

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, AHMEDABAD**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER**

आयकर अपील सं./ IT(SS)A No.539 and 540/Ahd/2011

निर्धारण वर्ष/Asstt. Year: 2006-2007 and 2007-08

Shri Govind G. Sarawagi HUF V-2131, Surat Textile Market Ring Road, Surat. PAN : AAGHS 8859 F	Vs	ACIT, Cent.Cir.4 Surat.
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आयकर अपील सं./ ITA No.3177/Ahd/2011

निर्धारण वर्ष/Asstt. Year: 2008-2009

Manoj Sarawagi-HUF 538, J.J.AC Market Ring Road, Surat. PAN : AAGHS 8368 M	Vs	ACIT, Cent.Cir.4 Surat.
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आयकर अपील सं./ ITA No.3306/Ahd/2011

निर्धारण वर्ष/Asstt. Year: 2009-10

ACIT, Cent.Cir.4 Surat.	Vs	Shri Govind G. Sarawagi HUF V-2131, Surat Textile Market Ring Road, Surat. PAN : AAGHS 8859 F
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अपीलार्थी/ (Appellant)	प्रत्यर्थी/ (Respondent)
Assessee by :	Shri Mehul Shah
Revenue by :	Mrs.Vibha Bhalla, CIT-DR

सुनवाई की तारीख/Date of Hearing : 12/08/2015

घोषणा की तारीख /Date of Pronouncement: 30/09/2015

आदेश/O R D E R

PER RAJPAL YADAV, JUDICIAL MEMBER:

The Id.CIT(A)-II, Ahmedabad has decided appeals of the assessee for the Asstt.Year 2006-07 and 2007-08 vide separate orders of even

dated i.e. 17.8.2011. The assessee is challenging these orders in ITA No.539/Ahd/2011 and 540/Ahd/2011.

The appeals for the Asstt.Years 2008-09 and 2009-10 have been decided by the Id.CIT(A) by separate orders of even date i.e. 13.10.2011. The Revenue is challenging the order of the CIT(A) in the Asstt.Year 2009-10, whereas, the assessee is in appeal in the Asstt.Year 2008-09. Since common issues are involved in these appeals, therefore, we heard them together and deem it appropriate to dispose of these appeals by common order.

2. First common dispute is involved in the Asstt.Year 2006-07 and 2007-08. The assessee has pleaded that the assessment order framed under section 143(3) r.w.s. 153A are *void ab-initio* because no search was carried out upon the assessee, therefore, the AO has no jurisdiction to initiate proceedings under section 153A of the Income Tax Act, 1961.

3. Brief facts of the case are that search and seizure operation was carried out at the residential premises of *Karta* who happened to be a sub-group of Laxmipati group in Surat. This search was carried out on 20.1.2009. The assessee has filed return of its income under section 139 of the Income Tax Act on 31.7.2006 declaring an income of Rs.3,42,930/-. Along with search, a survey under section 133A of the Act was conducted at the business premises of the assessee on 20.1.2009. The Id.AO had issued notice under section 153A of the Income Tax Act on 27.7.2009 which was duly served upon the assessee. In response to the notice, the assessee has filed its return of income on 13.1.2010 declaring total income of Rs.3,42,926/-. After hearing the assessee, the Id.AO has passed the assessment order under section 143(3) r.w.s. 153A on 31.12.2010 in the Asstt.Year 2006-07. He has determined the taxable income of the assessee at Rs.72,42,926/-. An addition of Rs.69,00,000/- was made by the AO on the ground that the assessee has made payment of on-money in

purchase of plot bearing nos.30,31 and 32 of Central Park, Pandesara, Surat from Central Corporation. A total on-money of Rs.73,19,460/- was paid out of which Rs.69,00,000/- was paid during the accounting period relevant to the Asstt.Year 2006-07.

