/s 10 (38) only the requirement was the transaction of sale is undertaken on or after 01 October, 2004 and is chargeable to STT under Chapter VII of the Finance (No.2) Act, 2004. It means irrespective of manner of acquisition, the exemption u/s 10 (38) was allowed with only condition that the transaction of sale is undertaken on or after 01 October, 2004 and is chargeable to STT. However, department noticed that exemption provided under section 10(38) is being misused by certain persons for declaring their unaccounted income as exempt long-term capital gains by entering into sham transactions. Many judgements of various court were also pronounced in favour of assessee on account of long term capital gain on penny stocks.

10.2. With a view to prevent this abuse, the Government amended section 10 (38) to provide that exemption under this section for income arising on transfer of equity share acquired or on after 1st day of October, 2004 shall be available only if the acquisition of share is chargeable to STT under

Chapter VII of the Finance (No.2) Act, 2004. So, now to claim the exemption u/s 10 (38), it is also mandatory that the transaction of acquisition is carried through recognize stock exchange and STT should have been paid on such acquisition subject to notified transaction without STT listed in Notification No. 1789 (E) dated 05-06-2017.

10.3. In the case of assessee the STT was paid on the shares purchased and accordingly the capital gain on sale of shares sold during the year under consideration is exempt from tax u/s 10(38) of the I. T. Act, 1961 as claimed in ITR.

10.4. It is further submitted that when there is no allegation by Ld. A.O. that assessee ever approached any broker or entry operator for any bogus entry for long term capital gain or he has provided any entry to the assessee then, the Ld. A.O. is not justified on drawing adverse inference against the assessee on the basis of the price of the shares quoted in the stock exchange. The reliance is placed upon the decision of Hon'ble Supreme Court in case of Lalchand Bhagat Ambika Ram vs. CIT 37 ITR 288, CIT vs. East Coast Commercial Co. Ltd. (1967) 63 ITRand it is submitted that the Hon'ble Supreme Court has held that the suspicion or presumption howsoever strong it may appear to be to true needs to be corroborated by some evidence to establish a link that the assessee has brought back his unaccounted income in form of Long term capital gain. The reliance is also placed upon the decision of Mumbai Special Bench of this Tribunal in case of GTC Industries Vs. ACIT 164 ITD 1. These principals enunciated by the Apex Court/High Courts have been followed by various Tribunals. In this regard the notable cases are DN Kamani (HUF) v. Dy. CIT [1999] 70 ITD 77 (Pat.) (TM) Pooja Bhatt v. Asstt. CIT [2000] 73 ITD 205 (Mum.) and Aishwarya K. Rai v. Dy. CIT [2007] 104 ITD 166 (Mum.) (TM). Thus it is contended that in case of the assessee, there is no direct evidence brought on record by the A.O. to hold that the assessee introduced his own unaccounted money by way of bogus long term capital gain and also there is no evidence whatsoever on record that assessee paid cash to obtain LTCG.

10.5. It is submitted that the Ld. A.O. only on the basis of report of Investigation Wing of department at Kolkata is holding the transaction of sale of said shares Splash Media & Infra Ltd. as bogus and also on suspicion of high rise in price of shares in stock market on online trading. The speculation on part of the department is with the intent to implicate everyone who has ever traded in this company Splash Media & Infra Ltd. to their investigation. No details / statement were recorded which may reflect any wrong doing on the part of assessee and hence all the generalized report gathered is being extrapolated to all the share holders of this company without any corroborative material. The assessee is not a party reported in the alleged dubious dealings,if anyhe has no nexus with the company whose shares purchased nor with its directors or operators. he is not connected with the activity of Broker who handled transaction of sale of shares.Thus the assessee having invested in shares of said company which gave huge capital gain in a short period does not mean that the transaction is bogus as all the documents and evidences have been produced. So unless the assessing officer list out all traders, buyers sellers and their share brokers of the mentioned shares and further links them with the assessee or his share broker or the person who bought the shares he sold There is no evidence brought on record that cash has been deposited in the account of purchaser of shares before issue of cheque and they were also not examined by Ld. A.O. and truthfulness of documents also not examined/verified by A.O. Thus it cannot be held only

on suspicion or doubt that the transaction made by assessee were non-

genuine.

10.6. As regards to reports of SEBI and STT these are general reports about Stock Exchange and of shares transactions to a HUF person or persons. The Courts/Tribunals have held that orders passed by the SEBI have different objectives such as orderly conduct of share markets and investors protection. Such orders cannot be held conclusive as regards the genuineness of the transactions under the IT Law. In this regard, it may be noted that stock market operations are subject to different regulations and the interest of general public is protected by prohibiting the market intermediaries from indulging in unfair trade practices like rigging the price of a particular scrip in collaborated manner. It has also been held that such orders cannot be of any assistance to the cause of the Revenue. Thus such reports of SEBI or STT cannot be attributed to assessee without any material or evidence that assessee also followed the same modus operandi. Therefore, merely on the basis of SEBI orders, share transactions cannot be considered as ingenuine/sham and, therefore, the sale proceeds of such share transactions cannot be taxed under section 68 of the Act.

10.7. It is settled rule of law is that any malpractice, like that of selling by short measures (Hira Bai Vs. CIT 4 ITR 95) or charging price in excess of the controlled price (Sivan Vs. CIT 34 ITR 328, CAG. IT Vs. Cherian 117 ITR 371) or selling smuggled goods (Lal Chand Vs. CIT 37 ITR 288 (SC) etc. cannot be attributed in general to the assessee that he followed such practice. The ordinary presumption of law is that apparent state of affairs is real unless the contrary is proved (Kalva Vs. Union of India 49 ITR 165 (SC), CIT Vs. Daulat Ram 87 ITR 349, 360-61 (SC). The presumption is in favour of good faithand non-concealment of income and the initial burden of finding some material in support of finding of concealed income is on department (CIT Vs. Swami 241 ITR 363).

10.8. Further in course of assessment proceedings assessee specifically made a request to A.O. that cross examination of concerned persons who have admitted on oath before different authorities of the department entire scheme of providing accommodation entries in the form of bogus LTCG as stated in assessment order which Ld. A.O. not allowed.

10.9. It is submitted as now it is settled law on the issue that no adverse inference can be drawn against the assessee without providing cross examination opportunity to the concerned assessee against whom an adverse inference is to be drawn by the department on the basis of third party statement. Andaman Timber Industries Vs. CCE -Kolkata - II (2016) 55 Taxworld (SC)."

10.10. The assessee submits that the right to cross examine the third party whose statement is relied by department is principle of natural justice and its denial is violation thereof. The Hon'ble Apex Court in case of Shree Ram Durga Prasad (RB) Vs. Settlement Commission (1989) 176 169,174 (SC) held that any order made in violation of principle of natural justice is void and nullity. As regards the non grant of opportunity to cross examine, the Hon'ble Supreme Court in case of Andaman Timber Industries vs. CCE 127 DTR 241 while dealing with the issue has held in para 5 to 8 as under:

"5. We have heard Mrs. Kavin Gulati, learned senior counsel appearing for the assessee, and Mr. K. Radhakrishnan, learned senior counsel who appeared for the Revenue.

6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity in as much as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross- examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their expenses-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit either testimony for which purpose it wanted to avail the opportunity of cross- examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. In view of the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice."

10.11. The Hon'ble ITAT Jaipur Bench, Jaipur recently in case of Pramod Jain, Jaipur vs DCIT, Cir-3, Jaipur and other connected case vide its orderdated 31-01-2018 (ITA No.(S) 368 to

372/JP/17) following the judgement of Hon'ble Supreme Court in case of Andman Timber Industries held that without giving opportunity of cross examination the assessment completed is a nullity. Therefore, the statement of witness cannot be sole basis of the assessment without given an opportunity of cross examination and consequently it is a serious flaw which renders the order a nullity.

10.12. As regards to statement of assessee recorded in course of search and post search proceedings which was subsequently retracted by him as obtained under pressure, duress and in disturbed medical condition on which in assessment order A.O. is heavily placing reliance. In this connection it is submitted that in the statement Shri BitthalDas Parwal stated that he earned cash income of Rs.

7,32,86,297/- from real estate transactions which was used in taking entry of Long Term Capital Gain in different names including assessee It is submitted that in course of massive search carried out at residential and business premises of assessee and his family members no document, loose paper, diary or evidence or any writing could not found for such precise huge real estate transaction generating said income and nor any document, loose paper, diary or any evidence was found for obtaining those ungenuine LTCG. This makes it abundantly clear and evident that there were no real estate transactions which earned income to him and that was used in taking entry of long term capital and his statement u/s 132 (4) and statement in post search proceedings was obtained under pressure and duress in mental disturbed condition to which assessee admitted just to buy peace and avoid litigation even though when all the necessary and proper documents in support of transaction(s) of LTCG were available and transaction was properly done in accordance with law and through banking channel. The CBDT vide instruction No. F286/2/2003 - IT Inv. Dated March 10, 2003 issued instructions reiterating 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 and no attempt should be made to obtain confession as to the undisclosed income as this does not serve any useful purpose since such confessions, if not based upon credible evidence, are later retracted by the concerned assesses while filing returns of income, 10.13. It is settled law that the assessee has right to retract the statement given if it remains unproved from any cogent material and is rather not supported with corroborative material and evidences. Where there is a specific ground taken for retracting a statement, that it was made under pressure, such a statement cannot be the sole basis, unless corroborated. Gajjam Chand Yellappa v I.T.O. (2015) 370 ITR 671 (T&AP).In the case of CTI v Naresh Kumar Agarwal (2014) 369 ITR 171 (T&AP) it was held that, where the assessee retracts the statement admitting undisclosed income on the plea that it was recorded under threat or coercion, with no evidence to support the admitted income, the burden of proof is on the Assessing officer to establish his conclusion. A statement which is not substantiated cannot be taken as binding on the assessee. CIT v Balasubramanian (P) (2013) 354 ITR 116 (Mad.). Therefore reliance made by A.O. on such statement is uncalled for.

10.14. The assessee has furnished all the evidences in support of its claim showing the investment in the shares and purchases of the shares has been accepted by the A.O. in the year of its acquisition and thereafter, until the same were sold. It is submitted that the assessee has shown the shares in the balance sheet as on 31.03.2010 which were not doubted by the A.O. and only when the same were sold, the Assessing officer has raised the suspicion of genuineness of the transactions.

The assessee is investing in the shares as can be seen from the various shares appearing in his balance sheet and in the Demat account.The transactions of purchase and sale are all through account payee cheque and the same is reflected in the Demat account. The sale of shares suffered STT, brokerages, etc. and therefore eligible for exemption u/s 10 (38) of the Income Tax Act. The reliance is also placed upon the decision of Hon'ble jurisdiction High Court in case of CIT vs. Smt. Pooja Agarwal in DBIT appeal No. 385/2011 dated 11.09.2017 aswell as decision of Hon'ble Madras High Court dated 11.08.2017 in case of M/s Lalitha Jewellery Mart P. Ltd. vs. DCIT.

10.15. Therefore, when the Assessing officer has not brought any material on record to show that the assessee has paid over and above the purchase consideration as claimed and evident from the bank account then, in the absence of any evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. The Hon'ble Jurisdiction High Court in case of CIT vs. Smt. Pooja Agarwal (supra) has upheld the finding of the Tribunal on this issue in para 12 as under: -

> "12. However, counsel for the respondent has taken us to the order of CIT (A) and also to the order of Tribunal and contended that in view of the finding reached, which was done through Stock Exchange and taking into consideration the revenue transactions, the addition made was deleted by the Tribunal observing as under:
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"Contention of the AR is considered. One of the main reasons for not accepting the genuineness of the transactions declared by the appellant that at the time of survey the appellant in his statement denied having made any transactions in shares. However, subsequently the facts came on record that the appellant had transacted not only in the shares which are disputed but shares of various other companies like Satyam Computers, HCL, IPCL, BPCL and Tata Tea etc. Regarding the transactions in question various details like copy of contract note regarding purchase and sale of shares of Limtex and Konark Commerce & Ind. Ltd., assessee's account with P. K. Agarwal & Co. share broker, company's master details from registrar of companies, Kolkata were filed.

Copy of depository a/c or demat account with ALankrit Assignment Ltd., a subsidiary of NSDL was also filed which shows that the transactions were made through demat A/c. When the relevant documents are available the fact of transactions entered into cannot be denied simply on the ground that in his statement the appellant denied having made any transactions in shares. The payments and receipts are made through a/c payee cheques and the transactions are routed through Kolkata Stock Exchange. There is no evidence that the cash has gone back in appellant's account. Prima facie the transaction which are supported by documents appear to be genuine transactions. The A.O. has discussed modus operandi in some sham transactions which were detected in the search case of B.c. Purohit Group. The A.O. has also stated in the assessment order itself while discussing the modus operandi that accommodation entries of long term capital gain were purchased as long term capital gain either was exempted from tax or wastaxable at a lower rate. As the appellant's case is of short term capital gain, it does not exactly fall under that category of accommodation transactions. Further as per the report of DCIT, Central Circle-3 Sh. P.K. Agarwal was found to be an entry

provider as stated by Sh. Pawan Purohit of B.C. Purohit and Co. group. The AR made submission before the A.O. that the fact was not correct as in the statement of Sh. Pawan Purohit there is no mention of Sh. P.K. Agarwal. It aws also submitted that there was no mention of Sh. P. K. Agarwal in the order of Settlement Commission in the case of Sh. Sushil Kumar Purohit. Copy of the order of settlement commission was submitted. The A.O. has failed to counter the objections raised by the appellant during the assessment proceedings. Simply mentioning that these findings are in the appraisal report and appraisal report is made by the Investing Wing after considering all the material facts available on record does not help much. The A.O. has failed to prove through any independent inquiry or relying on somematerial that the transactions made by the appellant through share broker P.K. Agarwal were non-genuine or there was any adverse mention about the transaction in question in statement of Sh. Pawan Purohit. Simply because in the sham transactions bank a/c were opened with HDFC bank and the appellant has also received short term capital gain in his account with HDFC bank does not establish the transactions made by the appellant were non genuine. Considering all these facts the share transactions made through Shri P.K. Agarwal cannot be held as non-genuine. Consequently denying the claim of short term capital gain made by he appellant before the A.O. is not approved. The A.O. is therefore, directed to accept claim of short term capital gain as shown by the appellant."

10.16. The Hon'ble Jurisdictional High Court of Rajasthan and Hon'ble ITAT, Jaipur have given judgement in the case of PCIT Vs. Pramod Kumar Jain & Others (DB Appeal No. 209/2018 dated 24-07-2018 (Raj) which are directly on the issue. In this case the Hon'ble ITAT after relying on the decision of Hon'ble Rajasthan High Court in case of CIT Vs Smt. Pooja Agarwal and various other decisions deleted the addition made by the AO by holding as under:-

> " In view of the above facts and circumstances of the case , we are of the considered opinion that the addition made by the AO is based on mere suspicion and surmises without any cogent material to show that the assessee has brought back his unaccounted income in the shape of long term capital gain. On the other hand, the assessee has brought back all the relevant material to substantiate its claim that transactions of the purchase and sale of shares are genuine. Even otherwise the holding of the shares by the assessee at the time of allotment subsequent to the amalgamation/merger is not in doubt, therefore, the transaction cannot be held as bogus. Accordingly, we delete the addition made by the AO on this account. "

The Delhi High Court of Delhi in a very recent decision of PCIT Vs Smt. Krishna Devi (ITA No. 125/2020 Dated 15-01-2021) held that:-

> On a perusal of the record, it is easily discernible that in the instant case, the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites, the AO observes that the quantum leap in the share price is not justified; the trade pattern of the

> aforesaid company did not move along with the Sensex; and the financials of the company did not show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an agreement to convert unaccounted money by claiming fictitious LTCG, which is exempt under Section 10(38), in a pre-planned manner to evade taxes. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income Tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of https://itatonline.org ITA 125/2020 and connected matters Page 8 of 10 providing entries of bogus LTCG. However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued under Sections 133(6)/131 of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh.

Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from de-

mat account and the consideration has been received through banking channels." The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the Page 9 of 10 ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material that could support the case put forth by the Appellant, the additions cannot be sustained.

12. Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an

issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent. With regard to the claim that observations made by the CIT(A) were in conflict with the Impugned Order, we may only note that the said observations are general in nature and later in the order, the CIT(A) itself notes that the broker did not respond to the notices. Be that as it may, the CIT(A) has only approved the order of the AO, following the same reasoning, and relying upon the report of the Investigation Wing. Lastly, reliance placed by the Revenue on Suman Poddar v. ITO (supra) and SumatiDayal v. CIT (supra) is of no assistance. Upon examining the judgment of Suman Poddar (supra) at length, we find that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. On such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the factual matrix at hand. Similarly, the case of SumatiDayal v. CIT (supra) too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue. 13. The learned ITAT, being the last fact-finding authority, on the basis of the evidence brought on record, has rightly come to the conclusion that the lower tax authorities are not able to sustain the addition without any cogent material on record. We thus find no perversity in the Impugned Order.

The following are other important judgements on the issue :-

> 13. The jurisdiction High Court in case of CIT Vs. Sumitra Devi (2014) 49 taxmann.com 37 (Raj.)held that since the A.O. had failed to show that material documents placed on record by assessee like brokers note, contract not, relevant extract of cash book, copies of share certificates, demat statements etc. were false, fabricated or fictitious, transaction of purchase and sale of shares could not be treated as non-genuine.
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> 14. The decisions of the Hon'bleCalcutta High Court in the case of CIT - Vs Carbo Industrial Holdigns Ltd. (244 ITR 422) and CIT - Vs - Emerald Commercial Ltd. (250 ITR 549) are relevant to the issue where the Hon'ble High Court has held that where the payments are made by Account Payee Cheques and the existence of the brokers is not disputed share transactions cannot be held to be bogus.
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> 15. Findings in Bhagwati Prasad Agarwal - Exchange shows that the name of the assessee is not appearing in respect of the transactions-in-question. The tribunal found that the chain of transaction entered into by the assessee have been proved, accounted for, documented and supported by evidence. The assessee produced before the Commissioner of Income Tax (Appeal) the contract notes, details of his DEMAT account and, also, produced documents showing that all payments were received by the assessee through bank. We do not, therefore, think that this appeal involves any substantial question of law requiring interference by this court under section 260A of the Income Tax Act, 1961. The appeal is, therefore, summarily dismissed.

16. Hon'ble Kolkata ITAT in the case of DolarraiHemani vs. I.T.O. (I.T.A. No. 19/Kol/2014) (A.Y. 2005-06) (Dt. of pronouncement 02.12.2016) wherein it has been stated that -

"We find that the similar issue had been adjudicated by the co-ordinate bench of this tribunal in the case of DCIT vs Sunita Khemka in ITA Nos. 714 to 718/Kol/2011 dated 28.10.2015 and in the case of I.T.O. vs Rajkumar Agarwal in ITA No. 1330 (Kol) of 2007 dated 10.8.2007 wherein it was held that when purchase and sale of shares were supported by proper contract notes, deliveries of shares were received through demat accounts maintained with various agencies, the shares were purchased and sold through recognized broker and the sale considerations were received by account payee cheques, the transactions cannot be treated as bogus and the income so disclosed was assessable as LTCG.We find that in the instant case, the addition has been made only on the basis of the suspicion that the difference in purchase and sale price of these shares is unusually high. The revenue had not brought any material on record to support its finding that there has been collusion / connivance between the broker and the assessee for the introduction of its unaccounted money."