4. In the Asstt.Year 2007-08 also, notice under section 153A was issued on 27.7.2009 and assessee has filed its return of income on 13.1.2009 showing total income of Rs.3,42,926/-. The assessment order was passed on 31.12.2010. The Id.AO has determined the taxable income of the assessee at Rs.35,78,370/- while passing the assessment order under section 143(3) r.w.s. 153A of the Income Tax Act. The Id.AO has basically made two additions. One addition of Rs.4,19,460/- which is part of payment of on-money falling in this accounting year and addition of Rs.28,58,402/- on account of unexplained investment in shares.

5. The Id.counsel for the assessee has raised two fold submissions. In the first fold submission, he contended that no authorization was issued for carrying out search on the HUF. The authorizations were issued in the name of individuals. More so, all the members of HUF were not covered under the search. He placed on record list of HUF members as well as copy of *Panchnama* exhibiting the authorization issued for covering the persons under the search action. On the strength of these details, he contended that since no search action was initiated in the case of the assessee, therefore, the AO has no jurisdiction to take action under section 153A of the Income Tax Act. For buttressing his contentions, he relied upon the decision of the Hon'ble Gujarat High Court rendered in the case of CIT Vs. Jolly Fantasy World Ltd., in Tax Appeal No.1254 of 2014 (Guj). He has placed on record copy of the decision rendered on 9.3.2015. He also relied upon the decision of the Gujarat High Court rendered in the case of CIT Vs. Ramesh D. Patel, Tax Appeal No.344, 346 to 349 of 2013 (Guj), and

copy of the said decisions dated 21.1.2013 has been placed at page no.63 of the case compilation. Apart from these two decisions from the jurisdictional High Court, the assessee has relied upon the orders of the ITAT in the case of A.L. Ahuja Vs. DCIT, 1 SOT 475 (Del), ACIT Vs. Smt. Mohinder Kaur, ITA No.13/CHD/2006 and Jindal Stainless Ltd. Vs. ACIT, 19 DTR 0345 (Del.Trib.). The Id. Counsel for the assessee has also placed the copies of these decisions.

6. In his next fold of submissions, the Id. Counsel for the assessee submitted that during the course of survey, a paper bearing no.15 of Annexure-AS/27 was found and impounded from group premises. This paper contains the details of payment for purchase of three plots bearing nos.30, 31 and 32 of Central Park, Pandesara, Surat, which were purchased by the assessee on 19.4.2006. The statement of Shri Rakesh Sarawagi was recorded under section 131 of the Act by the DIT (Investigation) Surat on 23.1.2009. In the statement, it was disclosed that these plots were purchased by Shree Siddhi Vinayak Sarees Pvt. Ltd. for a consideration of Rs.1,72,34,775/-. As far as the consideration is concerned, there is no dispute between the assessee and the Revenue. The dispute is that the assessee has paid a sum of Rs.73,19,460/- in cash over and above, the amount stated in the sale deed. In other words, the assessee had paid an amount of Rs.90.00 lakhs by cheque. Rs.9,15,315/- was outstanding out of the cheque amount. The case of the assessee is that this amount of Rs.73,19,460/- paid in cash was paid to Shri Javed S. Dalal in the accounting period relevant to the Asstt.Year 2009-10. It was submitted by the assessee before the AO that Shri Javed S. Dalal has booked these plots orally and ultimately the assessee has purchased these plots with the help of Shri Javed S. Dalal. It has paid on-money of Rs.73.00 lakhs to Shri Javed S. Dalal. The assessee has produced Shri Javed S. Dalal, who in his statement recorded on 23.7.2010 disclosed that this amount was received by him before the sale deed, but, later on he filed

confirmation before the AO that the payment was received during the accounting period relevant to the Asstt.Year 2009-10. He has shown this payment in his return for the Asstt.Year 2009-10. The assessee has also shown this payment in the return for the Asstt.Year 2009-10. In other words, the assessee has offered this amount for taxation in the Asstt.Year 2009-10. The statement of Shri Rakesh Sarawagi, director of Shree Siddhi Vinayak Sarees Pvt. Ltd. was recorded on 3.3.2009. In his statement, he has categorically stated that the payment of Rs.73,19,460/- was made in cash. It was made in the month of November, 2008. According to the Id.counsel for the assessee, immediately after search/survey, statement of various persons recorded. They were categorical that the payments were made in the month of November, 2008, falling within the accounting period relevant to the Asstt.Year 2009-10.