17. Roshan Raja (ITAT Mumbai) 2016 TaxPub (DT) 2777 (Mum Trib) Held: Where assessee claimed the income from long term capital gain on sale of listed equity shares and subject to STT as exempt under section 10 (38), no adverse finding had been rendered in respect of the direct material evidence placed on record in respect of its transactions. The addition under section 68 was not justified and therefore, A.O. was directed to accept the LTCG income shown as exempt under section 10 (38).

18. In the case of Pavillion Commercial Pvt. Limited Vs. I.T.O. Ward 5(2)/Kolkata ITA No. 935/Kol/2012 date of pronouncement 12/08/2016 held that we find that the transactions were complete in terms of documentation and there was no defect in the papers submitted by the assessee in support of the transactions. We also find that there wre entries for the sale purchase of the shares in the bank statements, contract notes, demat account of the assessee. In our considered view we find that the assessee has proved the transaction on the basis of documents and therefore the suspension of the broker by SEBI will not hold the transaction invalid.

19. I.T.O. vs. Indravadan Jain (HUF) (ITAT Mumbai) - 27/05/2016 Held: merely because the investigation was done by SEBI against broker or his activity, assessee cannot be said to have entered into ingenuine transaction, in so far as assessee is not concerned with the activity of the broker and have no control over the same.

20. The Hon'ble jurisdiction ITAT, Jaipur Bench, Jaipur in case of Pramod Jain Vs. DCIT and others vide order dated 31-01-2018 (ITA No. 368 - 372/JP/2017) upheld the same legal view and deleted the addition u/s 68 by treating it as unexplained credit by holding LTCG exempt u/s 10 (38) claimed by assessee as bogus by holding "In view of the above facts and circumstances of the case, we are of the considered opinion that the addition made by the A.O. is based on mere suspicion and surmises without any cogent material to show that the assessee has brought back his unaccounted income in the shape of long term capital gain. On the other hand, the assessee has brought all the relevant material to substantiate its claim that transactions of the purchase and sale of shares aregenuine.

Even otherwise the holding of the shares by the assessee at the time of allotment is not in doubt, therefore, the transaction cannot be held as bogus. Accordingly we delete the addition made by the A.O. on this account."

21. Hon'ble Kolkata ITAT in the case of Vipul Patel Vs. ITO-Ward 45(4), vide order dated 07-08-2019 held that:-

Assessee had purchased 1,10,000 equity shares of company KAFL from SEPL

- Later on, 96,001 shares were sold by assessee which resulted in long term capital gain (LTCG) which was claimed as exempt under section 10(38) - Assessing Officer received a report from Investigation Wing stating that bogus long term capital gain transactions were provided to several clients - On basis of same, he alleged that transactions in scrip of KAFL were manipulated by entry operators and share prices were hiked artificially to earn LTCG, thus, he treated said LTCG as bogus under section 68 and, accordingly, made additions to income of assessee - It was noted that assessee had paid amount to SEPL for purchase of shares through account payee cheque - Purchase bill and copy of bank statement showing payments made for purchase of shares were available on record - Further, assessee had sold shares in recognized stock exchange through a registered share and stock broker and received sale consideration by account payee cheque - Copies of contract notes in respect of sale of shares, copy of bank statements showing receipts against sale of shares were also available on record - Whether once assessee produced all relevant evidence to substantiate transaction of purchase, dematerialization and sale of shares, same could not be held as bogus LTCG transactions merely on basis of report of Investigation Wing, wherein there was a general statement of providing bogus long term capital gain transactions to clients without stating anything specifically about transaction of purchase and sale of shares by assessee - Held, yes [Paras 8 and 10] [In favour of assessee]

22. Hon'ble Delhi ITAT in the case of Smt. Karuna Garg Vs ITO- 39(4), Delhi held thatWhere assessee declared long term capital gain on sale of shares but Assessing Officer made section 68 addition in hands of assessee on basis of investigation wing report that assessee was beneficiary of accommodation entries, without conducting separate and independent enquiry, since shares were dematerialized and sales had been routed from de-mat account and consideration had been received through banking channels, assessee had successfully discharged onus cast upon him by provisions of section 68.

23. The Hon'ble jurisdiction ITAT, Jaipur Bench, Jaipur in case of Meghraj Singh Shekhawat Vs DCIT 443 & 444/JP/2017 dated 07-03-2018 "Brief facts are that the assessee is an individual and engaged in the business of retail sale of IMFL/Beer. During the assessment proceeding the AO noted that the assessee has shown long erm capital gain of Rs. 1,32,56,113/- which is claimed as exempt u/s 10(38) of the Act on saleof shares of M/s Rutron International Ltd. The AO received information from Investigation Wing, Kolkata that during the search conducted u/s 132 of the Act on 12.04.2015 at the business premises of one Shri Anil Agarwal Group it was found that Shri Anil Agarwal isone of the promoters of M/s Rutron International Ltd. The shares were sold by the assessee from his D-mataccount through the broker M/s Anand Rathi Share and Stock Brokers Ltd. and therefore, the

assessee denied any involvement of availing the bogus of long term capital gain. Consequently the AO made an addition of Rs. 1,32,56,113/- to the total income of the assessee u/s 68 of theAct. The ld. AR has submitted that the assessee was allotted 3,50,000/- equity shares by M/s Rutron International Ltd. on 01.03.2012 vide allotment letter dated 08.03.2012. The shares were allotted by the company at face value of Rs. 10/- each without charging any premium under preferential issue. The assessee paid the purchase consideration/ share application money vide cheque on 29.02.2012 the payment made by the assessee is duly reflected in the back statement of the assessee. The shares were dematerialized on 18.06.2012 and thereafter the shares were sold from 13.03.2013 onwards on various dates through M/s Anand Rathi Shares & Stock Brokers Ltd. The assessee has produced all the relevant evidence to show the allotment of shares, payment of consideration through cheque at the time of allotment of shares dematerialization ofthe shares and thereafter, sale of shares from the D-mat account. The Assessing Officer has not produced any material or record to controvert the evidence produce by the assessee.Considering all these facts the Hon'ble ITAT held that the order of the Assessing officer treating the long term capital gains bogus and consequential addition made to the total income of the assessee is not sustainable & deleted the same."

24. The Hon'ble jurisdiction ITAT, Jaipur Bench, Jaipur in case of Vivek Agarwal Vs ITO (2017) 292/JP/2017 dated 06-04-2018 "The brief facts of the case are that the assessee is an individual & has claimed exempt income of Rs. 4,78,38,157/- under the head Long Term Capital Gains on account of shares. The AO while passing the assessment order under section 143(3) has held that the long term capital gains claimed by the assessee is bogus as the assessee has arranged the accommodation entries from the persons who are engaged in providing bogus accommodation entries of capital gains. The Hon'ble ITAT held that the facts of the present case acquiring of shares M/s. Paridhi Properties Ltd. under private placement directly from the company and Subsequently on merger of the said company with M/s. Luminaire Technologies Ltd. The shares of the new entity were allotted to the assessee which were duly dematerialized and then sold from the Demat account are identical to the case of Shri Pramod Jain & Others vs. DCIT & others. In view of the finding of the Coordinate Bench on the identical issue it was found that when the payment of purchase consideration paid through cheque directly to the company and the subsequent merger of the company as per the scheme of merger approved by the High Court, then the transaction and sale of shares in question cannot be held as bogus. The AO has passed the impugned order on the basis of the statement of Shri Deepak Patwari which is identical as in the case of Shri Pramod Jain & others vs. DCIT. Accordingly following the order of the Coordinate Bench of this Tribunal, we hold that the addition made by the AO is merely based on suspicion and surmises without any cogent material to controvert the evidence filed by the assessee in support the claim. Further, the AO has also failed to establish that the assessee has brought back his unaccounted income in the shape of long term capital gain. Hence we delete the addition made by the AO on this account."

The following judgements of Courts are also relied : -

Asstt. CIT v. Kamal Kumar S. Agarwal (Indl.) [2012] 20 taxmann.com 338 (Nag.) CIT v. Shyam R. Pawar [2015] 54 taxmann.com 108/229 Taxman 256 (Bom.); I.T.O. v. Smt. Aarti Mittal [2014] 41 taxmann.com 118 (Hyd. - Trib.)' I.T.O. v. Ram Krishna Ghosh [2013] 33 taxman.com 145; Kamla Devi S. Doshi v I.T.O. [2017] 88 taxmann.com (Mum.- Trib.); Meenu Goel v. I.T.O. [2018] 94

taxmann.com 158 (Delhi - Trib.); PratikSuryakant Shah v. I.T.O. [2017] 77 taxmann.com 260 (Ahd. - Trib.); Smt. Anjli Pandit v. Asstt. CIT [2017] 88 taxmann.com 657 (Mum. - Trib.); Smt. Smita P. Patil v. Asstt. CIT [2015] 55 taxmann.com 346 (Pune - Trib.).

Recently the Punjab High Court in case of Pr. CIT vs. Hitesh Gandhi (ITA No. 18/2017 order dated 16-2-2017) and Pr. CIT vs. Prem Pal Gandhi (ITA No. 95/2017 order dated 18-1-2018) upheld the same law.

10.17. In view of above facts and position of law, the Ld. A.O. is wrong in holding that alleged unaccounted income of Rs. 2,83,12,308/- routed back to assessee during the year under consideration, camaflouged as long term capital gain which has been proved a bogus entry and thereby making an addition of Rs. 2,83,12,308/-

u/s 68 in the assessment order. The same deserves to be deleted. The order of the ld. CIT (A) is correct on facts of the case and in law and accordingly the ground(s) of appeal raised by department has no merit and deserves to be dismissed.

11. The addition of Rs. 2,83,123/- made u/s 69C for alleged commission is wrong in law. The addition u/s 69C of the Act can be made if expenditure is actually incurred and evidence of incurring such expenditure is available on record. No addition u/s 69C can be made notionally alleging expenses would have been made.

There is no material or evidence of paying any commission by assessee nor there is any evidence to whom the same was paid and hence addition u/s 69C is wrong and bad in law. The assessee contends that LTCG earned is a genuine transaction and brokerage paid to Share Broker for the transaction is recorded. The addition is thus wrong and deserves to be deleted.

12. We have considered the rival submissions as well as the relevant material on record. For the assessment year 2010-11, the revenue has challenged the deletion of addition of Rs. 2,83,09,544/- under section 68 made by the AO on account of Long Term Capital Gain claimed under section 10(38) of the IT Act. In the case in hand, we find that the transactions of purchase and sale of shares were on on-line through recognized Stock Exchange and were duly recorded in the books of account for the year under consideration but for the year in which the assessee acquired the shares in question. The assessee also brought on record the evidence in the shape of bills, allotment of shares, payment through banking channel, dematerializing of the shares in the Demat account of the assessee and sale of the shares through Stock Exchange from the Demat account of the assessee. The documentary evidence which can be independently verified and the correctness of the same cannot be questioned being the payment made by the assessee through banking channel reflected in the bank account statement as well as dematerializing of the shares in the Demat account proving the fact of holding of the shares by the assessee in the Demat account. The evidence produced by the assessee has established at least two facts that the assessee was holding the shares in his Demat account and the payment for purchase consideration was made through banking channel which is also not disputed by the AO. The AO has not brought on record any material to controvert or disprove these evidences of payment through banking channel, holding of the shares in the Demat

account of the assessee, sale of shares from the Demat account through Stock Exchange at the prevailing price in the Stock Exchange on the date of sale. Thus the conclusion of the AO is based on suspicion and surmises without any tangible material to show that the assessee's own unaccounted income has routed back to the assessee in the shape of Long Term Capital Gain. Though the ld. CIT D/R has relied upon various decisions, however, the judgment of the Hon'ble Jurisdictional High Court is binding on the Tribunal when there are divergent views of the different High Courts on an issue. Further, this Tribunal has already taken a consistent view on this issue in the case of Kota Dall Mills vs. DCIT (supra) as well as in a series of other decisions. In case of DCIT vs. A.M. Exports, the Coordinate Bench of the Tribunal vide order dated 7th January, 2019 in ITA No. 561/JP/2018 has again considered this issue in para 8 as under :-

> "8. We have considered the rival submissions as well as relevant material on record. The first aspect involved in the matter is sustainability of the addition made by the Assessing Officer without any incriminating material found or seized during the course of search and seizure action. There is no dispute that the original return of income filed by the assessee U/s 139(1) of the Act on 11/10/2010 was not pending assessment as on the date of search on 03/4/2013.

Therefore, the assessment was completed U/s 143(1) and it was not abated due to the search and seizure action U/s 132 of the Act on 03/4/2013. The order of the Assessing Officer is based on the statement of the assessee recorded U/s 132(4) of the Act and specifically the question No. 77. It is pertinent to note that during the course of search and seizure action, the statement of the assessee was being recorded from 04/4/2013 to 05/4/2013 and as many as 78 questions were put to the assessee. The statement of the assessee recorded U/s 132(4) runs into about 50 pages. The statement of the assessee was recorded from 12.00 noon on 04/4/2013 and continued up to 1.00 a.m. on 05/4/2013. After the break, the recording of statement again resumed at 7.50 a.m. on 05/4/2013 we note that up to question No. 67 were recorded on 04/4/2013 and up to 1.00 a.m. on 05/4/2013 and thereafter the statement of the assessee was again resumed in the morning of 05/4/2013 and continued up to question No. 78. It is manifest from the statement recorded U/s 132(4) of the Act that repeated questions were asked about the genuineness of the loans taken by the assessee during the financial year 2009-10 relevant to the assessment year under consideration and the assessee has given the answer and stated that all these loans are genuine and taken through banking channel and the assessee also repaid these loans prior to the date of the search. These transactions are very much part of the regular books of account of the assessee. However, the search team again put question to the assessee as question No. 77 in which the assessee has stated that the assessee has checked the details of the loans from M/s Dipnarayan Vyapar Pvt. Ltd. for which the assessee received cash and the same was declared as undisclosed income for the year of the search. We find that prior to that the assessee was also asked question No. 34 to 36 and question No. 39. Even after the statement recorded U/s 132(4) of the Act, the Investigation Wing again summoned the assessee U/s 131 of the Act for conducting post search enquiry and the statement of the assessee was recorded on 30/05/2013 wherein in response to question No. 12, the assessee clarified that the earlier statement of the assessee in question No. 77 was not a correct statement regarding the loan taken from M/s Dipnarayan Vyapar Pvt. Ltd.. Thus, for understanding of the issue, all the relevant questions put to the assessee and answered to them are to be read conjointly. Hence, we quote

question No. 34 to 36 and question No. 39 of assessee's statement recorded U/s 132(4) dated 04/4/2013 and question No. 77 of statement recorded U/s 132(4) on 05/4/2013 and question No. 12 and reply of the statement of the assessee recorded U/s 131 of the Act in post search investigation by the ADIT as under:

iz-34 eSa vkils vkidh Hkkxhnkjh QeZ ,-,e-,DliksVlZ cqd esa fuEufyf[kr vuflD;ksjMZ yksu ØsfMVlZ ds ystj fn[kk jgk gwi&

(i) Interlink saving & finance Pvt. Ltd. 57 Adarsh Nagar, Rishikesh, dehradun, Uttranchal.

(ii) Parmatma Developers Pvt. Ltd., 101, Balaram Dey Street, Gr Floor, Kolkata

(iii) Rameshwar Finvest Pvt. Ltd., 101 Balaram Dey Street, Kolkata

(iv) Sri Ram Tie Up Pvt. Ltd., 2, Banarashi Ghosh, 2nd Bye Lane, Kolkata

(v) _____do _____

(vi) Tara Vinimay Pvt. Ltd., 101, Balaram Dey Street, G. Floor, Kolkata

(vii) Victor Project Pvt. Ltd., 2 Mullick Street, Ist Floor, Kolkata

(viii) Yatan Traders Pvt. Ltd., 62/1, Hriday Krishna Banerjee Lane, Howrah.

mijksDr lHkh Transactions dh izek.k Li"V djs\a mÙkj& mÙkj mijksDr [kkrksa dh udyksa dks eSua s ns[kdj ;g dguk pkgrk gwi ;g foÙk o"kZ 2009&2010 C;kt ij dtkZ fy;k gqvk foÙk o"kZ 2011&12 eSua sa pqdk fn;kA iz-35 mijksDr of.kZr lHkh dEifu;ka vkids lEidZ esa dSls vk;h fooj.k nsA mÙkj& esjh QeZ }kjk t;iqj ,oa t;iqj ds ckgj eSa tgka ls Hkh O;kikj ds fy, eq>s dtkZ mÙkj izkIr gqvk eSua s fy;k rFkk yksVk;k ,oa xr o"kksZa eas buls esjk lEidZ dSls jgk eq>s vHkh ;kn ugha vk jgk gSA iz-36 bu dEifu;ksa ls D;k jsV vkWQ buVªsLV fn;k gS fooj.k ns\ mÙkj& xr o"kksZa dh ckr eq>s tckuhrkSj ij ;kn ugha gSA ;g QeZ }kjk is'k dh xbZ [kkrksa esa x.kuk dj fudkyuk gksxk tks Jheku~ ds dk;kZy; esa gktjh nsus vkÅaxk tc x.kuk dj crkÅaxkA iz-39 vkidh QeZ A.M. Exports dk Dipnarayan Vyapaar Pvt. Ltd. ds lkFk D;k lEcU/k gS] Li"V djs\a mÙkj& mÙkj eSua s Dipnarayan Vyapaar Pvt. Ltd. ls yxHkx rhu o"kZ igys C;kt ls iSlk m/kkj fy;k Fkk eq>s ;g iSlk fdl C;kt nj ij fnyk;k Fkk eq>s vHkh ;kn ugha vk jgk gSA Dipnarayan Vyapaar Pvt. Ltd. ls fdl O;fDr ds ek/;e ls iSlk m/kkj fy;k Fkk vHkh eq>s ;kn ugha vk jgk gSA bl lEcU/k esa tkudkjh izkIr dj eSa vkidks crk nwxa kA iz-77 geus iz'u la- 39 esa A.M. Exports ,oa Dipnarayan O;kikj ds Trancsa tions ds ckjs esa iwNk rks vkius v/kwjh tkudkjh nh Fkh D;k vc vkidks bl ckcr~ vkSj vf/kd fooj.k crkuk gS\ mÙkj& th gki] ^^esjs dks nks fnu ls ;kn djrs gq, ;kn vk jgk gS ,oa foHkkx ls lg;ksx mÙkj dh bPNk j[krs gq, crkuk pkgrk gwi fd eSua s eSllZ Dipnarayan Vayapar Private Limited dks pSd fn;k Fkk ftldk eq>s bl lky esa dS'k izkIr gks x;k ftls eSua s bl foÙk o"kZ dh v?kksf"kr vk; ds :i esa foHkkx dks lefiZr dj fn;k^^A iz-12 vkius iz'u la[;k 11 ds tokc esa ,usDlj As Exibit-5 ds ist la[;k 37 d tokc esa crk;k fd vkius eSllZ nhiukjk;.k O;kikj izk-fy- ls C;kt ij iSlk fy;k gqvk gSA mldk , ,e ,DliksVZ dh ys[kk iqLrdksa esa fnukad 01-04-11 ls fnukad 31-03-12 dh vof/k dk ystj gSA eSa vkidks ryk'kh ,oa tCrh dh dk;Zokgh ds nkSjku vkids l'kiFk ntZ