7. The AO has taxed this amount in both the years i.e. the Asstt.Year 2006-2007 as well as the Asstt.Year 2009-10.

8. On appeal, the Id.First Appellate Authority has deleted the addition from the Asstt.Year 2009-10 on the ground that it amounts to double taxation of the same amount. This order of the CIT(A) is being impugned by the Revenue in ITA No.3306/Ahd/2011.

9. The Id.DR on the other hand, contended that once the authorization was issued in the name of the members of HUF, then it should be construed that search warrant was issued in the name of HUF also. The AO has rightly taken cognizance under section 153A of the Income Tax Act. She further contended that the recipient in his statement recorded on 3.8.2010 under section 131 of the Act has replied that the payment was received before the execution of the sale deed, meaning thereby, the assessee has made payment in the accounting year relevant to the Asstt.Year 2006-07.

10. We have duly considered rival contentions and gone through the record carefully. The Hon'ble Gujarat High Court in the case of CIT Vs. Ramesh D. Patel, Tax Appeal No.347 of 2013 and other appeals) has considered an issue that where search warrant was not issued in the name of the assessee, then the AO will have no jurisdiction to assess him under section 153A of the Income Tax Act. The question framed by the Hon'ble Gujarat High Court in the case of Ramesh D. Patel (supra) read as under:

“Whether the ITAT was justified in law and in facts in annulling the assessment finalized u/s.153A(b) on technical ground that in absence of search warrant, no order can be passed u/s.153A(b) of the Act, without appreciating fact that the assessee did not challenge issue of statutory notice calling for return u/s.153A of Income Tax Act, 1961 within stipulated time or before completion of assessment, in view of section 124(3) of Income Tax Act,1961?”

11. After reproducing the finding recorded by the Tribunal, the Hon'ble Court has made the following observations:

“ Having heard the learned counsel for the parties, we find from the record that the Assessing Officer had made contradictory statements with respect to the assessee being subjected to search. In one order, he noted that no search warrant was issued against the assessee, while in another order, he recorded that not only M/s.J.K.Securities Group, but the assessee was also subjected to search. To clear this confusion, the Tribunal gave multiple opportunities to the Revenue to produce the record of search and authorization. Despite sufficient opportunities, the Revenue could not produce the same. The Tribunal, therefore, concluded that there was no search warrant against the assessee. The Tribunal, therefore held that in absence of any search warrant, the orders passed by the Assessing Officer under section 153B of the Act were invalid. We have no reason to interfere with the order passed by the Tribunal. Section 153A of the Act pertains to assessment in case of search or requisition. Sub-section (1) thereof provides that notwithstanding anything contained in sections 139, 147, 148, 149, 151 and 153 of the Act, in case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after 31st of May 2003, the Assessing Officer shall

issue a notice to such person requiring him to furnish the return of income and assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. Section 153B of the Act provides for time limit for completion of assessment under section 153A. Learned counsel for the assessee has rightly relied on a decision of the Orissa High Court in the case of Siksha 'O' Anusandhan v. CIT, 336 ITR 112 (Orissa) in which it was held that provisions of section 153A make it clear that only in the case of a person where a search was initiated under section 132 or books of account or other documents or any assets were requisitioned under section 132A after 31.3.2002, the Assessing Officer could after issuing a notice, assess or reassess the total income of such person for six assessment years immediately preceding the assessment year relevant to the previous year in which such search was conducted or requisition was made. In the present case, the Tribunal came to a factual finding that no search authorization was produced. This was necessary because the Assessing Officer had made contradictory references to the assessee being subjected to search or not. In absence of a search authorization, the Tribunal correctly held that assessment orders under section 153A could not have been passed."