c;ku dk iz'u la[;k 77 fn[kk jgk gwi ftlds mRrj esa vkius dgk Fkk fd------- ^^th gka esjs dks nks fnu ls ;kn djrs gq, ;kn vk jgk gS ,oa foHkkx ls lg;ksx dh bPNk j[krs gq, crk;k pkgrk gwa fd eSua s eSllZ nhiukjk;.k O;kikj izk-fy- dks pSd fn;k Fkk ftldk eq>s bl lky esa dS'k izkIr gks x;k ftls eSua s bl foRr o"kZ dh v?kksf"kr vk; ds :i esa foHkkx dks lefiZr dj fn;kA^^ d`i;k ryk'kh ,oa tCrh dh dk;Zokgh ds nkSjku vkids l'kiFk ntZ c;ku dk iz'u la[;k 77 ds tokc dks ,d ckj iqu% i<+dj le> ysosa fd vkius mijksDr iz'u la[;k 11 ds tokc esa D;k lgh mRrj fn;k gSA bl lac/a k esa eSa vkidk /;ku vk;dj vf/kfu;e 1961 ds vfHk;kstu izko/kkuksa dh rjQ vkidk /;ku vkdf"kZr djuk pkgrk gwi fd xyr c;kuh dh n'kk eas vkids fo:) vfHk;kstu dh dk;Zokgh izkjEHk dh tk ldrh gSA d`i;k ,d ckj iqu% lkspdj crk;sa fd vkius eSllZ nhiukjk;.k O;kikj izk-fy- ls fdruk :i;k m/kkj fy;k gS vFkok vkius pSd nsdj muls okil uxn jkf'k izkIr dh Fkh] Li"V djsAa mÙkj& eSua s vkids }kjk fn[kk;s x;s ,usDlj AS Exibit-5 ds ist la[;k 37 ,oa ryk'kh mÙkj ,oa tCrh dh dk;Zokgh ds nkSjku ntZ esjs c;kuksa dks vPNh rjg ls i<+dj le> fy;k gSA eSa ;gka ;g dguk pkgrk gwa fd ryk'kh ,oa tCrh dh dk;Zokgh ds nkSjku foHkkx ds vf/kdkfj;ksa }kjk bl lac/a k esa eq>ls ckj&ckj iwNk x;k rks eSua s ekufld :i ls Fkddj ;g tokc ns fn;k FkkA ysfdu vc eSua s viuh iwjh ys[kk iqLrdksa dks ns[k fy;k gS vkSj eSa vc ;g 'kiFkiwod Z c;ku djuk pkgrk gwi fd eSua s eSllZ nhiukjk;.k O;kikj izk-fy- pSd ls C;kt ij iSlk fy;k Fkk ,oa mldk Hkqxrku Hkh pSd ls gh fd;k gSA eSua s bl dEiuh ds lkFk dksbZ uxn ysu&nsu ugha fd;k gSA tgka rd vk;dj izko/kkuksa dh ckr gS mlds lac/a k esa esjs c;ku ntZ djrs oDr foHkkx }kjk eq>s voxr djk fn;k x;k Fkk tks esjh tkudkjh esa gSA fQj Hkh eSa iw.kZ :i ls larq"V gksdj bl i`"B ds ckjs esa tokc ns jgk gwAa In reply to the question No. 34, the assessee has clearly stated that the transaction of loan from all the parties were taken on interest in the F.Y. 2009-10 and these were repaid in the F.Y. 2011-12. Thereafter a specific question was put to the assessee regarding the loan taken from M/s Dipnarayan Vyapar Pvt. Ltd. as question No. 39 and in reply to the same, the assessee stated that the loan was taken about three years back on interest but the assessee was not able to remember the person through whom the loan was taken. Therefore, there was no ambiguity in the reply to question No. 39 except that the assessee was not able to tell the name of the person who helped the assessee in procuring the loan. Since the Investigation Wing was not satisfied with the answers of the assessee as they could not extract the statement which can be used against the assessee, therefore, question were continuously put to the assessee for two days and it is a matter of record that the assessee was grilled up to 1.00 a.m. on the night of 04/4/2013 and again restarted in the morning at 7.50 a.m. and the question No. 77 was again asked specifically regarding loan from M/s Dipnarayan Vyapar Pvt. Ltd. in reply to that the assessee has explained that after trying to remember for continuously for two days and hoping the cooperation from the department, he said that he received cash against the said loan which was declared as undisclosed income for the year of search. The Investigation Wing was still not satisfied with the statement of the assessee and again called the assessee for further investigation on 30/5/2013 and thereafter on 21/6/2013. The assessee was again put the question about the loan taken from M/s Dipnarayan Vyapar Pvt. Ltd., in reply, the assessee explained that on repeated instances of the investigation team and due to exhausted mind, the assessee given an incorrect reply to question No. 77 recorded U/s 132(4) of the Act on 05/4/2013 and again stated that after verifying the books of account, the said loan was taken on interest and was also repaid both the transactions are through banking channel. Thus, having regard to the background of the circumstances in which statement of the assessee regarding said transaction of loan from M/s Dipnarayan Vyapar Pvt. Ltd. was recorded and finally statement recorded in post search inquiry we are of the view that the assessee finally clarified the issue in the statement recorded U/s 131 of the Act and therefore, there was no admission on the part of the assessee. Except the statement of partner of the assessee, there was nothing

incriminating found or seized during the course of search and seizure action, therefore, the statement of the assessee recorded during the search and post search enquiry has to be read together and the outcome of the said statement is that the assessee has never admitted any bogus transaction except the misunderstanding due to continuous grilling by the Investigation Wing and due to mentally exhausted, the assessee given some inconsistent reply to question No. 77 which was subsequently clarified in question No. 12 of the statement recorded by the investigation Wing in the post search enquiry U/s 131 of the Act. Even otherwise, all these statements are only regarding one transaction of loan that cannot be applied to the entire transactions of loan taken from 12 parties. Therefore, except the statement of the assessee to question No. 77, which was subsequently clarified in question No. 12, there was nothing in the shape of any material or document much less incriminating material with the Assessing Officer to make the addition to the total income of the assessee. If the statement of the assessee is read in toto then there will be no admission regarding any of the loan transactions being an accommodation entry. Therefore, the question arises whether in absence of any incriminating material, the Assessing Officer can make any addition to the total income of the assessee when the assessment was not abated due to the search and seizure action. The Hon'ble Delhi High Court in the case of CIT Vs. Kabul Chawla (supra) has considered and observed in para 37 and 38 as under:

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

i. Once a search takes place under Section 132 of the Act, notice under Section 153 A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place. ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise. iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

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

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

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

Conclusion

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

Thus, the Hon'ble High Court has ruled that the Assessing Officer while making the assessment U/s 153A of the Act can make the addition only on the basis of some incriminating material unearthed during the course of search or requisition of documents, which were not produced or not already disclosed or made known in the course of original assessment. In the case in hand, all the transactions were duly recorded in the books of account. Even the loans were already paid during the F.Y. 2011-12 and therefore, these transactions were disclosed and known in the course of original assessment/return of income. Hence in absence of any incriminating material, the Assessing Officer cannot make any addition to the total income of the assessee. In the subsequent decision, the Hon'ble Delhi High Court in the case of Pr.CIT Vs. Meeta Gutgutia (supra) has held in para 57 to 72 as under:

57. The question whether unearthing of incriminating material relating to any one of the AYs could justify the re-opening of the assessment for all the earlier AYs was considered both in Anil Kumar Bhatia (supra) and Chetan Das Lachman Das (supra). Incidentally, both these decisions were discussed threadbare in the decision of this Court in Kabul Chawla (supra). As far as Anil Kumar Bhatia (supra) was concerned, the Court in paragraph 24 of that decision noted that "we are not concerned with a case where no incriminating material was found during the search conducted under Section 132 of the Act. We therefore express no opinion as to whether Section 153A can be invoked even under such situation". That question was, therefore, left open. As far as Chetan Das Lachman Das (supra) is concerned, in para 11 of the decision it was observed:

"11. Section 153A (1) (b) provides for the assessment or reassessment of the total income of the six assessment years immediately preceding the assessment year relevant to the previous year in which the search took place. To repeat, there is no condition in this Section that additions should be strictly made on the basis of evidence found in the course of the search or other post-search material or Information available with the Assessing Officer which can be related to the evidence found. This, however, does not mean that the assessment under Section 153A can be arbitrary or made without

any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

58. In Kabul Chawla (supra), the Court discussed the decision in Filatex India Ltd. (supra) as well as the above two decisions and observed as under: "31. What distinguishes the decisions both in CIT v. Chetan Das Lachman Das (supra), and Filatex India Ltd. v. CIT-IV (supra) in their application to the present case is that in both the said cases there was some material unearthed during the search, whereas in the present case there admittedly was none. Secondly, it is plain from a careful reading of the said two . decisions that they do not hold that additions can be validly made to income forming the subject matter of completed assessments prior to the search even if no incriminating material whatsoever was unearthed during the search.

32. Recently by its order dated 6th July 2015 in ITA No. 369 of 2015 (Pr. Commissioner of Income Tax v. Kurele Paper Mills P. Ltd.), this Court declined to frame a question of law in a case where, in the absence of any incriminating material being found during the search under Section 132 of the Act, the Revenue sought to justify initiation of proceedings under Section 153A of the Act and make an addition under Section 68 of the Act on bogus share capital gain. The order of the CIT (A), affirmed by the ITAT, deleting the addition, was not interfered with."

59. In Kabul Chawla (supra), the Court referred to the decision of the Rajasthan High Court in Jai Steel (India) v. Asstt. CIT [2013] 36 taxmann.com 523/219 Taxman 223. The said part of the decision in Kabul Chawla (supra) in paras 33 and 34 reads as under:

'33. The decision of the Rajasthan High Court in Jai Steel (India), Jodhpur v. ACIT (supra) involved a case where certain books of accounts and other documents that had not been produced in the course of original assessment were found in the course of search. It was held where undisclosed income or undisclosed property has been found as a consequence of the search, the same would also be taken into consideration while computing the total income under Section 153A of the Act. The Court then explained as under:

> "22. In the firm opinion of this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:

(a) the assessments or reassessments, which stand abated in terms of II proviso to Section 153A of the Act, the AO acts under his original jurisdiction, for which, assessments have to be made;

(b) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material; and

(c) in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made."

34. The argument of the Revenue that the AO was free to disturb income de hors the incriminating material while making assessment under Section 153A of the Act was specifically rejected by the Court on the ground that it was "not borne out from the scheme of the said provision" which was in the context of search and/or requisition. The Court also explained the purport of the words "assess" and "reassess", which have been found at more than one place in Section 153A of the Act as under:

"26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess'-have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word assess has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents.'"

60. In Kabul Chawla (supra), the Court also took note of the decision of the Bombay High Court in CIT v. Continental Warehousing Corpn (Nhava Sheva) Ltd. [2015] 58 taxmann.com 78/232 Taxman 270/374 ITR 645 (Bom.) which accepted the plea that if no incriminating material was found during the course of search in respect of an issue, then no additions in respect of any issue can be made to the assessment under Section 153A and 153C of the Act. The legal position was thereafter summarized in Kabul Chawla (supra) as under:

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

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

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

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

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

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

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

> 61. It appears that a number of High Courts have concurred with the decision of this Court in Kabul Chawla(supra) beginning with the Gujarat High Court in Saumya Construction (P.) Ltd. (supra). There, a search and seizure operation was carried out on 7th October, 2009 and an assessment came to be framed under Section 143(3) read with Section 153A(1)(b) in determining the total income of the Assessee of Rs. 14.5 crores against declared income of Rs. 3.44 crores. The ITAT deleted the additions on the ground that it was not based on any incriminating material found during the course of the search in respect of AYs under consideration i.e., AY 2006-07. The Gujarat High Court referred to the decision in Kabul Chawla (supra), of the Rajasthan High Court in Jai Steel (India) (supra) and one earlier decision of the Gujarat High Court itself. It explained in para 15 and 16 as under:
>
> '15. On a plain reading of section 153A of the Act, it is evident that the trigger point for exercise of powers thereunder is a search under section 132 or a requisition under section 132A of the Act. Once a search or requisition is made, a mandate is cast upon the Assessing Officer to issue notice under section 153A of the Act to the person, requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Since the assessment under section 153A of the Act is linked with search and requisition under sections 132 and 132A of the Act, it is evident that the object of the section is to bring to tax the undisclosed income which

is found during the course of or pursuant to the search or requisition.

However, instead of the earlier regime of block assessment whereby, it was only the undisclosed income of the block period that was assessed, section 153A of the Act seeks to assess the total income for the assessment year, which is clear from the first proviso thereto which provides that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso makes the intention of the Legislature clear as the same provides that assessment or reassessment, if any, relating to the six assessment years referred to in the sub-section pending on the date of initiation of search under section 132 or requisition under section 132A, as the case may be, shall abate. Sub-section (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-

section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso thereto says that such revival shall cease to have effect if such order of annulment is set aside. Thus, any proceeding of assessment or reassessment falling within the six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to be determined under section 153A of the Act. Similarly, sub-section (2) provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of the Act is annulled in appeal or any other proceeding.

16. Section 153A bears the heading "Assessment in case of search or requisition". It is "well settled as held by the Supreme Court in a catena of decisions that the heading or the Section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of section 153. the intention of the Legislature is clear, viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment In case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition, in other words, the assessment should connected With something round during the search or requisition viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub-section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition' or disallowance can be made only on the basis of material collected during the search or requisition, in case no incriminating material is found, as held by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra), the earlier assessment would have to be reiterated, in case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns, if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In case where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the

Assessing Officer could have passed under section 147 of the Act as well as under section 153A of the Act.

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19. On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of an the six assessment years. In the opinion of this court, the said contention does not merit acceptance, inasmuch as. the assessment in respect of each of the six assessment years is a separate and distinct assessment. Under section 153A of the Act, assessment has to be made in relation to the search or requisition, namely, in relation to material disclosed during the search or requisition. If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra). Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court In the case of CIT v. Jayaben Ratilal Sorathia (supra) wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years ; however, there must be some incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year.'

62. Subsequently, in Devangi alias Rupa (supra), another Bench of the Gujarat High Court reiterated the above legal position following its earlier decision in Saumya Construction (P.) Ltd. (supra) and of this Court in Kabul Chawla (supra). As far as Karnataka High Court is concerned, it has in IBC Knowledge Park (P.) Ltd.(supra) followed the decision of this Court in Kabul Chawla (supra) and held that there had to be incriminating material qua each of the AYs in which additions were sought to be made pursuant to search and seizure operation. The Calcutta High Court in Salasar Stock Broking Ltd. (supra), too, followed the decision of this Court in Kabul Chawla (supra). In Gurinder Singh Bawa (supra), the Bombay High Court held that:

> "6. . . . . once an assessment has attained finality for a particular year, i.e., it is not pending then the same cannot be subject to tax in proceedings under section 153A of the Act. This of course would not apply if incriminating materials are gathered in the course of search or during proceedings under section 153A of the Act which are contrary to and/or not disclosed during the regular assessment proceedings."

63. Even this Court has in Mahesh Kumar Gupta (supra) and Ram Avtar Verma (supra) followed the decision in Kabul Chawla (supra). The decision of this Court in Kurele Paper Mills (P.) Ltd. (supra) which was referred to in Kabul Chawla (supra) has been affirmed by the Supreme Court by the dismissal of the Revenue's SLP on 7th December, 2015.

The decision in Dayawanti Gupta

64. That brings us to the decision in Smt. Dayawanti Gupta (supra). As rightly pointed out by Mr. Kaushik, learned counsel appearing for the Respondent, that there are several distinguishing features in that case which makes its ratio inapplicable to the facts of the present case. In the first place, the Assessees there were engaged in the business of Pan Masala and Gutkha etc. The answers given to questions posed to the Assessee in the course of search and survey proceedings in that case bring out the points of distinction. In the first place, it was stated that the statement recorded was under Section 132(4) and not under Section 133A. It was a statement by the Assessee himself. In response to question no. 7 whether all the purchases made by the family firms, were entered in the regular books of account, the answer was:

> "We and our family firms namely M/s. Assam Supari Traders and M/s. Balaji Perfumes generally try to record the transactions made in respect of purchase, manufacturing and sales in our regular books of accounts but it is also fact that some time due to some factors like inability of accountant, our busy schedule and some family problems, various purchases and sales of Supari, Gutka and other items dealt by our firms is not entered and shown in the regular books of accounts maintained by our firms."

65. Therefore, there was a clear admission by the Assessees in Smt. Dayawanti Gupta (supra) there that they were not maintaining regular books of accounts and the transactions were not recorded therein.

66. Further, in answer to Question No. 11, the Assessee in Smt. Dayawanti Gupta (supra) was confronted with certain documents seized during the search. The answer was categorical and reads thus:

> "Ans:- I hereby admit that these papers also contend details of various transactions include purchase/sales/manufacturing trading of Gutkha, Supari made in cash outside Books of accounts and these are actually unaccounted transactions made by our two firms namely M/s. Asom Trading and M/s. Balaji Perfumes."

67. By contrast, there is no such statement in the present case which can be said to constitute an admission by the Assessee of a failure to record any transaction in the accounts of the Assessee for the AYs in question. On the contrary, the Assessee herein stated that, he is regularly maintaining the books of accounts. The disclosure made in the sum of Rs. 1.10 crores was only for the year of search and not for the earlier years. As already noticed, the books of accounts maintained by the Assessee in the present case have been accepted by the AO. In response to question No. 16 posed to Mr. Pawan Gadia, he stated that there was no possibility of manipulation of the accounts. In Smt. Dayawanti Gupta (supra), by contrast, there was a chart prepared confirming that there had been a year-wise non-recording of transactions. In Smt. Dayawanti Gupta (supra), on the basis of material recovered during search, the additions which were made for all the years whereas additions in the present case were made by the AO only for AY 2004-05 and not any of the other years. Even the additions made for AYs 2004-05 were subsequently deleted by the CIT (A), which order was affirmed by the ITAT. Even the Revenue has challenged only two of such deletions in ITA No.

306/2017.

68. In para 23 of the decision in Smt. Dayawanti Gupta (supra), it was observed as under:

> "23. This court is of opinion that the ITAT's findings do not reveal any fundamental error, calling for correction. The inferences drawn in respect of undeclared income were premised on the materials found as well as the statements recorded by the assessees. These additions therefore were not baseless. Given that the assessing authorities in such cases have to draw inferences, because of the nature of the materials - since they could be scanty (as one habitually concealing income or indulging in clandestine operations can hardly be expected to maintain meticulous books or records for long and in all probability be anxious to do away with such evidence at the shortest possibility) the element of guess work is to have some reasonable nexus with the statements recorded and documents seized. In tills case, the differences of opinion between the CIT (A) on the one hand and the AO and ITAT on the other cannot be the sole basis for disagreeing with what is essentially a factual surmise that is logical and plausible. These findings do not call for interference. The second question of law is answered again in favour of the revenue and against the assessee."

69. What weighed with the Court in the above decision was the "habitual concealing of income and indulging in clandestine operations" and that a person indulging in such activities "can hardly be accepted to maintain meticulous books or records for long." These factors are absent in the present case. There was no justification at all for the AO to proceed on surmises and estimates without there being any incriminating material qua the AY for which he sought to make additions of franchisee commission.

70. The above distinguishing factors in Smt. Dayawanti Gupta (supra), therefore, do not detract from the settled legal position in Kabul Chawla (supra) which has been followed not only by this Court in its subsequent decisions but also by several other High Courts.

71. For all of the aforementioned reasons, the Court is of the view that the ITAT was justified in holding that the invocation of Section 153A by the Revenue for the AYs 2000-01 to 2003-04 was without any legal basis as there was no incriminating material qua each of those AYs.