12. Similarly, in the case of Jolly Fantasy World Ltd. (supra), the Hon'ble Gujarat High Court has framed the following question of law, and answered these questions as under:

(i) "Whether the Hon'ble Appellate Tribunal has committed substantial error of law in accepting the additional ground of the assessee that since, the name of these assesseees are not appearing in the authorization/requisition, proceedings initiated u/s 158BC of the Act against them are void initio without appreciating the fact that the order under dispute was passed in pursuance of an order passed by the Tribunal itself?"

(ii) Whether the Tribunal was justified in law in accepting the additional grounds of the assessee which were raised after a lapse of 5 years of filing of second round of appeal and 14 years after the search without any justification by the assessee for such delay?"

(iv) Whether the Hon'ble Tribunal was justified in law in accepting the contention raised by assessee at a later stage that block assessment failed for want of jurisdiction even though the facts of the case clearly shows that the assessee had responded to

notices, filed return, participated in block assessment proceedings and accepted the assessment proceedings and further participated in set-aside assessment proceedings and suffered an assessment as per the direction of Hon'ble Tribunal, without raising such contention."

.....

"12. The aforesaid observations go to show that if the condition precedent for block assessment under Section 158BC is not satisfied, such would go to the root of the matter and the jurisdiction, which has not been expressly conferred by the statute, cannot be invested with the AO for the block assessment.

14. On facts, as recorded here above, admittedly, there was no warrant authorization on the name of the assessee and hence, the Tribunal has found the assessment as ab initio void, which, in our view, calls for no interference, on facts and on law.

15. In view of the above, we do not find that any substantial questions of law would arise for consideration as canvassed in the present group of appeals. Hence, all the appeals are meritless and therefore, dismissed."

13. A bare perusal of section 153A would indicate that this section provides that notwithstanding anything in section 139, 147, 148, 149, 151 and 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, The AO shall (a) issue notice to such person (b) assess or reassess the total income. The condition precedent for taking action under this section that search ought to have been initiated under section 132 of the Income tax Act upon that person. The learned DR appearing on behalf of the Revenue did not dispute with regard to this proposition. Her contention was that once on the members of the HUF search action has been initiated, then, the HUF as a whole would also be covered under this section. Before considering this argument, let us take note of the authorization. Copy of the *Panchnama* is available at page no.57. The relevant part of this *Panchnama* reads as under:

"Party No.E-1

PANCHNAMA

Dt. Of search : 20/1/2009

(To be prepared n quadruplicate)

- A) Warrant in the name Shri Govind Prasad G.
Sarawagi, Sanjay Kumar G.
Sarawagi, Maojkumar G.
Sarawagi, Rakeshkumar G.
Sarawagi.
- B) Warrant to search 9-C, 8-C, Rudravan Appts.,
(Details & Athwalines, Surat.
Ownership of place
of search)Telephone
numbers
- C) (A) and (B) stated (A) (B)
to be assessed

14. The assessee has submitted a list of members of the HUF, which reads as under:

Name	Relation
Mr.Govinprasad Gopiram Sarawagi	Karta
Mrs.Kanta Devi Govindprasad Sarawagi	Spouse of Karta
Mr. Sanjay Govindprasad Sarawagi	Son of Karta
Mrs.Sandhya Sanjay Sarawagi	Daughter in law of Karta
Mr.Manoj Govindprasad Sarawagi	Son of Karta
Mrs.Sarla Manoj Sarawagi	Daughter in law of Karta
Mr.Rakesh Govindprasad Sarawagi	Son of Karta
Mrs.Sujata Rakesh Sarawagi	Daughter in law of karta

Name of the HUF, who is separate taxable entity, is no where available in the *Panchnama*. It is also pertinent to note that all the members of the HUF were not covered under the search action. In section 153A, nowhere it has been provided that if the search is conducted on the partners, in their individual cases, then the firm would automatically deem to have been covered under search action. Similarly, there cannot be any implied search action on the HUF merely on the ground that some of the individual members of the HUF were covered under the search action. For invoking jurisdiction, there cannot be any implied operation of law. It should be specific and direct. Thus,

no search was conducted on the HUF, and therefore, no order under section 153A ought to be passed.