Conclusion

72. To conclude:

(i) Question (i) is answered in the negative i.e., in favour of the Assessee and against the Revenue. It is held that in the facts and circumstances, the Revenue was not justified in invoking Section 153A of the Act against the Assessee in relation to AYs 2000-01 to AYs 2003-04?

(ii) Question (ii) is answered in the affirmative i.e., in favour of the Assessee and against the Revenue. It is held that with reference to AY 2004-05, the ITAT was correct in confirming the orders of the CIT (A) to the extent it deleted the additions made by the AO to the taxable income of the Assessee of franchise commission in the sum of Rs. 88 lakhs and rent payment for the sum of Rs. 13.79 lakhs?

> The said decision of Hon'ble High Court was challenged by the revenue before the Hon'ble Supreme Court, however, the SLP of the revenue was dismissed vide order dated 02/7/2018 reported supra. Thus, the Hon'ble High Court has reiterated its view as taken in the case of CIT Vs. Kabul Chawla (supra) and specifically held that once the assessment has attained the finality i.e. is not pending then the same cannot be subject to tax in proceedings U/s 153A of the Act except some incriminating material are gathered in course of search or during the proceedings U/s 153A of the Act. The Hon'ble Jurisdictional High court in the case of Jai Steel (India) Vs ACIT (supra) has also considered this issue in para 22 to 26 as under:
>
> 22. In the firm opinion of this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:

(a) the assessments or reassessments, which stand abated in terms of II proviso to Section 153A of the Act, the AO acts under his original jurisdiction, for which, assessments have to be made;

(b) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material and

(c) in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made.

Though such a claim by the assessee for the first time under Section 153A of the Act is not completed, the case in hand, has to be considered at best similar to a case where in spite of a search and/or requisition, nothing incriminating is found. In such a case though Section 153A of the Act would be triggered and assessment or reassessment to ascertain the total income of the person is required to be done, however, the same would in that case not result in any addition and the assessments passed earlier may have to be reiterated.

23. The reliance placed by the counsel for the appellant on the case of Anil Kumar Bhatia (supra) also does not help the case of the assessee. The relevant extract of the said judgment reads as under:--

> "19. Under the provisions of Section 153A, as we have already noticed, the Assessing Officer is bound to issue notice to the assessee to furnish returns for each assessment year falling within the six assessment years immediately preceding the assessment year relevant to the previous year in which the search or requisition was made.

Another significant feature of this Section is that the Assessing Officer is empowered to assess or reassess the "total income" of the aforesaid years. This is a significant departure from the earlier block assessment scheme in which the block assessment roped in only the undisclosed income and the regular assessment proceedings were preserved, resulting in multiple assessments. Under Section 153A, however, the Assessing Officer has been given the power to assess or reassess the 'total income' of the six assessment years in question in separate assessment orders. This means that there can be only one assessment order in respect of each of the six assessment years, in which both the disclosed and the undisclosed income would be brought to tax.

20. A question may arise as to how this is sought to be achieved where an assessment order had already been passed in respect of all or any of those six assessment years, either under Section 143(1)(a) or Section 143(3) of the Act. If such an order is already in existence, having obviously been passed prior to the initiation of the search/requisition, the Assessing Officer is empowered to reopen those proceedings and reassess the total income, taking note to the undisclosed income, if any, unearthed during the search.For this purpose, the fetters imposed upon the Assessing Officer by the strict procedure to assume jurisdiction to reopen the assessment under Sections 147 and 148, have been removed by the non obstante clause with which sub-section (1) of Section 153A opens. The time-limit within which the notice under Section 148 can be issued, as provided in Section 149 has also been made inapplicable by the non obstante clause. Section 151 which requires sanction to be obtained by the Assessing Officer by issue of notice to reopen the assessment under Section 148 has also been excluded in a case covered by Section 153A. The time-limit prescribed for completion of an assessment or reassessment by Section 153 has also been done away with in a case covered by Section 153A. With all the stops having been pulled out, the Assessing Officer under Section 153A has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters, if need be.

21. Now there can be cases where at the time when the search is initiated or requisition is made, the assessment or reassessment proceedings relating to any assessment year falling within the period of the six assessment years mentioned above, may be pending. In such a case, the second proviso to sub-section (1) of Section 153A says that such proceedings "shall abate". The reason is not far to seek. Under Section 153A, there is no room for multiple assessment orders in respect of any of the six assessment years under consideration. That is because the Assessing Officer has to determine not merely the undisclosed income of the assessee, but also the 'total income' of the assessee in whose case a search or requisition has been initiated. Obviously there cannot be several orders for the same assessment year determining the total income of the assessee. In order to ensure this state of affairs namely, that in respect of the six assessment years preceding the assessment year relevant to the year in which the search took place there is only one determination of the total income, it has been provided in the second proviso of sub-Section (1) of

> Section 153A that any proceedings for assessment or reassessment of the assessee which are pending on the date of initiation of the search or making requisition "shall abate". Once those proceedings abate, the decks are cleared, for the Assessing Officer to pass assessment orders for each of those six years determining the total income of the assessee which would include both the income declared in the returns, if any, furnished by the assessee as well as the undisclosed income, if any, unearthed during the search or requisition. The position thus emerging is that the search is initiated or requisition is made, they will abate making way for the Assessing Officer to determine the total income of the assessee in which the undisclosed income would also be included, but in case where the assessment or reassessment proceedings have already been completed and assessment orders have been passed determining the assessee's total income and such orders subsisting at the time when the search or the requisition is made, there is no question of any abatement since no proceedings are pending. In this latter situation, the Assessing Officer will reopen the assessments or reassessments already made (without having the need to follow the strict provisions or complying with the strict conditions of Sections 147, 148 and 151) and determine the total income of the assessee. Such determination in the orders passed under Section 153A would be similar to the orders passed in any reassessment, where the total income determined in the original assessment order and the income that escaped assessment are clubbed together and assessed as the total income. In such a case, to reiterate, there is no question of any abatement of the earlier proceedings for the simple reason that no proceedings for assessment or reassessment were pending since they had already culminated in assessment or reassessment orders when the search was initiated or the requisition was made." (Emphasis supplied)

24. The said judgment also in no uncertain terms holds that the reassessment of the total income of the completed assessments have to be made taking note of the undisclosed income, if any, unearthed during the search and the income that escaped assessments are required to be clubbed together with the total income determined in the original assessment and assessed as the total income. The observations made in the judgment contrasting the provisions of determination of undisclosed income under Chapter XIVB with determination of total income under Sections 153A to 153C of the Act have to be read in the context of second proviso only, which deals with the pending assessment/reassessment proceedings. The further observations made in the context of de novo assessment proceedings also have to be read in context that irrespective of the fact whether any incriminating material is found during the course of search, the notice and consequential assessment under Section 153A have to be undertaken.

25. The argument of the learned counsel that the AO is also free to disturb income, expenditure or deduction de hors the incriminating material, while making assessment under Section 153A of the Act is also not borne out from the scheme of the said provision which as noticed above is essentially in context of search and/or requisition.

The provisions of Sections 153A to 153C cannot be interpreted to be a further innings for the AO and/or assessee beyond provisions of Sections 139 (return of income), 139(5) (revised return of

income), 147 (income escaping assessment) and 263 (revision of orders) of the Act.

26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess' have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word 'assess' has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents.

Thus, the Hon'ble High Court has held that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents. The ld. CIT(A) has decided this issue in para 7 to 7.7 as under:

> "7. I have perused the order of the AO and submissions made in this regard. I have also gone through the various case laws cited by the AR. For the sake of convenience the legal ground is adjudicated 1st as it goes to the root of the matter.
>
> 7.2 In support of the additional ground taken/ contention raised detailed written submission are made wherein the appellant has challenged the legal validity of the addition made in the order framed u/s 143(3)/153A. It is submitted that such additions cannot be made as they are not relatable to any incriminating seized material found during the course of search. The appellant has cited following judgments in support of the contention taken:
>
> 1) Jay Steel limited vs. ACIT (88 DTR 1) [Raj HC]
>
> 2) Kabul Chawla vs. ACIT 380 ITR 573 (Del HC)
>
> 3) Continental warehousing Corporation 374 ITR 645 etc. 7.3 I have perused the order of the AO and submissions made in this regard. Perusal of assessment order passed u/s 143(3)/153A shows that all the additions made by the AO are not relatable to any seized material. I also find that for the A.Yr the assessment stood completed on the date of search.
>
> 7.4 The issue of additions made by the AO in the assessment u/s 143(3)/153A without any reference to incriminating seized material was considered by the Hon'ble Rajasthan High court in the case of Jai Steel limited vs. ACIT (88 DTR 1). The Hon'ble court was of the view in case of completed assessments no addition can be made if no incriminating seized material is found during the course of search. The relevant observation of the judgment is reproduced below:

> "In the firm opinion of this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:
>
> (a) The assessments or reassessments, which stand abated in terms of II proviso to Section 153A of the Act, the AO acts under his original jurisdiction, for which, assessments have to be made;

(b) Regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material and just In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or 13 D.B. INCOME TAX APPEAL NO.53/2011 Jai Steel (India), Jodhpur vs. Assistant Commissioner of income Tax, Jodhpur (Along with other 16 similar matters) reassessment can be made."

7.5 Similar view point was expressed by the Hon'ble Delhi High court in the case of Kabul Chawla vs. ACIT 380 ITR 573 (Del HC). The relevant observation of Hon'ble court could be seen in para 37 & 38 of order, same is reproduced below:

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

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

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

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

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

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

assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

Conclusion

38. The present appeals concern AYs, 2002-03, 2005-06 and 2006- 07.0n the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.

7.6 The issue of additions made by the AO while framing the assessment u/s 143(3)/153A, if no incriminating material is found during the course of search was considered by Hon'ble Gujarat High court in the case of Soumya construction PL Vs CIT 387 ITR 529. In its order dated 14/03/2016 Hon'ble court has categorically stated that, in cases of completed assessment, if no incriminating material is found then no additions can be made in the assessment framed u/s 153A of the Act. The relevant para no. 18 & 19 of the court order can be referred to.

Similar view was also taken in the following judgments, including by Hon'ble ITAT Jaipur in many cases:

a. Continental warehousing Corporation 374 ITR 645 b. PCIT vs. Meeta Gutgutia 152 DTR 153 c. Vijay Kumar D Agarwal V/s DCIT in IT(SS)A Nos. 153,154,155 & 156/Ahd/2012 d. Ratan Kumar Sharma vs. DCIT ITA 797 & 798 /Jaipur/2014 e. Vikram Goyal vs. DCIT ITA 174/Jaipur/2017 etc f. Jadau Jewellers & Manufacturer PL Vs ACIT (686/Jaipur/2014) g. Prateek Kothari Vs. ACIT (312/Jaipur/2015.

7.7 Considering the above I am of the view that as the additions made by AO are without any reference to the seized material, they are not legally tenable. The same are therefore directed to be deleted. The legal ground taken by the appellant is thus allowed. The appellant succeeds on legal ground."

In view of the above facts and circumstances as well as in the light of binding precedents as discussed in the forgoing paragraphs, we do not find any error or illegality in the impugned order of the ld. CIT(A) qua this issue."

Accordingly, in view of the facts and circumstances discussed above, we do not find any error or illegality in the impugned order of the ld. CIT (A). Before parting with the matter, we may point out that the statements recorded by the Investigation Wing during the search and seizure action taking the confession and surrender from the assessee are clearly in violation of the Instructions of the CBDT vide F. No. 286/2/2003-IT(Inv.) dated 10th March, 2003 wherein the Board has expressed its serious concern about the fact that the assessees have claimed that they have been forced to confess the undisclosed income during the course of search and seizure and survey operation. Such confessions, if not based upon the credible evidence, are later retracted by the concerned assessees while filing returns of income. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Departments. Similarly, while recording the statement during the course of search and seizure and survey operations, no attempt should be made to obtain confession as to the undisclosed income. The Board has again issued a Circular dated 18th December, 2014 and advised the Taxing Authorities to avoid obtaining admission of undisclosed income under coercion/undue influences. Thus in the absence of any incriminating material found during the course of search and seizure action, the confession as recorded during the course of search and seizure action has no evidentiary value. It is also pertinent to note that if a confession revealing certain information or disclosing certain transactions which are not disclosed by the assessee in the books of account, the same has a good evidentiary value and a simplicitor retraction of such statement cannot be accepted until and unless the assessee at the time of retraction explains the mistakes and circumstances under which such mistakes were committed while making the confession. In the case in hand, the confession of the assessee is not revealing any transaction which is not already disclosed or recorded in the books of account. Therefore, any confession of undisclosed income which is already part of books of account as well as already disclosed in the return of income filed under section 139(1), in the absence of any supporting documentary evidence cannot be regarded as a good evidence for addition. Hence, we do not find any error or illegality in the impugned order of the ld. CIT (A) qua this issue. This covers the Ground Nos. 1 to 7 of the Revenue's appeal.

13. Since the issues involved in the rest of the appeals are identical and for the sake of convenience we have taken ITA No. 753/JP/2019 as a lead case which covers all other appeals, therefore, our finding in ITA No. 753/JP/2019 is applicable in all other appeals and consequently all the appeals of the revenue stand disposed off being dismissed.

14. In the result, appeals of the Revenue in ITA Nos. 753/JP/2019, 748/JP/2019, 750/JP/2019 and 150/JP/2020 are dismissed.

ITA NO. 149/JP/2020 A.Y. 2012-13 :

15. The grounds raised by the revenue in this appeal are as under :-

> 1. The ld. CIT (A) has erred in law and on facts (independently & severally granting relief to the assessee.

2. Whether on the facts and in the circumstances of the case the CIT (A) was right in deleting the addition of Rs. 4,12,500/- u/s 68 of the I.T act, 1961 made by the AO on account of bogus LTCG which was claimed by the assessee as exempt income u/s 10(38) of the IT Act.

3. Whether on the facts and in the circumstances of the case and in law that the CIT (A) was right in deleting the addition of Rs. 4,12,500/- made by the AO on the basis of incriminating documents and accepted n the statement u/s 132(4) and statement u/s 131, on account of investment in shares was made out of books.

4. Whether on the facts and in the circumstances of the case and in law, the CIT (A) was justified in holding that the statement recorded u/s 132(4) & 131 of the Income Tax Act, 1961 cannot be considered as an incriminating material found and seized during the search.

5. Whether on the facts and in the circumstances of the case and in law, the CIT (A) was justified in holding that the assessee filed retraction against the statement given u/s 132(4) during the search as well as post search proceedings, however the retraction was filed after 8 months without supporting evidences and also not reported during the search proceedings.

6. Whether on the facts and in the circumstances of the case and in law, the CIT (A) is was justified in allowing the appeal of the assessee holding that in absence of any incriminating material, the completed assessment can't be interfered with by the AO and completed assessment can be interfered with the AO while making assessment u/s 153A only on the basis of some incriminating material unearthed during the course of search which were not produced or not already disclosed. Although the same was accepted in the statement recorded under section 132(4).

7. The appellant craves to add, amend, alter or forego any ground(s) of appeal either before or at the time of hearing of the appeal.

16. Grounds no. 1 and 3 to 6 are covered by our decision in ITA No. 753/JP/2019 and therefore, no separate adjudication is required.

17. In respect of Ground No. 2, briefly stated the facts of the case are that the assessee is an individual deriving share of income from firm M/s. Maheshwari Associates and income from other sources. The assessee filed his return of income under section 139 on 15.03.2013 declaring an income of Rs. 9,40,240/-. A search was conducted on 07.01.2016 in case of Dilip Manihar Group, Jaipur and assessee was also covered in it. In search no incriminating material, loose paper or documents pertaining to year were found. However, in statement recorded in course of search assessee admitted an undisclosed income of Rs. 4,12,500/- for an alleged accommodation entry which later on was retracted by assessee being wrong and given under pressure.

18. We have heard the ld. D/R as well as the ld. A/R and considered the relevant material on record. The ld. D/R has relied upon the order of the AO. On the other hand, the ld. A/R submitted that the addition of Rs. 4,12,500/- on account of bogus Long Term Capital Gain earned by the HUF of the assessee was made in the hands of the assessee on protective basis and substantive addition was made in the hands of the HUF. In this connection the ld. A/R submitted that in the hands of the HUF a Short Term Capital Gain was declared and due tax was paid thereon and no deduction under section 10(38) of the IT Act was claimed by the HUF as alleged by the ld. AO. The ld. A/R also submitted a copy of the return of income filed by the HUF along with his written synopsis. The ld. A/R has further submitted that the case of the HUF has reached to its finality and the Short Term Capital Gain declared and tax paid thereon has been assessed in the hands of the HUF. In view of the above facts and circumstances of the case, the ld. A/R has strongly argued that no protective addition is to be made in the hands of the assessee. The ld. A/R submitted that the ld. CIT (A) has rightly deleted the addition.

19. We have considered the rival submissions and facts of the case and in our considered view the protective addition made in the hands of the assessee is not tenable in the eyes of law as substantive addition has been made and the case of the HUF has reached its finality. Accordingly, we set aside the protective addition made by the AO in the hands of the assessee. Further, the ld. CIT (A) has also considered the facts and circumstances of the case and deleted the addition on merit. After considering the totality of facts and circumstances of the case, we find no infirmity in the order of the ld. CIT (A) and accordingly we upheld the order of the ld. CIT (A). Ground no. 2 is rejected.

20. Before parting, we may make it clear that these appeals have been decided on the basis of documents placed on record and the submissions along with case laws relied on by the respective parties before us and on the basis of circumstances arises from the facts of the present case. This decision may not be the precedent in other cases having different facts.

20. In the result, appeal of the Revenue in ITA No. 149/JP/2020 for the assessment year 2012-13 is dismissed.

Order pronounced in the open court on 24/02/2022.

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(RATHOD KAMLESH JAYANTBHAI)	(Sandeep Gosain)
ys[kk lnL;@Accountant Member	U;kf;d lnL;@Judicial Member

Tk;iqj@Jaipur
fnukad@Dated:- 24/02/2022.
Das/

vkns'k dh izfrfyfi vxzfs 'kr@Copy of the order forwarded to:

1. vihykFkhZ@The Appellant- Smt. Saroj Parwal, Jaipur, M/s. Bitthal Das Parwal, HUF, M/s. Hari Narain Parwal HUF, Smt. Jyoti Falor & Shri Jitendra Kumar Falor, Jaipur.

2. izR;FkhZ@ The Respondent- The DCIT/ACIT, Central Circle-3, Jaipur.

3. vk;dj vk;qDr@ CIT

4. vk;dj vk;qDr@ CIT(A)

5. foHkkxh; izfrfuf/k] vk;dj vihyh; vf/kdj.k] t;iqj@DR, ITAT, Jaipur.

6. xkMZ QkbZy@ Guard File {ITA No. 753(5)/JP/2019} vkns'kkuqlkj@ By order, lgk;d iathdkj@Asst. Registrar.

Sl. No.		Date	Initial
1	Date of dictation		
2	Date on which the typed draft is placed before the Dictating Member ..... Other Member.....		
3	Date on which the approved draft comes to the Sr.P.S./P.S		
4	Date on which the fair order is placed before the Dictating Member for pronouncement		
5	Date on which the fair order comes back to the Sr.P.S./P.S.		
6	Date on which the file goes to the Bench Clerk		
7	Date on which the file goes to the Head Clerk		
8	The date on which the file goes to the Assistant Registrar for signature on the order		
9	Date of Dispatch of the Order		

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