15. Since we have not upheld the assessment order passed under section 153A, therefore, do not deem it necessary to consider other issues on merit in Asstt.Years 2006-07 and 2007-08.

16. We now take the appeal of the Revenue i.e. ITA No.3306/Ahd/2011.

17. The grievance of the Revenue is that the Id.CIT(A) has erred in deleting the addition of Rs.73,19,460/-.

18. Brief facts of the case are that the assessee has filed its return of income on 31.3.2010 declaring total income of Rs.7,63,23,722/-. As discussed above, the assessee has purchased three plots in Central Park Area, where it paid a sum of Rs.73,19,462/-, over and above the amount stated in the sale deed. This amount was paid in cash. The assessee has offered this amount for taxation in the Asstt.Yar 2009-10. The Id.CIT(A) has directed the AO to exclude this amount on the ground that equivalent to this amount has been added in the income of the assessee for the Asstt.Year 2006-07 and 2007-08. The Id.CIT(A) was of the opinion that the sale deed was executed in the accounting year relevant to Asstt.Year 2006-07, and therefore, the assessee must have paid amount before the sale deed. We have quashed the assessment order on the ground that no search action was taken against the assessee and therefore, no assessment order can be framed under section 153A of the Income Tax Act. In this year, the AO has passed the assessment order under section 143(3). He has accepted the return of income filed by the assessee at the same figure. Since we have deleted the addition from the Asstt.Year 2006-07 and 2007-08, therefore, the arguments of double taxation would not be available to the assessee. The Id. Counsel for the assessee did not dispute for

setting aside the order of the CIT(A) and inclusion of this amount for taxation in the Asstt.Year 2009-10, as offered by the assessee in its return of income. We allow the appeal of the Revenue and restore the addition of Rs.73,19,460/-. The total taxable income of the assessee will be of Rs.7,63,23,720/- which has been determined by the AO. The directions of the CIT(A) for reduction of Rs.73,19,460/- out of this amount are vacated. This appeal be treated as allowed for statistical purpose.

19. Now we take the ITA No.3177/Ahd/2011.

20. The assessee has taken four grounds of appeal. Out of that, the ground no.3 and 4 are general grounds of appeal, which do not call for recording of any specific finding. Hence, they are rejected.

21. In ground no.1, the assessee has pleaded that the Id.CIT(A) has erred in confirming the action of the AO for adding Rs.6,98,606/- in the total income of the assessee under section 69B of the Income Tax Act, as unexplained investment.

In ground no.2, the assessee has pleaded that the Id.Revenue authorities have erred in rejecting its claim of long term capital gain exempt from tax amounting to Rs.7,61,589/-.

22. Both these grounds are inter-connected to each other, therefore, we take them together. Brief facts of the case are that the assessee has filed its return of income on 13.9.2008 declaring total income of Rs.16,23,748/-. The case of the assessee was selected for scrutiny assessment and notice under section 143(2) of the Act dated 16.9.2009 was issued and served upon the assessee. On scrutiny of the accounts, it revealed to the AO that the assessee has shown long term capital gain of Rs.7,61,589/- which it claimed as exempt. The Id.AO has noted the details of purchase and sales of shares in paragraph 4 at page no.2

of the assessment order. A perusal of these details would indicate that the assessee had purchased shares of three companies from Swan securities Pvt. Ltd. in the month of April, 2005 for consideration of Rs.2,04,659/-. These shares were sold in March, 2007. The Id.AO found that the assessee has not made the payment of purchase of shares upto the end of the financial year on 31.3.2006. According to the AO, the DEMAT account of the assessee reflects that almost all the shares are credited in April, 2007 and they were within a maximum period of 5 days. Thus, in the opinion of the AO, the assessee has not earned any long term capital gain, which is exempt from tax. He worked out an amount of Rs.6,98,606/- as unexplained investment and made addition under section 69B of the Income Tax Act. This amount has been worked out after debiting purchase price of Rs.1,97,890/- out of sale price of Rs.8,69,496/-. Before the Id.CIT(A), it was contended that the assessee had made purchases from Swan securities Pvt. Ltd. which is duly registered with SEBI and concerned stock exchange. All the purchases are supported by bills, giving full details as to the name of scrips, quantity, price, total purchase consideration, brokerage, bills of brokers etc. The purchases were made at the prevailing market rate as quoted by the recognized stock exchange. The relevant quotes were produced before the AO. The purchase price of the shares is proved and there is no dispute about the source of payment. The broker has confirmed the transactions in response to the query raised under section 133(6) of the Act by the AO. The broker has also given an extensive reply. All the payments were made to the brokers through account payee cheques. Actual deliveries were taken by the assessee in its DEMAT account maintained with M/s.Motilal Oswal Securities Ltd. Copies were also produced in the record. The Id.First Appellate Authority has rejected the contentions of the assessee by giving following reasons:

"a) The shares claimed to have been purchased through Swan Securities P.Ltd. were purchased un 1.4.2005 and 11.4.2005 No payment is made upto 31,3.2006 and from the copy of the account of the subsequent period, it is clear that the payment was made after sale of these shares through another broker Motilal Oswal Securities Ltd.

b) No demat account of Swan Securities P.Ltd. or the appellant was produced before the Assessing Officer to prove that the purchases of shares were pooled in the demat account of the broker in the month of April,2005.

c) Copy of the demat account of Motilal Oswal Securities Ltd. clearly proves that the shares were credited in the account of broker from April,2007. In the debit side of the demat account transaction report inter depository reference is made for the same shares on the same date but -from which depository account, the shares were transferred, was never explained before the Assessing Officer or during the appellate proceedings.

d) The purchase of shares in the month of April,2005 was never done through recognized stock exchange or even contract note of broker was never produced before the Assessing Officer or during the appellate proceedings

e) The appellant had not filed any balance sheet for the year ended on 31.3.2006 alongwith the original return which reflected the investment in shares. It is clear from the copy of the return of income filed during the appellate proceedings because as per list of enclosures, the balance sheet was not enclosed with the return. The appellant has made wrong claim that the balance sheet as on 31.3.2006 alongwith the return of income was filed on 31.07.2006 i.e. before the date of search.

f) The claim of the appellant that broker M/s.Swan Securities P.Ltd. was reputed broker working for many years and duly registered with stock exchange and the appellant has not deposited any advance money with the broker because the transaction were carried on mutual trust of buyer and seller, is also of no help to the appellant because had the appellant shown purchase of shares through M/s.Swan Securities P.Ltd,, but it sold the shares through M/s.Motial Oswal Securities Ltd who is another broker. The payment to M/s. Swan Securities P. Ltd. was reflected in the ledger account of M/s.Swan Securities P.Ltd, only after realization of sale proceeds of shares sold through Motial Oswal Securities Ltd. This also proves that shares were not pooled in the demat accout of Swan Securities P. Lid.

g) The appellant has utterly failed to prove the share holding for more than 12 months by producing any other credible evidence in the form of demat account by showing purchases of shares in the demat account of the appellant or broker and payment for the purchase of shares in the normal course of business i.e. in normal time period. The purchases of shares were also not made through any of the recognized stock exchange which is clear from the bills issued by M/s.Swan Securities P.Ltd. on which the bill dates and .the settlement date is same and shares were not purchased and settled through any stock exchange.”

23. The Id.counsel for the assessee has reiterated the contentions as raised before the CIT(A). He relied upon the order of the ITAT passed in ITA No.3233 and 3156/Ahd/2010 in the case of Manojkumar Sarawagi HUF for the Asstt.Year 2007-08. He contended that addition of Rs.22,93,718/- in the case of one of the HUFs associated with group concern was made. This addition was made on account of unexplained cash credit in the books of the HUF. The assessee had purchased shares from Swan securities Pvt. Ltd. and these were sold through the broker, M/s. Motilal Oswal Securities. The Revenue has doubted the genuineness of the transaction, but the Tribunal has accepted the contentions of the assessee, and deleted the addition. He has placed on record copy of the Tribunal's decision.

24. On the other hand, the Id.DR relied upon the order of the CIT(A).

25. Before embarking upon the objections raised by the Revenue, we would like to make reference of the observations made by the ITAT in the case of Manojkumar Sarawagi (HUF) in Asstt.Year 2007-08. The observations of the Tribunal read as under:

"7. We have heard the rival submissions and perused the materials available on record. The assessee claimed long term capital gains on sale of shares. It was claimed that shares have been purchased from broker M/s. Swan Securities Pvt. Ltd. in April, 2005. The assessee filed confirmation of the broker M/s. Swan Securities Pvt. Ltd. before the Assessing Officer who has confirmed purchase of shares by the assessee through them in

April, 2005. Copy of the account was also furnished and the consideration was made through banking channel. PB-17 and is the ledger accounts of the party to confirm purchase of the shares through banking channel. PB-9 is debit note of the broker charging interest on the outstanding amount against the assessee in accounting year 2006-07. PB-17 is ledger account to show that shares have been purchased by the assessee in April, 2005 through the broker M/s. Swan Securities Pvt. Ltd. PB-22 is also the statement of bills containing the closing balance of the shares purchased by the assessee on 31-03-2006. PB-12 to 16 are the brokers debit note to support the contention of the assessee that shares were purchased in April, 2005. The assessee also filed sale bills to show that the same shares were sold through the broker M/s. Motilal Oswal Securities Ltd. and payments have been received through account payee cheques on which security transactions taxes and stamp duty have been paid. The same is supported by PB-2 which is ledger account of the broker through whom shares were sold at Rs.16.42 lacs. PB-3 to 7 are the brokers contract note to show that shares were sold in March, 2007. Copy of the bank statement was filed in support of the contention. PB-22 is the balance sheet of the assessee as on 31-03-2006 to show outstanding liability in the name of M/s. Swan Securities Pvt. Ltd. through whom shares were purchased. The assessment order for assessment year 2006-07 u/s 143(3) of the IT Act passed after scrutiny in which returned income is accepted on furnishing the documents on the record of the AO. Therefore, it is unbelievable that the assessee would not have filed the profit & loss and balance sheet for the assessment year 2006-07 before the AO. We may further note that the AO in the assessment order merely holding that purchases are not genuine presumed that sales of the shares are bogus. The AO has not mentioned even the name of the brokers in the assessment order through whom the shares have been sold. The AO ignored all the documentary evidences on record in respect of the sales of the shares. Since nothing is mentioned in the assessment order with regard to sale of the shares by the assessee through broker, therefore, sale of the shares is not doubted by the AO. Since the assessee proved the sources of the sale proceeds of the shares through identified party who has also acknowledged the same, therefore, no addition u/s 68 could have been made against the assessee unless purchases of the shares are made, sales could not be doubted by the AO. Therefore, there is no undisclosed cash credit involved in this case and as such the learned CIT(A) rightly held that the sale proceeds of the shares cannot be termed as unexplained cash credit. The coo-ordinate Bench in the group cases of Smt. Vimlabrani Biharilal Batra and Others (supra) considering the identical issue in the light of the case laws relied

upon by the learned Counsel for the assessee deleted similar addition and held in Para 10 and 11 of the order dated 16- 09- 2011 as under ":

26. The case of the assessee is that it has purchased shares for consideration of Rs.1,97,890/- pertaining to three companies on 1.4.2005 and 11.4.2005 through Swan Securities Pvt. Ltd., meaning thereby, the shares were not purchased from stock market, but, they were purchased off-line. According to the assessee, these shares were credited to its DEMAT account maintained with M/s.Motilal Oswal Securities Ltd. in the month of April, 2007, and thereafter, these shares were sold. The assessee had computed long term capital gain on the sale of these shares and claimed exemption of Rs.7,61,589/-. The AO has rejected the claim of the assessee. In support of its claim, the assessee has submitted the confirmation from the broker, copy of the bill raised by the broker, details of payments through account payee cheques, receipt of sale proceeds through account payee cheques. The AO had issued summons under section 133(6) to Swan Securities Pvt. Ltd. who has confirmed the transaction and submitted requisite details. According to the assessee, it has shown investment of these shares in the balance sheet as on 31.3.2006 which were filed along with return of income filed on 31.7.2006, i.e. before the date of search. It is also pertinent to note that these shares were sold before search and capital gain was shown in the return. The copy of the DEMAT account of the assessee also shows that some part of the shares purchased have been received in the DEMAT account of the assessee and have been later on sold through M/s.Motilal Oswal Securities Ltd. in the Bombay Stock Exchange. The case of the Revenue, on the other hand, is that the assessee did not make payment of purchase price before 31.3.2006. Thus, it gives a suspicion about the genuineness of the transaction. The second reasons assigned by the Id.CIT(A) is that the alleged balance sheet was not annexed with the return filed on 31.7.2006, because, nothing is mentioned to this effect in the list of enclosures. On an

analysis of the objections pointed out by the Id.CIT(A) extracted supra, we find basically two circumstances are being highlighted against the assessee for doubting its claim of long term capital gain. The first circumstance is that payment of purchase price was not made before 31.3.2006. The contention of the assessee is that it has ordered for the purchase of shares and purchase was made on account of mutual trust that payment will be made. These have actually been made by the assessee later on. Thus, this is not such an issue which can doubt the very transaction. The next reason assigned by the Id.CIT(A) is that the assessee has not made deposit of advance money with the broker. To our mind, these circumstances highlighted by the Revenue are of peripheral in nature. Once the assessee has been pleaded that it has made purchase of shares through Swan Securities Pvt. Ltd. and Swan Securities Pvt. Ltd. has trust in the assessee of payment, then actual payment not made before 31st March would not create any dent in the transaction of the assessee. The Id.AO failed to point out any defect in the confirmation of Swan Securities Pvt. Ltd. or any documents furnished to him in response to his query under section 133(6) of the Act. The shares have actually been sold by the assessee. It means it must have been purchased. The purchase and sale both happen before the date of search. There cannot be any specific reason for the assessee to make such a claim after the search, because nothing discriminatory *qua* this transaction was found. If the Swan Securities Pvt. Ltd. has confidence of recovery of its amount incurred for purchase of shares at the instructions of the assessee, then, merely on account of the reason that payment was outstanding, transaction cannot be doubted. The payment has been subsequently made reflects the relationship between Swan Securities Pvt. Ltd. and the assessee. Under similar circumstances, the ITAT has deleted the addition made by the AO on account of unexplained cash credit in the case of Manojkumar Sarawagi-HUF (supra). Though this decision has not laid down any proposition of law, it has been put in service simply in order to

corroborate that Swan Securities Pvt. Ltd. and M/s.Motilal Oswal Securities Ltd. are genuine brokers dealing in share transactions.

27. Taking into consideration all the facts and circumstances, we allow both the grounds of appeal raised by the assessee, and the direct the AO to accept the claim of long term capital gain made by the assessee.

28. In the result, appeals of the assessee and that of the Revenue are allowed.

Order pronounced in the Court on 30th September, 2015 at Ahmedabad.

**Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER**

**Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER**