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आयकर अपीलीय अधिकरण, **चंडीगढ़** न्यायपीठ - **चंडीगढ़**।

IN THE INCOME TAX APPELLATE TRIBUNAL
CHANDIGARH - BENCH 'A'

BEFORE S/SHRI N.K. SAINI, VICE-PRESIDENT AND
RAJPAL YADAV, VICE-PRESIDENT

Sr. No.	ITA No. & Asstt.Year	Appellant	Respondent
1-3	ITA Nos.708, 710, 711 /Chd/2018 A.Ys.2011-12, 2013-14 and 2014-15	Shri Sanjay Singal	DCIT, Cent.Cir.1 Chandigarh
4-6	714, 716 and 717/Chd/2018 A.Ys. 2011-12, 2013-14 and 2014-15	Smt.Aarti Singal	-do-
7-8	718 and 719/Chd/2018 A.Ys.2013-14 and A.Y.2014-15	Shri Aniket Singhal	-do-
9	705/Chd/2018 A.Y.2014-15	Shri Sanjay Singhal (HUF) All are having common address at : 3-Indl. Area, Phase-1 Chandigarh.	-do-

(Applicant)		(Responent)

Assessee by :	Shri S.K. Tulsiyan, Advocate with Shri Ashwani Kumar, CA Smt. Abha Agrawal, CA Ms.Bhoomiya Verma, Adv Shri Aditya Kumar, CA Shri Bhavnesh Jindal, CA
Revenue by :	Shri G.C. Srinivastava, Spl.Counsel

सुनवाई की तारीख/**Date of Hearing : 23/06/2021**
घोषणा की तारीख /**Date of Pronouncement: 20/09/2021**

आदेश/O R D E R

PER BENCH: This is a bunch of nine appeals filed by four assessees against common order of the ld.CIT(A)-3, Gurgaon dated 31.3.2018.

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2. It is pertinent to note that the ld.CIT(A) has decided eighteen appeals by the impugned order in the following cases:

i) Shri Sanjay Singhal
Asstt.Years 2008-09, 2010-11 to 2014-15

ii) Smt.Aarti Singhal
Asstt.Year 2008-09, 2010-11, 2011-12 to 2014-15

iii) Shri Aniket Singhal
Asstt.Year 2013-14 & 2014-15

iv) Shri Sanjay Singhal (HUF)
Asstt.Year 2011-12 to 2014-15

3. Though we will refer the facts in detail, but at this stage, it is important to note that search under section 132(1) of the Income Tax Act, 1961 was carried out by the Department at the business premises of the assessee-group i.e. Bhusan Power & Steel Group ("BSPL" for short) along with residential/ business premises of its directors and other related entities/ persons on 3.3.2010 and 21.2.2014 for A.Y.2014-15. The second proviso to section 153A contemplates that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this section i.e. section 153A(1) pending on the date of initiation of search under section 132 or making of requisition under section 132A as the case may be, shall abate. It is further observed that apart from present nine appeals, eight more appeals i.e. ITA Nos.706, 707, 709/Chd/2018 filed by Shri sanjay Singhal for the Asstt.Year 2008-09, 2010-11, 2012-13; and ITA No.712, 713 & 715/Chd/2018 also filed by Smt.Aarti Singhal for the Asstt.Year 2008-09, 2010-11, 2012-13. Similarly, the assessee, Shri Sanjay Singhal

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HUF has also filed appeals against reopening of the assessment in the Asstt.Year 2011-12 and 2013-14.

4. These appeals pertain to unabated years i.e. in these years assessment/reassessment were not pending on the date of search. Similarly, in the case of Shri Sanjay Singhal HUF assessments were reopened. Therefore, for the facility of adjudication, the Tribunal has segregated these appeals from the present-one, and decided the appeals of Shri Sanjay Singhal and Smt.Aarti Snghal vide order dated 7.2.2020. Similarly, in the case of Shri Sanjay Singhal HUF were decided on 19.6.2020. The Department had filed Misc.Application in all these appeals, which also stands dismissed by the Tribunal. Thus, out of 18 appeals decided by the ld.first appellate authority by the common order, eight appeals were decided by the Tribunal.

5. Adverting back to the facts of the present appeals, we find that all the appellants have taken almost identically worded grounds of appeal except variation in the quantum of amounts mentioned in those grounds. It is also worth to note that at the time of hearing, the ld.counsel for the assessee has filed gist of arguments along with detailed arguments in a compilation, running into 17 pages dated 18.6.2021. He has tabulated the amounts in dispute in each appeal exhibiting as to how the grounds are common. Therefore for the facility of reference, we take note grounds of appeal from ITA No.708/Chd/2018 for the Asstt.Yar 2011-12 in the case of Shri Sanjay Singhal, and thereafter, we take note of details of addition compiled in the tabulated form by the ld.counsel for the assessee. They read as under:

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GROUNDS:

*"1. That order dated 31.03.2018 passed u/s 250(6) of the Income Tax Act, 1961 (hereinafter **called** the "Act") by the Ld. Commissioner of Income Tax (Appeals)-3, Gurgaon is against law and facts on the file in as much as he was not justified to uphold the action of the Ld. Assessing Officer in initiating proceedings u/s 153A of the Act despite the fact that no incriminating material was found during the course of search u/s 132 conducted on 21-02-2014 whereby the order passed is without jurisdiction, bad in law and void ab-initio.*

2. That the Ld Commissioner of Income Tax (Appeals)-3, Gurgaon gravely erred in upholding the action of the Ld. Assessing Officer in making an addition of Rs.56,12,10,020/- representing the sale proceeds of listed equity shares held by the Appellant for more than 12 months by invoking the provisions of Sec. 68 of the Act by ignoring the relevant specific facts and circumstances of the case and by relying on extraneous arguments and evidences, including in particular, circumstantial evidence, which has no bearing and applicability to the case.

3. That the Ld Commissioner of Income Tax (Appeals}-3, Gurgaon was not justified to uphold the action of the Ld. Assessing Officer in treating the transactions relating to purchase and sale of equity shares as ingenuine transactions.

4. That the Ld Commissioner of income Tax (Appeals)-3, Gurgaon further gravely erred in upholding the action of the id. Assessing Officer in making an addition of Rs.3,53,37,680/- on account of alleged commission expenses paid by the Appellant for arranging the alleged entries in respect of Long Term Capital Gains by invoking the provisions of Sec. 69C of the Act on sheer presumptive basis.

5. That the Ld. Commissioner of income Tax (Appeals)-3, Gurgaon while adjudicating the appeal, has dismissed various grounds of appeal raised by the Appellant by relying on statements of various persons and data without affording any opportunity to cross examine such persons thereby ignoring the basic principles of natural justice despite the fact that a specific ground was raised to this effect."

ADDITIONS:

Sanjay Singal

Particulars	A.Y. 2011-12	A.Y. 2013-14	A.Y. 2014-15	Total

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Total Sale proceeds u/s 68 (on a/c of alleged bogus LTCG)	561,210,020	92,916,613	598,599,451	1,252,726,084
6.5% of LTCG u/s 69C towards alleged commission expenses	35,337,680	5,517,492	38,128,964	78,984,136
Sub-total - SS - (A)	596,547,700	98,434,105	636,728,415	1,331,710,220

Smt. Aarti Singal

Particulars	A.Y. 2011-12	A.Y. 2013-14	A.Y. 2014-15	Total
Total Sale proceeds u/s 68 (on a/c of alleged bogus LTCG}	835,373,595	130,872,875	637,938,975	1,604,185,445
6.5% of LTCG u/s 69C towards alleged commission expenses	52,579,573	7,813,248	40,568,540	100,961,361
Sub-total - ARS - (B)	887,953,168	138,686,123	678,507,515	1,705,146,806

Aniket Singal

Particulars	A.Y. 2011-12	A.Y. 2013-14	A.Y. 2014-15	Total
Total Sale proceeds u/s 68 (on a/c of alleged bogus LTCG)	-	466,845,231	1,162,207,39	1,629,052,628
6.5% of LTCG u/s 69C towards alleged commission expenses		29,954,940.	7 73,668,055	103,622,995
Sub-total -ANS-(C)	-	496,800,171	1,235,875,452	1,732,675,623

Particulars	A.Y. 2011-12	A.Y. 2013-14	A.Y. 2014-15	Total
Total Sale proceeds u/s 68 (on a/c of alleged bogus LTCG)	NA NA	NA NA	581,711,166	581,711,166
6.5% of LTCG u/s 69C towards alleged commission expenses			36,933,225	36,933,225
Sub-total -SS(HUF)-(D)			618,644,391	618,644,391

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6. Before we advert to the grounds of appeal taken by the appellants, it is pertinent to note that the Department has filed an application under Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 under the signature of Shri G.C. Srivastava, Special Counsel for the Revenue. The application read as under:

> *"*
>
> *May it please your Honours,*
>
> *Based on certain information received from CBT, the Directorate of Enforcement (ED) has conducted detailed enquiries, in the cases of the assesses whose appeals are pending before Hon'ble ITAT as mentioned above, under Prevention of Money Laundering Act, and has filed criminal charges against members of the group. During such investigations, statements of all those agencies/entities who were involved in providing bogus Long Term Capital Gains to the assesses, including the statement of Sri Sanjay Singhal, were recorded. The copies of such statements are made available to the Assessing Officer now, I have been instructed to file copies of these statements and other documents before your Honours as additional evidence with a prayer for the admission of the same.*
>
> *A brief submission on the reasons for filing the additional evidence and their relevance to the present case is as under:*
>
> *1. Crucial documents have been received from the Enforcement Directorate (ED) in the cases of M/s. Bhushan Group wherein a FIR has been filed by ED against the companies in the Bhushan Group, including Bhushan Power and Steel managed by Sh. Sanjay Singal. (Page 1 of the Annexure)*
>
> *2. The FIR, under the Indian Penal Code, 1860 and Prevention of Corruption Act, 1988, alleges Criminal Conspiracy, Cheating, Falsification of accounts, Criminal Misconduct and use of Forged Documents.*
>
> *3. During the course of investigation by ED, statements of Sri Sanjay Singal were recorded where he reiterated his earlier admission that the LTCG claimed to have been earned by him and his family members was a mere accommodation entry.*
>
> *4. In the backdrop of this factual matrix, we pray for admission of the additional evidence, which includes statements of Sh. Sanjay Singal and*

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other connected parties to the present case of availing bogus LTCG recorded by ED under PMLA Act, 2002:

i. Sh. Sanjay Singal, in his statement dt. 07.10.2016, before the Enforcement Authorities admitted that Sh. R.P. Goyal, director supervised the unaccounted cash transactions on his instructions, which were not shown in the books. It was duly acknowledged that this cash was received back in the form of purchase of shares through various dummy companies, or for minute cash expenses. (Pages 7-14 of the Annexure)

ii. Sh. Sanjay Singal, in his statement 03.10.2019, admitted the modus operandi employed for routing of funds by BPSL to various parties on account of purchase of goods, without any actual movement of goods. (Pages 15-20 of the Annexure)

in. That four companies, i.e., Jasmine Steel Trading, Marsh Steel Trading, Diyajoti Steel and Vision Steel, were managed by him and his family members as a part of Bhushan Group and all the directors in these companies were employees of BPSL working under the directions of Sh. Sanjay Singal.

iv. It is duly admitted that the funds invested by Sanjay Singal, Sanjay Singal HUF, Aarti Singal and Aniket Singal were earned by LTCG from sale of shares of various entities.

v. Admittance that BPSL had paid money to parties by RTGS as capital advance, which were all controlled by entry operators, who routed the payments through a web of shell companies back to the above-mentioned 4 companies managed by Bhushan group.

vi. Sh. Sanjay Singal agreed with the contents of the statement of Sh. R.K.Kedia (broker) dt. 17.09,2019 (Pages 21-23 oftheAnnexure) wherein he had explained in detail the modus operandi adopted by Singals to avail bogus LTCG.

vii. The statements of other co-conspirators like Sh Irish Chandra Shah, Praveen Kumar Jain (Pintu), J.P.Purohit, Praveen Kumar Agrawal, Alkesh Shin ma and others were also recorded by ED who not only reiterate what was stated by them earlier but also throw a great deal of light on the bogus nature of these transactions. (Pages 31-68 of the Annexure)

5. These pieces of evidence could not be filed earlier as either these did not exist at the relevant time, or it was not in possession of the Income tax Department.

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6. Nonetheless, these pieces of evidence have a direct bearing on the merits of the case as these relate to those very issues which are the subject matter of present appeals.

7. The list of documents prayed for admission as additional evidence is contained in a separate Annexure/Paper-book (68 Pages).

It is, therefore prayed that these documents may kindly be admitted as additional evidence in the aforesaid cases, and these may be considered at the time of hearing of the appeals on merits. This is being filed in digital mode and physical copy would also be made available if required.

Revenue shall be obliged for the act of kindness.

Thanking Your Honours

Sd/-
(G.C. Srivastava)
Advocate
Special Counsel for Revenue….”

7. Qua this application, we have heard the ld.senior counsel for the Revenue as well as the ld.counsel for the assessee. It is pertinent to note here that hearings of these appeals were commenced on 21.6.2021. The ld.counsel for the assessee has concluded his arguments on 21.6.2021. After conclusion of the arguments of the ld.counsel for the assessee, the ld.senior counsel for the Revenue brought to our notice an application of the department for admission of additional evidence. The ld.counsel for the assessee raised a strong objection about admission of this additional evidence. The stand of the ld.counsel for the assessee is that the issues involved in these appeals are directly covered by orders of the ITAT in the case of other family members i.e. father of Shri Sanjay Singhal (appellant no.1). The department has filed an application before the Hon’ble President, ITAT under section 255(3) of the Income Tax Act, 1961 for constitution of a Special Bench in the aforesaid matter, and the Hon’ble President has called for comments of the Bench. After the

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comments of the Bench, the Hon'ble President has heard both the parties, and thereafter declined the prayer of the Revenue for constitution of a Special Bench. He alleged that in order to create a distinction between the cases already decided vis-à-vis the present appellant, the Revenue has filed an application dated 7.6.2021 for permission to admit additional evidence. Hearing was fixed on 8.6.2021 before the Hon'ble President. According to ld.counsel for the assessee, this was an effort before Hon'ble President to accept a disparity on facts and, therefore, these appeals be referred to Special Bench, but Hon'ble President rejected such effort. In support of its application, the Revenue has pleaded that Income Tax Department has carried out search operation at the premises of brokers, Shri RK Kedia and Shri Shrish Shah and their statements were recorded under section 132(4) of the Act which have been used by the Revenue, while denying claim of the assessee for the long term capital gain. Simultaneously, CBI has registered case as well as the ED has recorded statement of Shri RK Kedia under section 50 of the Prevention of Money Laundering Act, 2002 ("PMLA"). Therefore, it is necessary to take on record disclosure made by the persons before the ED and other prosecuting agencies. With regard to the position whether the Revenue can produce additional evidence at the second appellate stage, more so, in the capacity of a respondent, he relied upon the decision of Special Bench in the case of LG Electronics India P.Ltd. in ITA No.5140/Del/2011. He also relied upon the decision of Hon'ble Supreme Court in the case of Jyotsna Suri Vs. ITAT & Ors., 9 SCC 211. He further relied upon judgment of Hon'ble Delhi High Court in the case of HL Malhotra Vs. DCIT, ITA

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No.211/2020 dated 22.12.2020. He placed on record copies of these decisions.

8. Since interlocutory application was pressed after conclusion of the arguments of the ld.cousnel for the assessee, therefore, at the time of hearing we permitted both the parties to give their submissions in writing on the admission of additional evidence as well as consideration of them on merit after admitting, if taken on record. In other words, we have invited the arguments of the ld.counsel for the assessee as well as Revenue on merit of this material, but subject to condition that in case application of the Revenue for admission of additional evidence is rejected, then no such submissions would be considered. Thereafter, after conclusion of hearing an opportunity was provided to both the sides to file written submissions and ld.counsel for the Revenue filed written submission dated 29.6.2021, and the ld.counsel for the assessee has filed written submissions on 2.7.2021. Since we have taken cognizance of the Revenue's application in verbatim, we therefore deem it appropriate to take of objections filed by the assessee as well. The objection reads as under:

> *"1. That the Respondents have preferred an Application under Rule 29 of the Income Tax Appellate Tribunal Rules, 1963 (ITAT Rules) for the admission of additional evidence being 'certain information' received from the CBI and the Directorate of Enforcement (ED) that are in the nature of a) the ECIR/FIR filed by the CBI against the Appellants, Sh. Sanjay Singhal and his wife and b) the various statements of Sh. Sanjay Singhal, Sh. R.K. Kedia, Sh. Shirish Chandra Shah, Sh. Jadish Prasad Purohit and others third parties that have been recorded by the ED under the provisions of the Prevention of Money Laundering Act, 2002 (PMLA).*
>
> *2. The Special Counsel for the Respondents is seeking the admittance of the aforesaid documents/statements (material) as additional evidence to be filed before this Hon'ble Bench by alleging that such material have a direct*

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bearing on the merits of the case, as they relate to the very issue of bogus LTCG which is the subject matter of the present ITAT Appeals.

3. The Appellants raise their vehement objection towards the admittance of such material firstly on the ground of delay, since the present Appeals have been pending since the year 2018, and all the material that the Special Counsel is seeking to admit as additional evidence is dated either in the year 2016 or the year 2019, therefore, the same was in the knowledge and possession of Department and if indeed were sought to be used by the Department in a bona fide manner, would have been brought on record much sooner than June 2021, when the aforesaid matters (pertaining to the abated AYs) had been listed for final arguments and disposal.

4. The Appellants also object to the admittance of such material on the ground that the Special Counsel for the Respondents had not disclosed the date of receipt of the said information from the ED in his Application. The same thus casts further doubt on the intent of the Department that is seemingly trying to stall/delay the hearing of this case on merits by creating hurdle after hurdle, first with the application for the constitution of the Special Bench, and now with the application for the filing of additional evidence.

5. The Appellants submit that the application of the Department u/s 255(3) for the constitution of a Special Bench in the aforesaid matters had been heard by this Hon'ble Bench in the month of May 2021, upon which, this Hon'ble Bench posted the matter before the Hon'ble President of the ITAT with their comments. The Hon'ble President, ITAT then posted the matter for hearing on the 8th of June 2021. All of a sudden on 7th June 2021, the Special Counsel of the Department files the present Application for admittance of additional evidence, just one day before the date of hearing. No such mention of this Application is even made before the Hon'ble President during the course of the hearing dated 8th June 2021.

The Department is therefore blowing hot and cold/approbating and reprobating at the same time, since even before the hearing could have been concluded before the Hon'ble President ITAT vis-a-vis their Application for the constitution of the Special Bench in which they have objected to the hearing of the said matter before this Hon'ble Tribunal by averring a non-uniform approach taken by the ITATs for certain questions of law which would have a cascading impact for the abated AYs, the present Application for the admittance of Additional Evidence had been filed that has nothing to do with the issue of the Special Bench and has everything to do with the case on merits.

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There is thus a lack of clarity in how the Department is seeking to approach this matter. The same therefore casts huge doubt on the bona fides of this very Application, and the intent behind its utilisation, that seems more in the nature of a delay tactic, since no explanation on the 'delay' in filing this additional evidence has been brought on record by the Special Counsel.

6. On jurisdiction, the Appellants submits that Rule 29 of the ITAT Rules, 1963 has been erroneously invoked by the Special Counsel since the said Rules only permits, at the discretion of the ITAT, the admission of additional evidence in only two situations:

A. If the Tribunal requires any document to be produced or any witness to be examined or an affidavit to be filed to enable it to pass orders or for any other substantial cause (OR)

B. If the income tax authorities have decided the case without giving sufficient opportunity to the assessee to adduce evidence either on the points specified by them or not specified by them, then the Tribunal, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced.

Thus the filing of additional evidence before the ITAT is not a matter of right of either party, since Rule 29 starts with the wordings "the parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunar - unless such additional evidences fit under either one of the two situations prescribed above,

7. Furthermore, when the Department is seeking to file additional evidence it can only do so under the situation No.l prescribed above since situation No.2 pertains to the assessee only. Situation No.l is specifically worded to mean that it is the ITAT that must 'require' such additional evidence that could be in the nature of a document to be produced or a witness to be examined or an affidavit to be filed - in order to enable the ITAT to pass orders or for any other substantial cause. Here, this Hon'ble Bench, never sought the present additional evidence (that has been recorded by the ED under a different Statue altogether) to be caused to be produced by the Department. Therefore a suo moto filing of additional evidence by the Department when the matter has been listed for final adjudication and disposal is bereft of jurisdiction since the same has not occurred pursuant to a direction of this Hon'ble Bench on the grounds that such additional evidence is required to enable the passing of the orders in the present Appeals or for any other substantial cause.

8. Thus the present Application is bound to be dismissed on the grounds of jurisdiction alone since the Special Counsel has been unable to substantiate

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how the Department is even covered under Rule 29 to enable the filing of such additional evidence. The admissibility of the same is thus a secondary question that only arises when the Department can adequately show under which of the two situations (specified under Rule 29) it falls under. Since neither of the situations prescribed under Rule 29 applies to the Department in the present case since situation No, I arises only at the direction of the Tribunal and situation No.2 applies only to an assessee (if the assessee is able to show that sufficient opportunity had not been provided by the lower authorities) - then the present Application has been filed without jurisdiction, rendering the same to be null and void in law.

9. Without prejudice to the above, on the merits of this Application and the additional evidence contained therein, the Appellants submit that the additional evidence that has been sought to be admitted by the Special Counsel all pertain to the statements recorded under Sec.50 of the PMLA, 2002, by the ED. The Special Counsel is thus seeking to use evidences recorded under a different Statute by a different authority in a crisscross manner, by alleging that the said information has a direct bearing on the merits of the present Appeals filed under the Income Tax Act, 1961.

10. In rebuttal, the Appellants firstly submit that the Income Tax Act, 1961 and the PMLA, 2002 are two different sets of legislation. The aims and objectives of the said legislations are quite different and distinct. Under the Income Tax Act, the procedure for the gathering/recording admissible evidence to fasten additional liability unto the assessee is governed by Sec.I42 of the Act which is the 'Inquiry' before an assessment is made u/s 143(3).

11. Sec. 142 provides the foundational framework of the independent investigation and enquiry that the A.O. ought to conduct before an order of assessment is passed qua the assessee u/s 143(3) of the Act. Sec. 142 imbibes within itself the Principle(s) to the Natural Justice that must be followed by the A.O.

In elaboration, the details of the inbuilt procedure u/s 142 are iterated as below:

Sec.142(1) of the Act empowers the A.O. to call for information/material from the assessee. Sec.142(2) provides that for the purpose of obtaining such full information in respect of income or loss of any person, the A.O. may make such enquiry as he considers necessary. In other words, Sec.142(2) empowers the A.O. to make such enquiry to obtain on record such oral and/or documentary evidence as he/she considers necessary for the purpose of such assessment. Sec. 142(3) mandates that the information/evidence collected pursuant to the enquiry conducted u/s 142(2) which is proposed to

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be utilized during the assessment, shall first be put to the assessee to provide him/her with an opportunity of being heard before the same is utilized by the A.O. to make an addition/disallowance u/s 143(3). Sec.l42(3) utilizes the word 'shall' therefore rendering the same to be by no means discretionary. Thus the mandatory intermediary step prescribed u/s 142(2) cannot be given a go past, in order to utilise such information/evidences adversely against the assessee without the latter's rebuttal. The same if done, is a direct violation of the procedure of enquiry prescribed u/s 142 that inherently encompasses the Principle(s) of Natural Justice.

Thus, in the case at hand, the present Application towards admitting such additional evidence that has been recorded under the PMLA, 2002 has been preferred by the Department in complete ignorance of the specific procedure laid down under Sec. 142 of the Act to consider evidence as admissible evidence for the purpose of making an assessment under Sec. 143(3). Reliance in this regard is made to the decision of the coordinate Bench of the Kolkata ITAT in the decision of in M/s. SPML Infra Ltd. vs. DCIT, ITA No. 1228/Kol/2018 that has held as follows:

> *"14. To conclude: We note that none of the statements were recorded by the assessing officer of the assessee company, and no opportunity for cross examination has been provided to the assesses company. The mandate of law to conduct enquiry by the Assessing Officer on due information coming to him to verify authenticity of information was not done as per section 142 of the Act. Therefore, mere receipt of unsubstantiated statement recorded by some other officer in some other proceedings more particularly having no bearing on the transaction with the assessee does not create any material evidence against the assesses This is because section 142(2) mandates any such material adverse to the facts of assessee collected by AO u/s 142(1) has to be necessarily put to the assessee u/s 142(3) before utilizing the same for assessment so as to constitute as reliable material evidence through the process of assessment u/s 143(3) of the Act,"*
>
> *[Emphasis Supplied]*

12. In the present Appeals the A.O. has already relied on certain evidences obtained from third parties (in the nature of statements and/or documents) - the reliance upon which the Appellants have argued cannot be made for the purpose of a 143(3') assessment since the same had not been put to them per the statutory procedure prescribed under Sec.l42(2). Now, by way of this present Application, the Special Counsel has attempted to bring on record further material that has remained untested on the anvil of Sec. 142(3) by seeking to equate the statements recorded by the ED under the PMLA, 2002 as additional evidence that can also be validly utilised for the purpose of sustaining an addition that has already been made under the Income Tax Act

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by the A.O, on the basis of separate third party material/statements, without subjecting such the latter to the rigours of Sec. 142.

In other words, it is already the Appellants' case that the initial third party material/statements that the A.O. has relied upon to make the impugned assessment orders u/s 153A/143(3)-has not been subject to the procedure of enquiry prescribed u/s 142 of the Act, since the A.O. has sought to utilise those solely on 'borrowed satisfaction' to make the assessment us/ I43(3)/l 53A. Now, in a further attempt at deviating the procedural fetters prescribed u/s 142, the Special Counsel has filed such additional evidence, by completely ignoring that the very same rigours of Sec. 142 will also apply to such additional evidence that has been recorded by a separate governmental department (the ED) under a separate Statute (the PMLA).

13. The Appellants thus submit that without fulfilling the mandate of Sec. 142, the evidence cannot be considered as admissible evidence on record, in order to fasten liability unto the assessee u/s 143(3). This is more so because the additional evidence seeking to be admitted vide the present Applications are statements that have all be recorded u/s 50 of the PMLA, 2002 post the completion/finalisation of the search assessments u/s 153A/143(3) in the case of all the Appellants, that were assessed to tax vide the impugned assessment orders (all) dated 28.03.2016. Thus when the additional evidence, especially the statements of Sanjay Singhal specified therein (that have been recorded on 07.10.2016 and 03.10.2019 by the ED) have all been recorded post the finalisation of the search assessments in the case of all the Appellants - then such evidence that was not on the record of the A.O. during the course of the search assessments, cannot now be utilised as admissible evidence in order to fasten liability against the Appellants under the Income Tax Act, especially since such material that has been recorded post the completion of the search, cannot possibly be subject to the rigours of Sec.142 of the Act.

In other words, statements that have been recorded by the ED under the PMLA, cannot be utilised in the form of evidence for the purpose of the Income Tax Act at the stage of the appellate authority (i.e., the ITAT) unless the same had passed through the fetters of Sec.142 at the time of the search assessment, which it hasn't and now cannot. In support reliance is craved on the decision ofR.K. Sayal (2000) 113 Taxman 40 (Chandigarh) (Mag.), ITA T Chandigarh) that has clearly held that evidence collected post the completion of the block assessment cannot be admitted under Rule 29, for the following reasons:

> *A. The Hon'ble Bench has held that if such evidence were to be considered as 'additional evidence' then, having regard to the provisions of the Income Tax Act, the Tribunal will have to restore the matter to Assessing Officer, for the reasons mentioned by learned*

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Departmental Representative i.e., to enable the assesses to meet the new facts as now found by Assessing Officer. See Para 3.4.

B. The Hon'ble Bench also held that plea of the D.R. that the said evidence is only to strengthen the case of A.O. looks attractive on the face of it, but if seen closely it is nothing but an attempt to improve upon the case of A.O. by bringing on record further evidence which the A.O. could not collect and examine within the period of limitation specified for block assessment. See Para 3.3.

C. The Hon'ble Bench thus held that an attempt is being made to indirectly do what cannot be done directly and that allowing such additional evidence in an act that bypasses the rigours of the Statute - cannot be done. See Para 3.4.

14. The Appellants further submit that the decisions relied upon by the DR to admit such additional evidence at this stage of the proceedings can be distinguished (as done in the paragraphs below) and thus do not support the case of the Department:

A. In the case of Text Hundred India Pvt. Ltd., ITA 2077, 2061 & 2065/2010 (Delhi H.C., decision dated 14.01.2011) the application for the filing of additional evidence had been moved by the assessee on the ground that the assessee could not produce these records before the lower authorities due to non- retrievability of e-mail on the date because of technological difficulties. See Para 15.

B. In the said case the Hon'ble Bench has clearly held that the question of admitting additional evidence arises when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent to the Appellate Court coming in its way to pronounce judgment, and only then can the expression "to enable it to pronounce judgment" be invoked. The provision does not apply where with existing evidence on record the Appellate Court can pronounce a satisfactory judgment. See Para 14.

C. Per the Hon'ble Bench, the Tribunal looked into the entire matter and arrived at a conclusion that the additional evidence was necessary for deciding the issue at hand. It is thus clear that the Tribunal found the requirement of the said evidence for proper adjudication of the matter and in the interest of the substantial cause. See Para 15.

D. In the case of L.G. Electronics India Pvt. Ltd. vs. ITO, ITA 5140/DEL/2011 (Special Bench, decision dated January 2013) the

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D.R. therein sought permission to file additional evidence being copies of orders passed by TPO in the assessee's own case for A.Y 2008-09 along with written submissions of the assessee before the TPO and statements of employees of the assessee. See Para 8.1.

E. Per the Hon'ble Bench, the Department was seeking to invoke Rule 29 for filing certain material that was already in the knowledge of the assessee therein, and therefore, technically the same was held to be not in the nature of additional evidence since the same comprised solely of orders of the TPO in the assessee's own case, the submissions made by the assessee, and the statements of the assessee's employees as recorded by the Revenue. Per the Hon'ble Bench, the said material was, therefore, nothing but a corroboration of the material that was existing otherwise, and the same was therefore admissible under Rule 29. See Para 8.6-

Thus this Application has been filed, after assessing the line of argument sought to be taken by the Appellants, in an attempt to better the Department's case by now utilising evidences recorded under a different Statute to prejudice the Bench into sustain additions made under the Income Tax Act. The reliance on such additional evidence was imperative to the case of the Special Counsel, who at the time of the hearing had also based his final arguments primarily on the contents of this additional evidence.

15. On the utilisation of statements recorded under Sec.50(2) of the PMLA, 2002 in a proceedings initiated under the Income Tax Act, 1961, the Appellants further submit that the same is also impermissible in light of Sec.71 of the PMLA, which states that the PMLA as a Statute operates as a self-contained code and a stand-alone law. Therefore statements recorded u/s 50(2) of the PMLA have direct admissibility as evidence only vis-a-vis the provisions of the PMLA. The same can in no manner be extended to be considered as admissible evidence under the Income Tax Act, by bypassing the mandate of Sec.142 that encompasses the Principles of Natural Justice.

16. It is also submitted that Sec.65 of the PMLA, 2002 states that the provisions of the Criminal Procedure Code, 1973 (CrPC) shall apply in so far as they are not inconsistent with the provisions of the PMLA vis-a-vis arrest, search and seizure, attachment, confiscation, investigation and prosecution and all other proceedings under the Act.

17. Thus even if a statement recorded u/s 50 of the PMLA is not equated to a statement recorded under Sec. 161 r/w 162 of the CrPC, it is obvious that in order to sustain a conviction under the PMLA a criminal trial ensues to prosecute the accused. This is in line with the protection awarded to an

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individual under Art.20 in respect of the conviction of offences, where Art.20(3) specifies that no person accused of any offence shall be compelled to be a witness against himself.

Thus a mere statement recorded u/s 50(2) of the PMLA is not 'evidence in itself even for the purpose of prosecuting the accused under the PMLA, let alone under the Income Tax Act, that has its own separate procedure in place for collecting and admitting evidence u/s 142 before the same can be adduced and utilised by the A.O. to make an impugned addition u/s 143(3) of the Act.*

18. Further, as per the decision of the Hon'ble S.C. in the case of KTMS Mohamed & Ors. vs. UOI, (1992) 3 SCC178, the Hon'ble S.C. has clearly held that statements recorded by the ED cannot be termed to be statements that are recorded during the course of a judicial proceedings to enable their utilisation in Income Tax Act proceedings. This is because the statements recorded by the ED do not have the procedural safeguards that exist under the CrPC when the statement is recorded before a Magistrate. Thus any confession made before the ED cannot be suo motu considered as evidence to fasten liability under the Income Tax Act, especially when such statements have been retracted. The relevant excerpts of the said decision are quoted hereunder:

> *"28. Coming to the FERA, it is a special law which prescribes a special procedure for investigation of breaches of foreign exchange regulations. Vide Shanti Prasad Jain v. The Director of Enforcement [1963J2SCR297. The proceedings under the FERA are quasi-criminal in character. It is pellucid that the ambit, scope and intendment of these two Acts are entirely different and dissimilar.*
>
> *29. Therefore, the significance of a statement recorded under the provisions of FERA during the investigation or proceeding under said Act so as to bring them within the meaning of judicial proceeding must be examined only quo the provisions of the FERA but not with reference to the provisions of any other alien Act or Acts such as I. T. Act.*
>
> *30. If it is to be approved and held that the authorities under the I.T. Act can launch a prosecution for perjury on the basis of a statement recorded by the Enforcement Officer then on the same analogy the Enforcement authority can also in a given situation launch a for perjury on the basis of any inculpatory statement recorded by the Income-tax Authority if repudiated subsequently before the Enforcement authority. In our opinion, such a course cannot be and should not be legally permitted.*

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> *31. Leave apart, even if the officers of the Enforcement intend to take action against the deponent of a statement on the basis of his inculpatory statement which has been subsequently repudiated, the officer concerned must take both the statements together, give a finding about the nature of the repudiation and then act upon the earlier inculpatory one. If on the other hand, the officer concerned bisect the two statements and make use of the inculpatory statement alone conveniently bypassing the other such a stand cannot be a legally permissible because admissibility, reliability and the evidentiary value of the statement of the inculpatory statement depend on the benchmark of the provisions of the Evidence Act and the general criminal law. "*
>
> *[Emphasis Supplied]*

19. The Appellants submit that the case of KTMS Mohamed & Ors. (supra) has direct applicability to the case at hand, more so because the statement of Sanjay Singhal that had been recorded by the E.D. has been retracted by him, vide Retraction Letter dated 20.12.2019 from Tihar Jail. In the said statement, Sh. Sanjay Singhal has emphasised that he was pressurised by the ED officers, and was given no such opportunity to read and/or understand the papers signed and/or statements recorded and signed, all of which was taken under the threat and pressure of arrest. In fact, Sh. Sanjay Singhal also states that when he refused to sign any further documents/statements, they arrested him on 22.11.2019. He has also emphasised on the pressure and trauma of the entire incidence.

This retraction has not been brought to the notice of this Hon'ble Bench by the Department while making the present Application for admission of the statements of Sanjay Singhal as additional evidence. As held in the decision of KTMS Mohamed & Ors. (supra), inculpatory statements that have been subsequently repudiated cannot be utilised across different proceedings emanating under different Statutes. The Hon'ble S.C. has also held that a statement that has been subsequently retracted cannot be utilised in its original form, by giving a go by to the retraction brought on record. Therefore the very reliance on the statements of Sanjay Singhal as 'evidence' in itself, let also as admissible additional evidence before this Hon'ble Tribunal for the purpose of sustaining an addition made under the Income Tax Act, 1961 — is impermissible in law.

20. For the aforesaid reasons, the Appellants pray that the present Application for the admission of additional evidence may be pleased to be rejected by this Hon'ble Bench for being bereft of jurisdiction, and even otherwise, bereft of any merits in support of their admissibility under law."

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9. We have duly considered rival submissions and gone through the record carefully. Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 has direct bearing on the controversy, therefore, it is imperative upon us to take note of this Rule as under:

> *"29. Production of additional evidence before the Tribunal- The parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal, but if the Tribunal requires any documents to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or, if the income-tax authorities have decided the case 'without giving sufficient opportunity to the assessee to adduce evidence either on points specified by them or not specified by them, the Tribunal, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced."*

10. A perusal of the above rule would indicate that parties of the appeal i.e. either appellant or respondents are not entitled to produce additional evidence either oral or documentary before the Tribunal. However, in case any evidence is required by the Tribunal, in the interest of justice, then such opportunity could be given to the parties. In other words, for just decision of any appeal, if some material is required by the Tribunal, then that material could be taken up on the record. As observed by the Special Bench of ITAT in the case of LG Electronics (supra) additional evidence can be permitted if the evidence does not raise any new area of dispute, if the evidence has relevance to the issue. A perusal of the application filed by the Revenue would reveal that the Revenue intends to place on record copies of the statement recorded by the ED i.e. including the statement of the assessee as well as Shri R.K. Kedia, Praveen Kumar Jain and Shri Sirish Chandrakant Shah. We have

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taken into consideration the material sought to be placed on record by the Revenue vis-à-vis scope of Rule 29 of the ITAT Rules. It is pertinent to observe that the Income Tax Act provides a complete frame work for scrutinising the return and passing assessment order. The Act itself contemplates certain safeguards for protecting rights of the assessee i.e. return could be scrutinized within the time frame by issuance of notice under section 143(2) of the Act. If the time limit is expired, then only on the basis of new information comes to the possession of the AO that income has escaped, he could reopen the assessment by issuance of notice under section 148 of the Act. Similarly, during the course of assessment proceedings, section 142 of the Act contemplates power of the AO for collecting the information and other material from the assessee. In the present appeals, assessments were framed long back; appeals were pending in the Tribunal since 2018. Evidence was alleged to be placed on record were statements recorded way back in 2016 and 2019. By placing such statement on record, a new line of discovery of facts required to be unearthed. All these persons would be required to be called upon and cross-examination is required to be made. It is also pertinent to note that these are the statements recorded under PMLA after conclusion of the assessment order. They cannot be brought on record to fulfill any lacunae, if any, left in the assessment order. Special Bench of the ITAT in the case of LG Electronics (supra) has observed that evidence would have direct bearing, and did not raise any area of new dispute. These statements themselves have been recorded after finalisation of the assessment order. They would open up a new set of inquiry. In other words, an attempt is

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being made indirectly to bring some material in order to improve the case of revenue which cannot be done directly. Even otherwise, the criminal trials in pursuance of those statements have yet to be finalized. It is also pertinent to note that no appeal is being provided against the assessment to the Revenue. The right of appeal has been provided to the assessee only. Now, an attempt is being made by the ld.counsel for the Revenue to improve the assessment order by bringing on record new set of evidence which will open a new set of inquiry. If these evidences are taken into account, the matter has to be remitted back to the AO and the AO would be directed to consider materials afresh which could never have been considered under the scope of block assessment under section 153A of the Act. The ld.AO will get new extended limitation which otherwise is not available to him. As observed earlier, these statements were recorded by the Investigating agencies. Their reliability or admissibility has to be determined by judicial adjudicating body. The process has not been completed with regard to the statement sought to be placed on record. Therefore, the Tribunal does not feel, in any manner that these are the materials, which should have been placed on record for just decision of the appeals, rather we are of firm view that permitting to place on record such material would cause prejudice to the assessee. As far as case law relied upon by the ld.counsel for the Revenue is concerned, they only postulate that ITAT has the power to permit Revenue to produce additional evidence in the capacity of respondent also. There is no dispute with regard to the above proposition. In given case Tribunal can feel that certain details possessed by the Revenue are necessary for just decision of the appeal then, it can direct the Revenue

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for production of those details. Thus, these cases are not applicable on the facts of the present appeals. It is also pertinent to mention that the assessee has duly demonstrated in the reply extracted above as to why these evidences should not be taken on record. We have gone through the reply and emphasizing more particularly on para no.15 to 18 demonstrating the eventual value of these statement. We are satisfied that by way of this application a fatuous attempt is being made to create artificial distinction between these appeals vis-s-vis the earlier orders of the ITAT on the same point. In substance these are not the evidence required by the ITAT for just decision of the appeals. In view of the above discussion, the application of the Revenue is rejected.

Now we take the appeals for adjudication:

11. For the facility of reference, we are taking the facts from the appeal of Shri Sanjay Singal mainly and any variation on facts would come to our notice, we will note them. The assessee in the present case is an individual and a key person of the group known as BSPL Group. The brief facts as alleged by the Revenue are as under:

12. There were search and survey operations under section 132/133A of the Income Tax Act, 1961 was carried out at the office premises of Shri Shrish Chandrakant Shah (for short SCS) located at different places and the parties/ entities connected to him dated 9th April 2013 by the Directorate of Investigation, Ahmedabad Income Tax. During the search and survey proceedings, various documents were found. Statements of Shri SCS and other persons connected to him (Shri SCS) were recorded under section 132(4), 131(IA) of the Act. Based on the above, it was

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revealed to the AO that Shri SCS is engaged in the activity of providing accommodation entries in the form of share capital, share premium, unsecured loan and long-term capital gain against the payment of commission. For this purpose, SCS was controlling and managing 212 companies used for layering the funds including the company namely M/s PIL which was also subject to search operation. It was also discovered during the search that Shri SCS has generated long-term capital gain of Rs. 560 crores using the shares of PIL by way of accommodation entries. One of the beneficiaries of bogus long term capital was the group of the assessee of such bogus LTCG. The names of persons of BSPL group being the beneficiaries of LTCG are as under:

i. Shri Sanjay Singal
ii. Smt. Arti Singal
iii. Shri Aniket Singal
iv. Sanjay Singal HUF

13. The assessee group has purchased the shares of PIL on preferential allotment basis in the year 2008 dated 04-08-2008 @ 2.25 per share having face value of Rs. 1 per share and premium of Rs. 1.25 per share. These shares were sold in the year 2010-11 and 2011-12 at an average price of Rs. 65 per share. Thus it was alleged that Shri SCS has converted the unaccounted money of various parties/beneficiaries by providing long-term capital gain to them which was exempted under section 10(38) of the Act by manipulating in the price of the shares of PIL. All these facts narrated above were duly admitted by Shri SCS in the statement furnished under section 132(4)/131-IA of the Act which was recorded at different point of time.

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14. The statement of Shri Om Prakash Anandilal Khandewal (OPK), the director of PIL, was also recorded under section 132(4) of the Act wherein he had admitted that PIL was a paper company, having no business and was used by Shri SCS for generating bogus long-term capital gain to extend the benefit to the parties. The statement of Shri OPK was also confirmed by Shri SCS.

15. In the course of search at the premise of SCS, among other documents, two documents in the form of MS Excel file namely CASH & CHEQUE SHEET and KEDIA-2 were found.

CASH & CHEQUE SHEET

16. The cash & cheque sheet contains date-wise details of receipts of cash from the beneficiaries and cheque payment of accommodation entries to them in coded-form. There was also the name of cash courier (Aangdia) in the remark column by whom Shri SCS received the cash amount. The name of the assessee and his associates was also appearing in this sheet in coded form.

17. Against the receipt of cash from the assessee, the name of cash courier (Aangdia), Shri Pintu alias Chintan (Praveen Kumar Jain) was appearing. This fact was also corroborated in the independent search and seizure operation carried out under section 132 of the Act by the Directorate of Investigation, Mumbai in case of Shri Praveen Kumar Jain. During search, the books and other records were found and impounded. On comparison of these impounded documents with the

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cash and cheque sheet maintained by SCS, it was noticed by the AO that the entries of the assessee group were matching. Shri Praveen Kumar Jain in his statement admitted to have received the cash from Shri RK Kedia who is the broker of the assessee on behalf of Shri SCS.

KEDIA-2

18. Likewise, a MS Excel file recovered from the computer of SCS. The name of the MS excel file was "New Account". The MS excel file was containing the details of the different brokers through whom Shri SCS has provided bogus long-term capital gain to the beneficiaries. One of the excel sheet of MS excel file was containing the name 'Kedia-2' which was related to a broker namely RK Kedia based in Delhi. This sheet contains the details as given under:

i. The trading of shares of the company namely PIL on a particular date along with the number of shares and the rate per share.
ii. The commission charged by Shri SCS on such bogus transaction.
iii. Cash received from the beneficiaries against the sale of shares held by such beneficiaries.
iv. The Aangadia charges paid. etc

19. On verification by the Directorate of Investigation team from BSE about the trading of PIL shares, it was found that these shares of PIL, as recorded in the excel sheet discussed above were exactly sold by the assessee and its group members to the companies controlled and managed by Shri SCS. The impugned sheet revealed the receipt of cash of Rs.129 crores and cheque payment of Rs.165.1 crores by SCS to the assessee for providing accommodation entries by way of long-term

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capital gain. Shri SCS for this transaction has charged a commission of Rs.3.81 crores along with Aangadia charges of Rs.9,02,250/- only. When confronted, Shri SCS also admitted that he has provided accommodation entries in the name of long-term capital gain to the group of the assessee through the broker, Shri RK Kedia.

20. Further, receipts of cash recorded in kedia-2 sheet were also matching with the books/ records maintained by Shri Parveen Kumar Jain alias Pintu which were impounded by the Directorate of investigation of Mumbai as mentioned in previous paragraph.

21. Similarly, a search and seizure operation under section 132 of the Act subsequently and simultaneously was carried out at the premises of the assessee group and Shri RK Kedia dated 21st February 2014 by the Directorate of Chandigarh. In the search proceedings at the premises of the assessee, various loose papers were found and impounded which were incriminating in nature. The assessee was also confronted with the statements of various persons recorded under section 132(4)/131-1A of the Act along with the documents found during the search in the case of Shri SCS and Praveen Kumar Jain. The statement under section 132(4) of the Act was also recorded of the assessee wherein he admitted to disclose additional income of Rs. 250 crores on account of bogus long-term capital gain through the sale of PIL shares.

22. Subsequently, one more search and seizure operation under section 132 of the Act dated 13 June 2014 was also carried out by the Directorate of Investigation, Delhi in the case of Shri RK Kedia, a

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broker wherein it was admitted that he has arranged the bogus long-term capital gain on the request of the assessee. For this purpose, Shri RK Kedia used to receive cash from the office of the assessee through Shri Alkesh Sharma and Suresh Gupta, employees of the BSPL group. Likewise, in the course of search and seizure operation, certain loose papers of incriminating nature were found which were named as Extract E-14 Annexure A 27. The relevant page bearing No. 64 to 70 of such seized documents contained details of the sale, purchase of shares and receipts and payment of cash representing bogus transactions carried out by the assessee and the same were matching with the records of Kedia-2 sheet, and records maintained by Shri Praveen Kumar Jain.

23. In addition to the above, there were many other incriminating documents found during the course of search under section 132 of the Act at the premises of Shri RK Kedia dated 13th June 2014. These incriminating documents were maintained in the excel sheets, books of accounts and tally software in coded form. All these documents were under the custody of Shri Manish Arora an accountant and employee of Shri RK Kedia. On being questioned, Shri Manish Arora admitted on oath that all the seized documents related to the accommodation entry business of Shri RK Kedia through various companies. This fact was also admitted by Shri RK Kedia in the statement furnished under section 132(4) of the Act. As per Shri RK Kedia, these companies were controlled and managed by various accommodation entry operators and these were only paper companies which were not doing any actual work. As such, these companies were engaged in providing the various accommodation entries including the long-term capital gain to the

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various beneficiaries. Shri RK Kedia also furnished the list of 31 such companies along with the details of the persons who are managing and controlling such companies with contact details. Besides the statement of Shri RK Kedia, the post search enquiries also revealed the fact that such companies highlighted by Shri RK Kedia, were paper companies which were engaged in providing accommodation entries.

24. It was noticed by the AO that the assessee, through Shri RK Kedia, has taken long-term capital gain on the sale of the shares with respect to 10 companies which were included in such 31 companies, as discussed in preceding paragraph. Regarding such companies, the details were found and impounded from the premises of Shri RK Kedia, containing the transactions of sale/ purchase of shares and dealing of cash. This fact was admitted by him that these companies were engaged in providing accommodation entries. The list of 10 companies from which assessee earned long term capital stand as under:

SI. No.	Name of the company
1.	DB (International) Stock Brokers Ltd.
2	Blue Circle Services Ltd.
3	Unisys Software &Holding Indust. Ltd.
4	Nouveau Multimedia Ltd.
5	Action Financial Services (India) Ltd.
6	Global Infratech & Finance Ltd. now known as Asian Lak Capital & Finance Ltd.
7	Rutron International Ltd.
8	Rander Corporation Ltd.
9	Matra Kaushal Enterprises Ltd.
10	Grandma Trading & Agencies Ltd.

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25. It was further found that one of the companies namely M/s Blue Circle Services Ltd was controlled and managed by Shri Jagdish Prasad Purohit who admitted in the course of search conducted under section 132 of the Act on various dates i.e. 19th November 2011, 12th February 2013, 17th December 2013 and 21st January 2015 in a statement furnished under section 132(4) of the Act, that he was engaged in providing accommodation entries. For this purpose, he has used several companies including M/s Blue Circle Services Ltd. The financials of M/s Blue Circle Services Ltd were very weak and showing a meagre income. Thus the rise in the price in the shares of M/s Blue Circle Services Ltd from Rs. 4 to 75-80 during 2010 to 2014 was not justified. However, the trade volume of shares of M/s Blue circle services Ltd has been recorded at Rs.1387.66 crores during such period which was done through the several brokers. Most of the brokers at different point of time have admitted on oath to have arranged bogus long-term capital gain to certain beneficiaries through impugned company i.e. M/s Blue Circle Services Ltd. In connection with the share trading of M/s Blue Circle Services Ltd, certain documents were also found from the premises of Shri RK Kedia marked as A-2 pages 19 to 26. The transactions as appearing in these seized documents were exactly matching with the data of Bombay stock exchange showing the sale made by Shri Aniket Singal, relative of the assessee group. Further the cash received by Shri Kedia against the accommodation entry of long term capital gain was recorded on dated 11th,12th,13th and 17th September 2012. Another document was also found which is incriminating in nature marked as “Chopra Account/ BPSL Account”

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containing the details of cash receipt and cheque payment from the group of the assessee in connection with bogus long-term capital gain along with the commission charges at the rate of 6.5% for arranging such accommodation entry. The entries under this reconciliation statement were admitted by Shri RK Kedia and his employee Shri Manish Arora in the statement furnished under section 132(4) of the Act dated 13th June 2014. The counterparties who have purchased the shares of M/s Blue Circle Services Ltd from the group of the assessee were identified which were managed by Shri Praveen Aggarwal, Shri Natwar Lal Daga and Shri Krishan Khadaria etc. The fact that Shri Praveen Aggarwal was engaged in providing the accommodation entries gets established as he has admitted in the statement furnished under section 132(4) of the Act at the time of search under section 132 of the Act dated 13th September 2012.

26. It was further observed by the AO that similar modus operandi was used in respect of the remaining 9 companies with respect of which the assessee has shown bogus long-term capital gain. The list of such companies has already been discussed in the preceding paragraph. The necessary documents in connection with such bogus long-term capital gain which were seized from the premises of RK Kedia were provided to the assessee.

27. The AO also found that there was an investigation carried out by SEBI in respect of certain companies which were alleged in the manipulation of the price of their scrips. There were 17 companies found by SEBI which were engaged in the manipulation of the price. Out of

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such 17 companies, 8 companies are those from where the assessee has shown long-term capital gain as discussed above.

28. There were certain other assessee's/beneficiaries who have taken long-term capital gain on the sale of PIL and other companies as admitted by them in their respective assessment. One of group namely Shri Uday Hasmukhalal Vora and Dhiren Hasmukhalal Vora have offered the same to tax voluntarily before the settlement commission. The relevant finding of the AO is recorded on page 104 to 106 of the assessment order. It was also seen from the BSE data that majority of share were sold within a minute of putting the sale request. However, the assessee and his family members have not disclosed the additional income admitted by them in the course of search for Rs. 250 crores.

29. In view of the above, the AO issued a show cause notice to the assessee, proposing to treat the amount of impugned long-term capital gain as unexplained cash credit under section 68 of the Act.

30. In response to such show cause notice, the assessee submitted that he acquired the shares of PIL as share warrant which were subsequently converted into equity shares. Consequently the shares were dematerialised and held for more than 12 months. The shares were sold through the brokers registered with the BSE and to the unknown parties. All the sale proceeds were received against the sale of shares through the banking channel and through the plate-form of BSE. None of the transaction for the sale of shares was under his control as he was unknown about the buyer of the shares. All the transactions of sale &

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purchase of the shares were duly supported on the contract note, sale bill etc. Furthermore, M/s PIL was planning to establish a big project in Gujarat and Mumbai and in overseas countries in the field of mobile, internet, network -related solutions etc. Therefore, the assessee has made investment in such company.

31. The assessee also claimed that he does not know any person with the name Shri SCS and Praveen Kumar Jain, and thus he has nothing to do with the documents seized from the premises and the statement of Shri SCS & Praveen Kumar Jain. Accordingly the assessee requested for the cross-examination of the parties as discussed above. Similarly the assessee has not paid any cash to the parties for carrying out any transaction of bogus long-term capital gain. The purpose of maintaining documents by the third parties were not known to him and the name of the assessee or his family members were not appearing in those seized documents. Therefore, no adverse inference can be drawn and even the records match with the data maintained by the respective parties.

32. The assessee also submitted that the statement of Shri RK Kedia was not reliable as he was changing his stand frequently. The assessee further contended that the statement furnished by him under section 132(4) of the Act admitting an income of Rs. 250 crores dated 21st February 2014 cannot be relied upon as it was given under the pressure of the search team.

33. The shares were sold to the unknown parties. Likewise all the counterparties/purchasers of the shares were not among the list of 212

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companies which were allegedly engaged in providing accommodation entries and controlled by Shri SCS. There cannot be any adverse inference on the observation that the shares were sold within a minute after putting the sale request made by the assessee.

34. With regard to long term capital gain earned by the assessee and his associates from the companies other than PIL, the assessee made similar argument that he did not know any of the persons who was allegedly controlling those companies or involved in activity of accommodation entry. Their statements were recorded behind his back. Thus, he requested for cross verification and also requested to point out specific charges made out of their statement. The assessee similarly contended that he or his family is not involved in any manner in the activity of price manipulation but acting as normal investor. Therefore, he is not answerable to any finding with regard to the manipulation in the prices of the shares by those persons who are not connected to him in any manner. Similarly, he also contended that whatever document impounded from the premises of third party or from Shri RK Kedia were not prepared by him or his family members. Likewise his or his family members names were not appearing on those document. Thus no inference can be drawn against him.

35. However, the AO disregarded the contention of assessee by observing that the onus is upon the assessee to justify, based on the documentary evidence, that the impugned long-term capital gain is genuine. There were several evidences recovered in the course of search under section 132 of the Act, carried out at various persons at different

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locations, which proves that the impugned long-term capital gain represents the sham transactions which was undertaken through a syndicate of entry-providers. Thus in such a situation, merely filing the DMAT account, contract notes, bills and bank details, to prove that all the transactions were carried out through the banking channel, is not sufficient enough on the part of the assessee to discharge the onus imposed under section 68 of the Act. Since the onus lies upon the assessee, it was expected from the assessee to produce the brokers through whom the transactions were carried out at the stock exchange, counterparties who purchased the shares from the assessee, the directors of the companies with respect to which the long-term capital gain was declared. The production of these persons was necessary to establish the identity, creditworthiness and genuineness of the transactions but the assessee failed to do so. The contention of the assessee that he does not know Shri SCS does not appear to be true for the reasons as detailed below:

i. The group companies of the assessee have issued shares at a huge premium to the companies which were controlled and managed by Shri SCS.

ii. It was admitted by the assessee in the submission dated 3rd February 2016 that its group company namely M/s Bhushan Power and Steel Limited has given advances for the purchase of capital assets in the course of its business to the companies which were managed and controlled by SCS.

36. There were many operators who were involved in jacking up the price of certain companies and providing accommodation entries to the

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beneficiaries. This fact of involving various brokers in the activity of accommodation entries has already been elaborated in the preceding paragraph. Therefore, contention of the assessee that the shares of PIL were also sold to other companies which were not managed and controlled by SCS does not make the transaction genuine. It is for the reason that there was a syndicate which was operating in tandem for generating the bogus long-term capital gain. It is very unusual that majority of the trades were executed within the minute after placing the order. It is possible only when the buyer and the seller are artificially synchronised for carrying out the transactions. There were certain documents found during the course of search marked as"Kedia -2", "cash and cheque sheet" from the premises of Shri SCS and other documents/records etc from the premises of Shri RK Kedia and Praveen Kumar Jain which were exactly matching with the records of the assessee. Therefore these documents conclusively prove that the assessee has undertaken sham transactions in the form of long-term capital gain. Likewise, these seized documents are not available in public domain and therefore nobody can access to them as these relate to the transactions carried out by the assessee group. Thus all the transactions are linked with each other. The statement recorded of Shri RK Kedia is backed by plethora of incriminating documents which were seized during the search proceedings. As such the statement of Shri RKKedia supports and incorporates the evidences found during the search. Therefore, the contention of the assessee that the statement of Shri RKKedia is not reliable as he is changing his statement is of no significance.

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37. The disclosure made by the assessee for Rs.250 crores on behalf of the group was based on the documents found during the search proceedings at various places. The entries recorded in those documents i.e. CASH/ CHEQUE SHEET AND KEDIA-2, were matching with the books of accounts/ bank statement of the assessee group. As such the assessee failed to make any satisfactory reply on confrontation of various documents and thus he admitted in the statement recorded under section 132(4)/131-1A of the Act to disclose a sum of Rs.250 crores. Out of such sum Rs.159.61 crores was surrendered for the long-term capital gain shown from PIL in the assessment year 2011-12 and 12-13. Therefore the contention of the assessee that the disclosures were made under pressure is not tenable.

38. The group of the assessee has generated huge long-term capital gain on the purchase and sale of shares of the companies which were not having any business activity. All these companies were showing meagre income. Likewise, these companies were incurring only nominal cost which suggests that these companies are not actively engaged in any activity. Had there been any activity, the same would have been reflected from the financial statements of the relevant companies. Similarly, these companies have issued shares at a huge premium which was immediately utilised for making the investment in the shares of other companies. Thus, considering all these facts, the amount of capital gain generated on the sale purchase of these companies is against the human probability. Therefore, the preponderance of the probability suggests that

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the transactions carried out by the assessee group in the name of long-term capital gain are a sham transaction.

39. There were various direct and circumstantial evidence available on record indicating that the prices of the shares of the impugned companies were rigged up in an organised manner by the network of the various entry-operators. All the transactions of purchase and sale of the shares of these companies on the stock exchange were carried out in synchronised manner. Most of the time transaction gets completed immediately after putting the bid on the stock exchange.

40. There were various search and seizure operations as well as survey operations on various companies, brokers, sub-brokers, employees etc. who have furnished the statement under section 132(4) of the Act by admitting that they were engaged in providing accommodation entries to the beneficiaries. Some of the names of these persons are Shri SCS, Praveen kumar Jain, RK kedia, Manish Aroroa, OPK etc. The statements of these persons were backed by various incriminating documents found from their premises. Thus the statements corroborate the fact that the group of the assessee had been engaged in taking the accommodation entries from various entry operators. Likewise, none of the statement was recorded under section 132(4) of the Act using any coercion. As such all the statements were furnished by the entry operators/companies admitting their involvement in the activity of accommodation entries which was based on the incriminating materials. Furthermore, there was the consistency among the statements furnished by the parties under section 132(4)/131(1A) of the Act admitting the fact that they were

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engaged in providing the accommodation entries to the beneficiaries including the assessee.

41. There were series of documents found during the search wherein the entries for receipt of cash were recorded. All these entries of cash receipt were matching with the seized documents which were found at different places during the independent searches. Besides the cash transactions, there were banking transactions also recorded which were matching with the books of accounts of entities of entry provider and the bank statement of the assessee group company. All these documents read in toto evidence that the group of assessee has given cash to the entry providers for generating accommodation entries in the form of long term capital gain. For this purpose, the commission was also paid by the group of the assessee which was also appearing in the seized documents.

42. Regarding the contention of the assessee for providing the opportunity of cross-examination of the persons as discussed above, it was noticed by the AO that the addition was not made merely on the basis of the statement but it was backed by various incriminating documents found during the independent searches. Therefore in such circumstances, it was not obligatory to extend the opportunity of cross-examination to the assessee. Besides, there were numerous searches in different parts of the country in the case of various persons and therefore it was not feasible to provide the opportunity of the cross-examination of the alleged person to the assessee. However, nobody appeared in response to the summons issued to various parties under section

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133(6)/131 of the Act. Furthermore, the sham transactions generally carried out in an organised manner by the group/network of syndicate and therefore member of such syndicate did not come forward for the cross-examination.

43. The proceedings under the income tax Act being the civil proceedings does not requires absolute evidence. Therefore the aspect of preponderance of probability cannot be ignored in the given facts and circumstances, especially on the basis of the documents and the statement recorded of various persons during various search proceedings as discussed above. All the companies which have been used for the purpose of generating the long-term capital gain on the sale & purchase of the shares were financially weak and having no business transaction. Thus, no prudent businessman will take the risk by making the investment in the shares of such companies. Therefore, the preponderance of probability suggest that the assessee has entered into such transaction with view to convert unaccounted money with the help of entry provider in the form of bogus long-term capital gain which is also supported by the plethora of evidence gathered in various searches, statements and surrounding facts and circumstances. Accordingly, the AO treated entire long term capital gain earned by the assessee for A.Y. 2008-09 to 2014-15 as unaccounted/unexplained money u/s 68/69C being bogus long-term capital gain and commission expenses thereon. Thus the AO for the year under consideration i.e. A.Y. 2014-15 made additions for a sum of Rs. 59,85,99,451/- on account of bogus long term capital gain and Rs. 3,81,28,694/- on account of commission charges.

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44. Aggrieved assessee preferred an appeal to the learned CIT (A)

45. The assessee before the learned CIT (A) submitted that the transactions for the purchase and sale of the shares of the alleged companies were backed by the necessary supporting evidences such as the contract notes, Demat Accounts, banking statement showing payment for purchase and proceeds against sale received in bank etc. However, the AO has not pointed out any defect in such documents which were produced before him during the assessment proceedings. The AO has merely treated the impugned long-term capital gain as bogus and therefore unexplained cash credit on the basis of reports received from the directorate of investigation wing. As such, the Directorate of investigation wing in the course of search proceedings conducted under section 132 of the Act, in the case of various persons not connected with the assessee, have collected the documents as well as recorded the statements. Based on the same it was alleged that the assessee has generated bogus long-term capital gain. Accordingly, the assessee submitted that the AO without pointing out any defects in the primary documents but relying on the documents/statements of the 3rd parties without conducting any independent enquiry has concluded that the impugned long-term capital gain as bogus in nature. Thus the act of the AO is without the application of mind.

46. The assessee further submitted that there was a specific request made to the AO during the assessment proceedings for extending the opportunity of cross-examination of the parties whose statements were relied for alleging that the transaction of long-term capital gain was

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bogus in nature. It is the settled law that no adverse inference can be drawn against the assessee until and unless the assessee is afforded the opportunity of cross verification.

47. It was also contended that the conditions as specified under section 10(38) of the Act for treating the particular long-term capital gain as exempted from tax have been duly satisfied. As such the assessee has generated the long-term capital gain on the sale of listed securities and after making the payment of security transaction tax. Therefore, the AO should have viewed the transactions of impugned long-term capital gain within the parameters of the provisions specified under section 10(38) of the Act.

48. The sale and purchase of the scripts listed on the stock exchange are regulated by SEBI, internal control/guidelines of the stock exchange. Furthermore, a company before listing shares in a stock exchange has to face various hurdles for compliance of the conditions specified by the stock exchange as well as SEBI. Therefore, treating the impugned long-term capital gain as bogus in nature would be a disgrace of such authorities which came into existence through the Parliament of India. Further in such a highly regularised and formalized system of trading, rigging or manipulating the transaction is almost impossible.

49. The word penny stock has not been defined anywhere in any of the Act. However, penny stock refers to the scripts of small companies. The trading of shares of such small companies cannot be viewed with prejudicial mind. Accordingly, any gain arose out of the trading of

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shares of such small companies cannot be termed as bogus in nature. The rise in the price of the shares in market is not always based on the company's financial position, profit/growth rather its value/price is determined on the demand and supply of the script. As such the price of the script depends upon various factors such as the field in which the company is operating, the competition that the companies is facing, the difficulty for making the entry in the particular field, the background of the promoters, Govt. policy, budget proposals, future plans etc.

50. Furthermore, the assessee was nowhere involved in the jacking up of the price of the companies as discussed above. There is no allegation brought on record by the revenue suggesting that the assessee was involved in any manner in rigging up the price of the alleged companies.

The AO while treating the impugned long-term capital gain as bogus in nature has referred to various statements and documents seized in the course of search from the place of the 3rd parties. As such there was no iota of evidence found from the premises of the assessee suggesting that the assessee was engaged in generating such capital gain which is bogus in nature. Therefore, no reference can be made to the documents collected from the 3rd party while deciding the income of the assessee.

51. The AO in treating the long-term capital gain on the script of PIL has heavily relied upon the statement of Shri SCS/ RK Kedia/ Manish Arora, OPAK, Praveen Kumar Jainviz a viz the documents found from the premises of SCS and others. In this regard it was submitted that the

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assessee does not know the said parties except Shri RK Kedia. No transaction was carried out with any of them except certain help received from Shri RK Kedia. Therefore, it was submitted by the assessee that he has not provided any cash to any of the party. The company namely BSPL has given advances for the acquisition of capital assets, through Shri RK Kedia, to various companies in the course of normal business. As such it was not known that such companies belong to Shri SCS.

52. Regarding the sheet marked as Kedia-2, it was submitted that assessee has not prepared such sheet. The sheet was prepared by SCS for the reasons best known to him. As such, the assessee does not know any reason for the sheet Kedia 2 being maintained by Shri SCS. The bank payment was made through RK Kedia for the acquisition of the capital assets by BPSL. Why the details of bank payment were recorded in the sheet found from the premises of Shri SCS, this question can only be answered by Shri RK Kedia. There can be some internal dealing between them which can be clarified by them only. It has already been submitted that it has not provided any cash of whatsoever to any party. Therefore the cash transactions recorded in the documents found from the premises of the 3rd party namely Shri SCS , RK Kedia and Praveen Kumar Jain which were also matching/correlating with the respective records maintained by them are not known by him. For what purpose they were recording the transactions, they can only clarify. Furthermore, in none of the document the name of the assessee group was shown. The assessee also made same arguments with respect to the CASH AND CHEQUE SHEET found from the premises of Shri SCS.

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53. The cash trail found by the AO with respect to the parties namely Shri SCS , RK Kedia and Praveen Kumar Jain pertained to the period 28th of June 2011 to 27th August 2011 whereas the assessee has made the last sale of shares of PIL dated 3rd May 2011 much prior to the cash trail as pointed out by the AO. Therefore, no reference can be made to such documents.

54. It was also submitted that the assessee has not made any payment of commission or agreed to pay to Shri RK Kedia as recorded from the documents found from his premises. Admittedly, the investment in PIL and other companies was made as per the advice of Shri RK Kedia and therefore it might be possible that Shri RK Kedia was expecting some commission on such investments. However, Shri RK Kedia has never demanded any commission from the assessee. Therefore, it is best known to Shri RK Kedia, what was the purpose for maintaining such record.

55. The assessee has sold the shares of PIL to various companies numbering into 141 and there were only 21 companies out of such 141 companies belonging to the group of SCS. In other words, several companies to whom the shares were transferred were not the part of the entities of Shri SCS. Therefore, there is no question of treating the sale of shares to other companies as unexplained cash credit under section 68 of the Act. Once the transaction of selling shares to the companies other than 21 companies belonging to Shri SCS has to be accepted as genuine long-term capital gain, then the transaction of selling the shares of the group company controlled and managed by Shri SCS should also be given the same treatment.

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56. All the shares were sold through the stock exchange which is regulated by the various authorities. Once the request of sale of shares was made on the stock exchange which was matched with the other party as buyer, the same was accepted and accordingly, the transaction got executed. As such there is no role of the assessee in such price fixing with the buyer. As such the buyers are always unknown to the seller. Accordingly, the contention of the AO that the transaction of sale purchase was completed in a couple of minutes is not tenable and carried no merits.

57. Regarding the long-term capital gain shown on the sale of the shares of M/s Blue Circle Services Ltd, it was submitted that it was treated as bogus on the basis of statements recorded of various persons such as Shri RK Kedia, Manish Arora, Praveen Agrawal and Jagdish Purohit besides the document marked as annexure 2 and backup data found from the premises of RK Kedia. But the fact is this that he does not know to Shri Jagdish Purohit and Parveen Aggarwal. Moreover, the assessee has not carried out any transaction either directly or indirectly with these persons. Similarly, the name of assessee group was not appearing in the statements furnished by Shri Jadish Purohit and Praveen Agrawal. Similarly, these two persons did not even admitted in the statement that they have helped each other in generating the bogus long-term capital gain. Likewise, the allegation of the AO that Shri Jagdish Purohit was controlling the affairs of the company namely M/s Blue Circle Services Ltd was not correct as his name was not appearing in the list of Board of Directors of the company. The assessee further

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contended that his name is not appearing on the documents seized from the premises of Shri RK Kedia which were marked as annexure 2 and the backup data. The transactions recorded therein or between Shri RK Kedia and Jagdish Purohit without having any reference to the assessee. Furthermore, the transactions recorded in these seized documents pertained to the financial year 2012- 13 whereas the assessee has sold the shares of M/s Blue Circle Services Ltd in the financial year 2011-12. Accordingly, it was contended that the assessee has no role in the documents seized during the search proceedings.

58. The assessee has sold the shares in the case of M/s Blue Circle Services Ltd worth of Rs.170 crores. Out of Rs. 170 crores, the shares value of Rs. 60.12 crores were allegedly purchased by the companies controlled and managed by Shri Praveen Agarwal, an entry operator, which constitutes 37% of the total value of the shares sold. Thus it can be inferred that the remaining 63% of the total value of the shares were sold to other parties in respect of which no doubt was raised by the AO. Furthermore, all the transactions have been carried out through the stock exchange regulated by the SEBI, where the seller and the buyer's do not know each other and seller or buyer doesn't having any control on such transactions. Thus it cannot be said that the transactions of shares trading was carried out in synchronised manner.

59. With respect to the allegation of the AO for the weak financial and no business activity in the case of M/s Blue Circle Services Ltd, the assessee repeated the same arguments which have been elaborated in the preceding paragraph. In sum and substance, the contention of the

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assessee was that the weak financial of the company cannot be a criteria to determine the value of the shares rather it depends upon various other factors. Similarly, the assessee submitted that its group has made investments in the company as discussed above and other companies considering the future prospective as a normal investor only. If there was any rise or fall in the price of the company, he had no role of whatsoever and there was no document brought on record for alleging so.

60. All the necessary documents in support of the transactions for the impugned long-term capital gain were furnished which cannot be brushed aside by the AO by resorting to the approach of preponderance of probability. It is because, all the transactions are backed by the documentary evidence. Thus, no inference can be drawn against the assessee based on the principle of preponderance of probability.

61. However, the learned CIT (A) disagreed with the contention of the assessee by observing that the assessee group has shown long-term capital gain of Rs. 694 crores over the period of time against the investment made for Rs.21 crores only. The entire investment was made by the assessee group in the penny stock companies having weak financials and no major business activities. Besides this, the assessee has not made any other investment in any other company. Thus, it is humanly impossible for generating such huge capital gain in such short period of time without any manipulation.

61.1 The assessee himself has admitted to have generated long-term capital gain for Rs. 250 crores in the statement furnished under section 132(4) of the Act after confronting various documents of incriminating

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nature and the statement recorded of various persons. Thus, the admission by the assessee in itself is a vital piece of evidence that the group of the assessee has generated huge bogus long-term capital gain. The admission for disclosing the income was made by the assessee based on the incremental documents found during the search as well as the statements recorded of various persons and therefore the argument of the assessee that the admission was made to buy the peace of mind or it was given under coercion/pressure has no relevance.

62. The banking transactions and shares transactions appearing in the sheet marked as Kedia -2 are matching with the bank statement and BSE data of the assessee group company. At the same time, such sheet was also containing the details of the cash transactions as well as the commission charges. Therefore, the transactions reflected in such sheet has to be seen as a whole evidencing that the assessee has paid cash against the sale of shares in order to take the accommodation entries. Thus, it is hard to believe the contention of the assessee that its group was indulged in the share trading activity as the investor only.

63. The incriminating documents found during the search proceedings pertaining to the particular A.Y. only but the assessee has carried out identical transactions in the immediate preceding year also. Thus, it can be concluded that the transactions of the earlier year was also bogus in nature. Usually, the bogus transactions are fabricated in such a way that they appear to be correct based on the documentary evidence. But such evidence has to be evaluated in the light of other vital information available on record which was found in the course of search of other

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parties. If a transaction is genuine then all other information available on record would also support and indicate the genuineness of the transactions. But the assessee is harping upon the documentary evidence to justify the transactions of long-term capital gain without bringing any material on record against the documents/findings discovered during the search proceedings by the Directorate of Investigation, Ahmadabad, Mumbai, Delhi, Chandigarh etc.

64. Generally, the principles of natural justice demands affording opportunity of cross-examination of the documentary evidence as well as the statements recorded of the parties if used against the assessee. But such principles are not absolute meaning thereby it depends upon the facts and circumstances whether to extend the opportunity to the assessee for the cross-examination. In a situation where the addition is based solely on the statements, then it becomes obligatory on the part of the AO to adhere the principles of natural justice. However, in the case on hand, there were various vital piece of evidences which were gathered after conducting various searches at different locations and on different persons by the Directorate of Investigation wing of Mumbai, Kolkata, Ahmedabad, Delhi and Chandigarh. Therefore, in such a situation it is not compulsory to afford the opportunity of cross-examination, especially in fact that the assessee failed to discharge the onus cast upon him.

65. In view of the above the learned CIT (A) confirmed the order of the AO by observing as under:

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In view of the facts and circumstances borne out of the assessment order and Legal precedents as discussed above, I am of the view that documents submitted as evidences to prove the genuineness of transaction are themselves found to serve as smoke screen to cover up the true nature of the transactions in the facts and circumstances of the case as it is revealed that purchase and sale of shares are arranged transactions to create bogus profit in the garb of tax exempt LTCG by well-organized network of entry providers with the sole motive to sell such entries to enable the beneficiary to account for the undisclosed income for a consideration or commission.

In view of the above discussion, I am of the considered view that share transactions leading to LTCG by the appellant are sham transaction entered into for the purpose of evading tax. Accordingly it held that the AO has rightly added the said amount of Rs.62,66,38,865/- as undisclosed income of the appellant. Since arranging such accommodation entry necessarily entails payment of commission to entry providers, the AO's action in quantifying and adding such unexplained expenditure at Rs.3,93,17,170/- u/s 69 of the Act based on statements of brokers/entry providers is also upheld for the reasons recorded in the assessment order at para 12.4. Accordingly, additions made by the AO are confirmed and the grounds of appeal are dismissed."

66. Being aggrieved by the order of the learned CIT (A), the assessee is in appeal before the Tribunal.

67. The ld.counsel for the assessee while impugning order of the ld.CIT(A) appraised us chronology of events, and in this connection he took us through page no.1 and 2 of the consolidated written submissions filed by him, which is running into 175 pages. In order to appreciate the facts in more scientific way, we deem it necessary to take note of list of events incorporated by the ld.counsel for the assessee in his submission, which reads as under:

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Dates	*Particulars*
03.03.2010	*Search u/s 132(1) (S&S) on 03.03.2010 at the residential and business premises of the Directors and related persons of the Bhushan Power & Steel Group (BPSL Group) by DIT(Inv), New Delhi - No incriminating material pertaining to any irregular availment of bogus LTCG by the Assessee(s) found.*
04.03.2010 *13.04.2010* *25.05.2010* *18.06.2010*	*Sanjay Singal's voluntary disclosure of Rs. 302 Crs u/s 132(4) in the hands of himself, his wife and group companies (Letter dt. 18.06.2010, 13.04.2010, 25.05.2010) for AY 2010-2011 as undisclosed income emanating from seized documents - no connection with the issue of LTCG.*
15.12.2011 *20.12.2011* *30.06.2013*	*Assessments u/s 153A for A.Ys 2004-05 to 2010-11 in the cases of SS & ARS - no issue/addition relating to LTCG* *Pursuant to the D4 Order of the ITSC, dt.30.06.2013 the Assessment Order for the AY 2010-2011 stood revised - income declared in the hands of SS & ARS partly shifted to the hands of BPSL and excluded from their individual hands vide order of the ITSC*
29.03.2012	*Search at Himanush Verma on 29.03.12 by DIT(Inv), Delhi - Group concerns of the Assessee had made a further disclosure of 89.4 Crs for the AY 2011-2012 and 2012-13 on account of alleged bogus share capital/premium - No issue relating to LTCG*
13.09.2012	*S&S at residential cum office premises of Praveen Agarwal by DIT(Inv) Kolkata- statements recorded - documents relied upon mainly four excel sheets from hard disk ID mark PAL/HD/1 - allegedly shows datewise detail's of cheques/RTGS received and paid from/to various parties including BPSL group - statements dt. 12.11.2012, 05.02.2014, 30.04.2014, 18.11.2014 & 11.02.2015 recorded - Assessee(s) not named in any of the seized documents or statements.*
27.12.2012	*Survey at premises of BPSL Group by DIT(Inv),*

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	Chandigarh - BPSL Group Concerns made another voluntary disclosure of Rs.70.36 Crs for AY 2013-14 wrt unexplained credits, cash payments for land purchase and interest disallowance (and interest disallowance in the hands of BSPL was 9 crs) - nothing incriminating with respect to LTCG found.
09.04.2013	*S&S by DIT(Inv) Ahd in the case of Sirish Chandrakant Shah (SCS) - Alleged that BSPL has received a huge amount of accommodation entries from the cartel of Cos. managed and controlled by SCS. and various other entry operators. Documentary evidence in this regard - Kedia 2 (excel sheet), Cash & Cheque Sheets (tabulated data found at Pg.7/146 of the A.O Order) - noticeably, the names of Assessee(s) do not feature in any of these seized documents - statements of SCS, his employees, dummy directors etc. relied upon -statements of SCS dt. 13.04.2013, 03.06.2013, 05.06.2013, 11.06.2013, 25.11.2013 & 13.01.2014 relied upon*
19.10.2011, 12,02.2033, 17.12.2013	*Statements of Jagdish Prasad Purohit recorded u/s 1317 132(4) in course of S&S u/s 132(1) in the case of various companies allegedly controlled & managed by him - Assessee(s) not named anywhere in such statements*
11.10.2013	*Search at the premises of Praveen Kumar Jain (Pintu) by DIT(Inv), Mumbai, admitted on oath that he was in the business of providing accommodation entries and used to collect cash from angadias on behalf of SCS and would then pay SCS the same amount in cheque - seized documents relied upon mainly account of SCS in books of PKJ viz. SHIR ledger - statements dt.l 1.10.2013 relied upon - Assessee(s) not named in any of the seized documents or statements.*

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21.02.2014/ 22.02.2014	*S&S operation u/s 132(1) at BPSL group by DIT(Inv), Faridabad including residential & office premises of the Assessees herein (the impugned search) - docs seized from premises of BPSL and relied upon by the AO: 'Annexure HD of data backup', Annexure A-13, pgs 4 to 7 & pgs 133,133 & Annexure A-28, pgs 1 to 27 - all part of regular records of BPSL -these seized documents have no connection with the issue of LTCG - no incriminating documents found from the premises of the Assessees herein* *Statement of Sri Sanjay Singal recorded u/s 132(4) - In reply to last question on 22.02.14, SS disclosed additional income of Rs. 250 crores for the entire group and submitted a disclosure letter - specifically stated that the disclosure was made to avoid litigation and purchase peace of mind* *Simultaneous search operation in the case of R.K Kedia by DIT(Inv), Delhi - nothing incriminating wrt the Assesseee(s) found - in course of statement recorded u/s 132(4) on 21/22.02.2014 stated that investments in shares were made by the Singals on his advice - that the LTCG earned by Singals was genuine- contents of Kedia 2 Sheet seized from SCS was categorically denied by RKK (reply to Q 75).*
06.03.2014	*Sanjay Singal filed letter dt. 06.03.2014 giving breakup of Rs, 250 crores, i.e. Rs. 159.61 crores in the hands of SS, ARS & SS(HUF) for A.Y. 201 1-12 & 2012-13 - allegedly on account of exempt LTCG on sale of shares of Prraneta Industries Ltd.(PIL) solely for the purpose of buying peace of mind and avoiding protracted litigation- bifurcation w.r.t the balance offer was undertaken to be submitted in a few days after examining seized materials.*
13.06.2014	*S&S operation u/s 132(1) carried out once again by DIT(Inv), Delhi at the premises of RKK & at the residential premises of Manish Arora (employee of RKK) - alleged hard/soft data seized -statements of R.K. Kedia & Manish Arora recorded.* *In course of his statement recorded on 13.062014*

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	which continued upto 16.06.2014, RKK changed the stand taken by him earlier on 22.022014 and interalia stated that he had arranged bogus LTCG accommodation entries for various members of the Singal Family
14.10.2014	*Sri R.K. Kedia once again reverted to his original stand and retracted from his statement dated 13.06.2014 stating that the said statement was recorded under extreme pressure and he was forcibly made to sign certain typed statements without being allowed to go through the same and that he was never engaged in the business of providing accommodation entries.*
26.03.2015	*Due to the continuous pressure created by the Department, Sri R.K. Kedia without any explicable reason whatsoever, once again vacillated from his original stand and re-retracted the retraction filed by him on. 14.10.2014 by filing a letter & affidavit dated 26.03.2015*
12.12.2014 (SS & ARS) & 29.01.2015 (SS(HUF)), 12.08.2015 (ANS)	*Notice u/s 153A dt. 12.12.14 (SS & ARS), 29.012015 (SS(HUF) & 12.08.2015 (ANS) for the AY 2008-2009 to 2013-14 issued*
19.02.2015 & 08.09.20I5	*Assessee filed submissions dated 19.02.15 (in the case of SS & ARS) & 08.09.2015(in the case of ANS) in response to notice u/s 153A -validity of initiation of proceedings u/s 153 A for unabated years in the absence of incriminating materials challenged - Adhoc offer of additional income (not backed by any incriminating materials) was not reflected in the returns of income of the Assessee group on the strength of CBDT Circular Nos. F. No. 286/2/2003-IT (Inv.) dt 10-3-2003 and F, No. 286/98/2013-IT dt. 18.12.2014.*
10.08.20 15 & 08.09.2015	*Notice u/s 143(2) dt. 10.08.2015 issued Notice u/s 142(1) dt. 12.08.2015 - seeking details of exempt LTCG claimed in ITR, ledger of purchaser/seller in the books of the Assessee & cash flow statement*

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20/21.10.2015	*SCNsdt.20.10.2015 (for AY 201 1-12 to 2012-13) issued.*
09.112015	*SCN dt.. 09.1 1.2015 (u/s 142(1))(for AY 201 1-12 to 2014-15) issued*
13.01.2016	*Proceedings u/s 1 53 A dropped in the case of SS(HUF)*
03.02.2016	*Assessee(s)' submissions in response to SCN dt. 20/21.10.2016 - also requested for opportunity of cross examination*
05.02.2016	*Letter of AO seeking list of persons sought to be cross-examined by the Assessee(s).*
10.02.2016	*Notice u/s 142(1) dt. 10.022016*
17.02.2016	*Letter filed before AO requesting for cross examination*
26.03.2016	*Notice u/s 148 issued to SS(HUF)*
28.03.2016	*Assessment order u/s 153A passed in the cases of SS, ARS, ANS*
05.04.2016	*SS(HUF) filed return of income in response to notice u/s 148 and requested for supply of reasons recorded u/s 147*
15.09.2016	*Reasons recorded u/s.147 supplied to SS (HUF)*
15.09.2016	*Notice u/s.143(2) issued & served on SS(HUF)*
10.05.2016	*Notice u/s.142(1) along with questionnaire dated 10.5.2016 served on SS(HUF)*
23.08.2016	*SCN u/s.142(1) issued to SS(HUF)*
29.12.2016	*Assessment order u/s.148 r.w.s. 143(3) passed in the case of SS(HUF)*
31.03.2018	*Combined order passed by CIT(A)*

68. As observed earlier, the ld.CIT(A) has decided 18 appeals by the present impugned order. Out of those 18 appeals, appeals of the

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assessee for the assessment years 2008-09, 2011-12, 2012-13 in the cases of Shri Sanjay Singal and Smt.Arti Singal have been decided by the Tribunal vide its order dated 7.2.2020. Similarly, the appeals of the assessee, Shri Sanjay Singhal HUF for the Asstt.Year 2011-12 and 2012-13 have also been decided. The stand of the ld.counsel for the assessee is that in the group of BBS group large number of appeals came to the Tribunal. Out of which many appeals have been decided. The Tribunal has segregated those appeals under two compartments viz. the appeals pertaining to those assessment years whose assessment years have not been abated i.e. unabated year, because according to the Tribunal scope of those appeal altogether different than the scope of assessment years where assessment proceedings have been abated. According to the ld.counsel for the assessee, the issues involved in these appeals are common, whether involve unabated or abated years. The evidences collected by the Revenue are also common, and all those evidences were collected from the premises of the third party. The orders of ITAT dated 31.10.2018 in the case of Shri Brij Bhusan Singal in ITA No.1412 to 1414/Del/2018 and other appeals have been placed on record. Similarly, order of the Tribunal in the case of Shri Brij Bhusan Singal and others Vs. DCIT in ITA No.1415 to 1417/Del/2018 dated 7.12.2018 have also been placed on record. According to the ld.counsel for the assessee, the issues are identical, and there is no disparity on the facts, and therefore, the Tribunal is required to follow its view taken in the case of other family members by the coordinate bench. We took cognizance of these facts and proceed to take note of further submissions raised by the assessee as under:

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i) The Assessees have filed their returns of income for the years under consideration on various dates. During the said years, the assessees earned Long Term Capital Gains (LTCG) in various scrips on which Securities Transaction Tax (STT) had been duly paid and having complied with all the requisite conditions, they claimed the LTCG as exempt u/s 10(38) of the Act. The ld. A.O, proceeded to add back the entire proceeds arising on sale of shares u/s 68 and alleged unaccounted commission expenses u/s 69C to the income of the Assessee(s) for the relevant years relying on various arguments/so-called evidences as discussed in the body of the assessment orders. It is clearly evident from the discussions made in the assessment order that the so-called evidences used by the A.O in making the impugned additions have no evidentiary value vis-a-vis the present assessees, are highly unreliable and do not conclusively prove that the impugned LTCG were not genuine or sham.

ii) It is submitted that most of the shares of the companies on which LTCG has been earned were allotted to the Assessees by way of preferential allotment. One of the grounds taken by the A.O in doubting the transactions carried out by the assessee and alleging personal connection between the Assessee(s) and the promoters of the said companies/ entry providers is that the shares of the said companies were allotted by way of preferential allotment. In this regard, it is submitted that the issuance of shares on preferential basis was in consonance with applicable S.E.B.1

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regulations and Listing Agreement norms. It is clarified here that the fact that the shares of the companies were allotted to them by way of preferential allotment does not signify any connection of the assessees with the companies. In terms of the applicable provisions of the Companies Act, a preferential allottee of shares is not required to attend any Board meetings, there being a complete divergence between the management and ownership, a company being a body corporate, having a separate legal entity. The process of preferential allotment which is invariably spread by the word of mouth, the possibility of personal contact between the promoters/management and preferential allottees is miniscule.

iii) Various statutory/regulatory bodies such as S.E.B.I, the Stock Exchanges etc. are involved in the process of preferential allotment of shares as well as the follow up of public issue. The entire process involves a multi-stage, rigorous, coordinated and time bound process involving comprehensive due-diligence, vetting of documents, background check of promoters, compliance with well-laid out guidelines and parameters etc. A company intending to go in for a public issue can allot shares by way of preferential allotment only after getting the approval of S.E.B.I. In the entire process, S.E.B.I also approves the list of persons/ entities to whom shares are to be allotted on preferential basis, also incorporating therein the terms and conditions including, lock in, if any subject to which the shares are to be issued. In the given backdrop, the Assessee(s) herein cannot be faulted for relying on a commercial proposition which was duly compliant with law,

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including approval of S.E.B.I. To disregard the activities conducted by a Company as dummy when almost its entire spectrum of activities has been pre-scrutinized and approved by various agencies, including the capital market regulator S.E.B.I would be disregarding the functioning of bodies operating under a law enacted by the Parliament of India.

iv) The shares allotted by the companies were listed and traded on the stock exchange. These shares were subsequently credited to the respective DEMAT Accounts of the Assessee(s) herein. After being held by the Assessee(s) for a period of more than 12 months, their sales were affected through registered brokers on the NSE/BSE in accordance with prescribed regulatory procedures, rules and applicable laws whereby both the limbs of the transaction viz. purchase and sale of shares got duly authenticated. The sale proceeds for the sale of shares were received through normal and regular banking channels from the stock broker through whom the shares had been sold, who, in turn received the same from the Stock Exchange through its designated payout mechanism and stood duly credited to the respective Assessee(s)' bank accounts.

v) The shares in question were of listed companies and were sold at prevailing market rates through the Bombay Stock Exchange Online Trading (BOLT) platform of the Bombay Stock Exchange and all the payments against the same were received through account payee cheques/RTGS from the stock broker. It

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may be mentioned that under the online web-based trading platforms of the relevant exchanges as per the prevalent procedures, the broker only acts as the intermediary. There is no physical interaction between the parties and accordingly, the identities of the counter-party (whether buyer or seller) is not available thereby eliminating the possibility of any collusion between the parties. The entire sales of shares were effected through web-based platforms of the relevant exchanges in which the seller can in no way sell the shares to a particular entity/individual & vice versa; where the trade is executed when the bid price offered by the buyer matches with the offer price of the seller and vice versa; and the entire transaction is a demand and supply game over which neither the buyer nor the seller has any control. The transactions carried out by the Assessee(s) stand fully documented and evidenced by contract notes/ bills of the relevant brokers issued in the form and manner as prescribed by the regulatory authorities, copies of which are duly enclosed in Paper Book No. 3 filed separately in the case of each Assessee for each of the years under consideration.

vi) It is submitted that the Assessee(s) herein were neither aware nor could be aware of the persons/ entities buying the shares sold by them. There was no way formal, informal or even collusive whereby they could control the sales of shares to ensure their sales to a particular person/entity. The Assessee(s) herein did not have any kind of relationship or control over the said companies save as that of passive investor and were not involved in the management

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thereof at any point of time. The Assessee(s) had no role whatsoever in the capital market operations of the scrips or influencing to any degree or extent their stock market prices. The transactions were entered into by the Assessee(s) in the capacity of stock market investor on the basis of market gossip, information and feedback received from various professionals, friends, relatives & other acquaintances mainly Sri R.K. Kedia, who were actively involved and had adequate knowledge of securities market, the Assessee(s)' perception and anticipation as to future price movements etc. with a view to earn profits from the appreciation, whether long term/ short term in the prices of the underlying shares. In order to evidence the said transactions, all relevant documentary evidences in the form of share purchase documents, DEMAT Accounts, Share certificates, contract notes and bank statements evidencing the relevant entries regarding receipts against sale of shares etc. were duly filed before the Revenue Authorities. The same are also placed in Paper Book No. 3 filed separately in the case of each Assessee for each year under consideration before the Hon'ble Bench.

vii) In the aforesaid backdrop, the ld.counsel for the assessee countered various arguments both legal and factual put forth by the Revenue Authorities in making the impugned additions as under:

69. RELIANCE ON THIRD PARTY STATEMENTS RECORDED U/S 133A/132(4) WITHOUT ALLOWING OPPORTUNITY OF CROSS-EXAMINATION – GROUND NO. 5

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i) In making the impugned additions u/s 68 & 69C of the Act, the A.O, in the assessment order has predominantly relied upon the statements of the following persons recorded by the Investigation Wing in course of separate search/survey actions in their cases:

Name of the Person/ deponent	Status
Sirish Chandrakant Shah (SCS)	Person allegedly managing &controlling affairs of M/s. P1L
Ranjan Kachaiia, Chandan Kumar Singh, Damodar Attal> Devang D. Master, Devang Jhaveri, Prakash Dave, Naresh Parmar	Employees/ Associates of SCS
Kumar Raichand Madan	Person supplying directors to SCS
Praveen Kumar Jain (alias Pintu)	Alleged accommodation entry provider facilitating conversion of cash into RTGS in the a/cs of SCS
Satish Saraf	Alleged accommodation entry provider facilitating conversion of cash into RTGS in the a/cs of SCS
Om Prakash Andilal Khandelwal	Promoter & Director of P1L
Yogender Kumar Gupta	Promoter & Director of M/s. Madan Industries Ltd. alleged to be controlled by SCS
Jayesh Raichand Thakkar	Promoter & Director of M/s. Prabhav Industries Ltd. allged to

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	be controlled by SCS
Sri Satyaprakash Goel	Director of Avance Technologies Ltd, alleged to be controlled by SCS
Sri Raj Kumar Kedia	Alleged entry operator
Manish Arora	Employee of Raj Kumar Kedia
Jagdish Prasad Purohit	Person allegedly controlling the following cos: 1 . Blue Circle Services Ltd. 2. Unisys Software & Holding Ltd. 3. Global Infratech Ltd.
Deepak Patwari	Alleged exit provider
Praveen Agarwal	Alleged exit provider

ii) It may be noted that in most of the statements (barring the statement of RKK & his employee Manish Arora), the Assessee(s) herein have not even been named/implicated. It is also pertinent to note that although Sri Jagdish Prasad Purohit has been alleged to be managing & controlling the affairs of Blue Circle Services Ltd. & Global Infratech Ltd., as per the information collected from the website of the Registrar of Companies, Sri Jagdish Prasad Purohit was not even a director in the said companies and accordingly had no locus standi w.r.t the said companies. Further, on a perusal of the statements of Sri Jadgish Prasad Purohit, it may be seen that he has given a list of the companies controlled & managed by him but the names of Blue Circle Services Ltd. & Global Infratech Ltd.

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nowhere feature in such list Further, Sri Jagdish Prasad Purohit has nowhere stated that he was providing any LTCG accommodation entries through the companies allegedly controlled & managed by him. Further, as elaborated subsequently, the Hon'ble Delhi ITAT in the case of Sri Brij Bhushan Singal & Ors Vs. ACIT (supra) has given a specific finding wherein Shri RK Kedia has been categorically held to be unreliable person and his statements and the documents seized from his premises have been held to have no evidentiary value considering the inconsistencies displayed by him.

iii) The impugned additions w.r.t the transactions resulting in exempt LTCG have been made by the A.O u/s 68 of the Act. Section 68 of the Income-tax Act, 1961 is attracted where any sum is found credited in the books of an assessee and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the AO, satisfactory. Under the provisions of section 68 of the Act, the primary onus to explain the nature and source of the amount so found credited is on the assessee. However, once the assessee proves the identity of credits by either furnishing Permanent Account Numbers or copies of bank accounts and shows the genuineness of the transaction by showing that money in the banks is by account payee cheques or by draft, etc., then the onus to disprove the same would shift to the Revenue (see paras 13 & 15 of the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Orissa Corporation (P) Ltd. (1986)159 ITR 78 (SC)).

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iv) The Assessee(s) herein filed cogent documentary evidences proving the nature and source of sums found credited in his/their books of account viz. proceeds arising on the sale of the impugned shares via regular banking channels over recognized stock exchange through registered stock brokers at prices prevailing at the stock exchange - and thus conclusively establishing all the requisite ingredients of section 68 viz. identity, genuineness and creditworthiness of the transactions involved. The primary onus cast on the Assessee(s) u/s 68 to explain the nature & source of sums found credited in his books thus stood discharged, shifting the onus to disprove the same on the A.O which the A.O desperately failed to do. The A.O. disbelieved the genuineness of the transactions carried out by the Assessee(s) and the truthfulness of the documentary evidences furnished in support thereto citing reference to third party statements & third party evidences gathered in course of separate search actions in the cases of third parties. The Assessee(s) herein vehemently denied the allegations framed on the basis of the impugned third party statements & data and made a categorical request for allowing him/them an opportunity to cross-examine the persons whose statements & seized documents were intended to be used against the Assessee(s). However, no such opportunity was provided to the Assessee(s) in complete denial of principles of natural justice, thus nullifying/neutralizing the referral value of such alleged third party evidences relied upon by the A.O. and consequently resulting in

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conclusion of the successful discharge of onus u/s 68 in the favour of the Assessee(s).

v) The two main principles of Natural Justice are firstly *'nemo judix in causa sua' or 'nemo debetesse judex inpropria causa sua,* that is, "no man shall be a judge in his own cause"- and the second rule is *'audi alteram partem'*, that is, 'hear the other side.' Both make cross examination as a *sine qua* non of due process of taking evidence and no adverse inference can be drawn against a party unless the party is put on notice of the case made out against him. The Assessee must be supplied the contents of all such evidences, both oral and documentary, so that he can prepare the case against him. This necessarily also postulates that he should cross examine the witness on whose statement the AO relies to hold the sale or purchase of shares as sham or not genuine.

vi) It is trite that if an Authority is relying on the testimony of a witness, the assessee is required to be afforded an opportunity to cross-examine him failing which the testimony cannot be utilized against the assessee. If this procedure is not followed, then there would be a case of denial of natural justice to the assessee and the addition on the basis of such statements/ material cannot stand. Addition on account of accommodation entry cannot be made on basis of unconfronted oral statement(s) of third party(ies). The ld.counsel for the assessees in support of his contentions relied upon the following judicial authorities:

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(i) Andaman Timber Industries Vs. Commissioner of Central Excise (2015) 281 CTR 241 (SC)
(ii) Kishinchand Chellaram (AIR 1980 SC 2117)
(iii) State of M.P. v. Chintaman Sadashiva Waishampayan AIR 1961 SC 1623
(iv) Lakshman Exports Ltd. v. Collector of Central Excise (2005) 10 SCC 634
(v) Rajiv Arora v. Union of India and Ors. AIR 2009 SC 1100
(vi) CIT Vs. SMC Share Brokers Ltd., (2007) 288 ITR 345 (Del)
(vii) Eastern Commercial Enterprise, (J994) (Cal) [210 ITR 103]
(viii) Prakash Chand Nahta Vs. CIT, (2008) 301 ITR 134 (MP)
(ix) Bangodaya Cotton Mills Ltd. vs. CIT [2009] 21 DTK 200 (Cal)
(x) CIT Vs. Sanjeev Kumar Jain (2009) 310 ITR 178 (P&H) i
(xi) CIT & Anr. Vs. Land Development Corporation (2009) 316 ITR 328 (Kar)
(xii) CIT Vs. Rajesh Kumar (2008) 306 ITR 27 (Del)
(xiii) Heirs & LRs of Late Laxmanbhai S. Patel Vs. CIT (2009) 222 CTR (Guj) 138
(xiv) CIT Vs. Pradeep Kumar Gupta (2008) 303 ITR 95 (Del)
(xv) CIT Vs. Dharam Pal Prem Chand Ltd. (2007) 295 ITR 105 (Del)
(xvi) CIT Vs. A.N. Dyaneswaran (2008) 297 ITR 135 (Mad)
(xvii) P. S. Abdul Majeed, (Kerala) (1994) [209 ITR 821]
(xviii) Prarthana Construction (P) Ltd. [2001] 70 TTJ 122(Ahd Trib)
(xix) CIT Vs. S.M Aggarwal 292 ITR 43
(xx) Straptex India (P) Ltd. Vs. DCIT [2003] 84 ITD 320 (Mum)
(xxi) R.W. Promotions (P.) Ltd. v. Asstt. CIT [2015] 61 taxmann.com 54 (Bom.)
(xxii) Obulapuram Mining Co, (P.) Ltd. v. Dy. CIT 160 ITD 224 (Bang. - Trib.)
(xxiii) CIT v. Indrajit Singh Suri [2013] 33 taxmann.com 281/215 Taxman 581 (Guj.)
(xxiv) Smt. Sunita Dhadda v. Dy. CIT [2013] 33 taxmann.com 639 (JP.- Trib.)
(xxv) Cannon Industries (P.) Ltd. v. Dy. CIT [2015] 59 taxmann.com 65 (Mum.- Trib.)

vii) In the instant case also, most of the third party statements & evidences relied upon by the A.O viz. the statements of alleged dummy directors of various companies, alleged employees of Sirish Chandrakant Shah, statements of Om Prakash Anandilal Khandelwal, Praveen Kumar Jain, Praveen Agarwal, Jagdish Prasad Purohit, Satish Saraf, Yogendra Kumar Gupta, Jayesh Raichand Thakkar, Sri Satyaprakash Goel, Deepak Patwari etc. are very generic. Apart from the fact that these persons were not made

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available to the Assessee(s) for cross-examination, it is submitted that these do not directly implicate/incriminate/name the Assessee(s) herein as illegal beneficiaries to alleged bogus LTCG in the shares of the impugned companies. The said statements only explain the general modus 'operandi with respect to the shares of few companies being allegedly utilized for the purpose of providing accommodation entries in certain cases. Thus, mere acceptance by third parties of their involvement in providing accommodation entries of various natures to different persons wherein the name(s) of the Assessee(s) has/have not been implicated cannot form the basis for making additions u/s 68 & 69C of the Act in the Assessee(s) case unless a definite case is proved against the Assessee(s) after providing him/them due opportunity of cross-examination of the alleged deponents.

viii) It is pertinent to note that the third party statements which were relied upon by the A.Os were not recorded by the A.O in course of the assessment proceedings in the case of the Assessee(s) herein but were pre-existing statements recorded by the Investigation Wing. Such statements, as judicially opined (infra), cannot form the basis of assessment in the case of the Assesses u/s 153A without conducting a proper enquiry and examination during the assessment proceeding itself. To support his contentions, the following decisions are relied upon:

i) ITO Vs. M/s. Softline Creations (P) Ltd. (in ITA No. 744/DeI/2012)
ii) CIT Vs. Gangeshwari Metal Pvt. Ltd. (2014) 264 CTR 277 (Del HC)
iii) M/s. Khatri Projects\Pvt. Ltd. Vs. ITO (I.T.A, no. 4353/Del/2016)
iv) M/s. Devansh Exports Vs. ACIT (I.T.A. No. 2178/Kol/2017)

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v) Moti Adhesive P. Ltd. Vs. ITO (ITA No. 3133/Del/2018)
vi) CIT Vs. Oasis Hospitalities Pvt. Ltd. (2011) 333 ITR 119 (Del HC)
vii) CIT Vs. Fair Invest Ltd. (2013) 357 ITR 146 (Del HC)
viii) ITO Vs Arora Alloys Ltd. (2012) [12 ITR (trib)263 (ITAT Chandigarh)
ix) CIT vs. M.K. Brothers 163 ITR 249 (Guj -High Court
x) Jagdamba Trading Company vs. ITO 107 TTJ 398 (Jd)
xi) Sarthak Securities Co. Ltd. Vs. ITO 329 ITR 110 (Delhi HC)
xii) Deeparaj Hospital (P) Ltd. Vs. ITO, 41/Agra/2017 dt. 01.06.2018 (Agra Trib)
xiii) ITO Vs. Reliance Corporation (2017) 55 ITR 69 (SN) (Mum) (Trib)
xiv) PCIT Vs. RMG Polyvinyl (I) Ltd. (2017) 83 taxmann.com 348 (Delhi HC)
xv) PCIT Vs. Meenakshi Overseas (P) Ltd. (2017) 82 taxmann.com 300 (Delhi HC)
xvi) Gee Cee Cycle Balls Pvt. Ltd. Vs. ITO, ITA No. 867/Del/2013 dt. 30.10.2015
xvii) CIT Vs. Goel Songs Golden Estate Pvt Ltd. ITA No. 212/2012 dt. 11.04.2012
xviii) CIT Vs. Vrindavan Farms (P) Ltd. ITA No. 71,, 72, 85/DeI/2015 dt. 12.08.2015
xix) Dwarka Gems Ltd. ITA No. 71/Jp/2017 (ITAT Jaipur)
xx) Nirmala Agarwal Vs. ACIT (ITA No. 995 & 996/Jp/2016) (ITAT Jaipur)

ix) Drawing support from the above cited judgments, it is submitted that in the instant case, the addition made by the AO u/s 68 & 69C primarily relying on third party documentation and third party statements recorded by the Investigation Wing without - (i) conducting an independent enquiry & investigation by examining the alleged deponents/departmental witnesses during the assessment proceedings (ii) allowing cross-examination of the deponents to the Assessee(s) and (iii) discrediting the evidences furnished by the Assessee(s) - is bad-in-law and hence not sustainable.

70. Re: Reliance on third party documentation/ evidence seized in course of search at the premises of third parties

1. The A.O has also placed strong reliance on hard/soft data seized from premises of third parties viz, various alleged entry/exit operators in course of search operations carried out in their cases. However, as discussed supra, such data was not corroborated by any incriminating materials/ documents in the case of the Assessee

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despite using the longest arm of the Revenue in the form of search action u/s 132(1) against the Assessee(s) herein. The A.O has categorized the various alleged documentary evidences seized in course of search in the case of the third parties under the following broad sub-heads:

- W.R.T the shares of M/s. Prraneta Industries Ltd: The A.O has mainly relied upon the alleged documentary evidences seized from the premises of Sri Sirish Chandrakant Shah (SCS) (mainly 'Kedia 2 sheet', 'cheque sheets' & 'cash sheets'), Sri Praveen Kumar Jain (Pintu) (mainly 'SHIR Ledger') and Sri R.K. Kedia (Annexure A-27, Extract E-14 comprising mainly of 'Deepu Ledger') in course of independent search actions in their cases. It may be noted that the names of the Assessee(s) herein do not feature in any of the said seized documents. The said documents apparently indicate some transactions interse between the various alleged entry/exit operators. Further, some of these documents allegedly contain few cheque/RTGS entries to and from BPSL group companies which stand duly disclosed in the regular books of account of BPSL group companies and hence cannot be considered as incriminating against the Assessee(s) herein. Thus, in the absence of clear mention of the names of the Assessee(s) herein in the said third party documentation and no nexus having been drawn by the Revenue Authorities between such third party documentation and any incriminating materials found in course of search from the premises of the Assessee(s) herein, nothing adverse can be

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implicated against the Assessee(s) in assessments framed u/s 153A of the Act.

- With reference to the shares of the companies other than M/s. Prraneta Industries Ltd.: In the name of documentary evidences, the A.O has primarily relied on certain fabricated hard/soft data claimed to be seized in course of subsequent search action on Sri R.K. Kedia on 13.06.2014, i.e. almost four months after the search action in the case of the Assessee(s) herein on 22.04.2014 although the simultaneous search action on Sri R.K. Kedia on 22.04.2014 had not resulted in discovery of any incriminating material against the Assessee(s) herein. As per the categorical finding and ruling of the Hon'ble Delhi ITAT in the case of Sri Brij Bhushan Singal & Ors Vs. ACIT (ITA Nos. 1415-1417, 1479-1481, 1483-1484/Del/2018) (as also elaborated subsequently), no reliance can be placed on documents seized from the premises of Sri R.K. Kedia who has been specifically held to be an unreliable person indulging in double speaking especially when no opportunity to cross examine him or his employee was provided to the Assessee(s). The A.O has also relied on certain data (excel sheets in hard disk marked PAL/HD/1) seized from the premises of one Praveen Agarwal (alleged exit provider) in course of separate search action in his case. The said data however does not relate to the Assessee(s) herein or to the issue of LTCG under the present appeals. These allegedly record certain cheque/RTGS entries to BPSL group companies which stand duly accounted for in the regular books of account of BPSL group companies. The same is

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clearly evident from the A.O's observation at page 98/146 of the Assessment Order (in the case of Sanjay Singal for A.Y. 2012-13) that "the details of cheque/RTGS transaction pertaining to assessee group seized from Praveen Agarwal matched the entries recorded by the assessee group in its regular books of account and bank statements". It may further be noted that even in the statements of Sri Praveen Agarwal (with respect to which no opportunity of cross examination was allowed to the Assessee(s) despite categorical request), nothing has been implicated against the Assessee(s) herein or with respect to the LTCG transactions carried out by the Assessee(s). Thus, what has been essentially relied upon by the A.O is third party documentation in respect of which no opportunity of cross examination of the person controlling/owning such documents was allowed to the Assessee(s). As such, nothing adverse can be implicated against the Assessee(s) herein on the basis thereof.

- Coming to the legal validity and evidentiary value of third party documents, at the outset, it is clarified that these hard/soft data were not seized from the possession and control of the Assessee(s) and have not been shown to belong to the Assessee(s) herein. Accordingly, presumption u/s.132(4A/292C w.r.t. these seized material is not applicable to the assessees herein.

71. As observed earlier, the ld.counsel for the assessee has placed on record, the detailed combined discussion with respect to present assessee, and the main submissions made by him are as under:

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i) At the outset, the ld.counsel for the assessee submitted that complete documentary evidences establishing genuineness of purchase and sales of the shares in the cases of all assesees were given and also placed on the paper book.

ii) While making additions, the ld.AO was mainly relied on the statement of persons viz. Shri Ankur Agarwal (employee of BSL), Shri RK Kedia (entry provider), Manish Arora (employee of Shri RK Kedia), the alleged entry and exit operators, directors of penny stock companies etc. The assessee has made a specific request for providing opportunity to cross-examine the persons whose statements were taken by the AO behind the back of the assesessee. However, no such opportunity was given to the assessee; but when the assessee was directed to appear on a particular date to cross-examine the parties, but they were not available on the specified date. Therefore, the impugned assessments were framed by the AO in gross violation of principle of natural justice. To support this contentions, the ld.counsel for the assessee relied upon various cases laws, including judgment of Hon'ble Supreme Court in the case of Andaman Timber Industries Vs. CIT, 281 CTR 241 (SC).

iii) The assessee has earned LTCG out of the preferential allotment. While denying the claim of the assessee, the ld.AO construed without any basis that the assessee has relation with

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the promoters of the said companies and entry providers, and therefore, preferential shares were issued to the assessee. In fact the preferential shares issued to the assessee was in accordance with the rules and regulations of the SEBI, and the allotment of such shares has been vetted by the SEBI which did not signify any connection of the assessee with the promoters of the company.

iv) The shares of company was listed and traded in the stock exchange, and the shares were credited to the respective DEMAT accounts of the assessee. After a period of 12 months, they were sold through registered brokers on the NSE/BSE in accordance with the prescribed regulatory procedures. The sale proceeds were received through normal banking channel from the stock brokers. In other words, transactions of sale and purchases were effected through proper and legal mechanism, and therefore, the same cannot be doubted.

v) It is further submitted that share transactions were conducted through the web-site of stock exchange at the prevailing market rate, and the payment thereof were received through banking channel i.e. account payee cheques/RTGS from the stock broker. It is pertinent to note that there is no human interaction between the parties, in respect of impugned transactions, as the same were done through web-based on line application. All the transactions are carried out by the assessee were fully documented in the form of contract notes/bills of relevant

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brokers. Copies of these contract notes/bills of brokers are annexed in the paper book.

vi) The assessee has no control over or aware of the parties/entities who buy and sell the shares. The transactions are entered into by the assessee on the basis of information and feedback received from various professionals, market gossips and looking to the general market conditions. The ld.AO has no room for doubt the transactions entered into by the assessee, because the assessee has filed all supporting evidences in the form of DEMAT accounts, share certificates, contract notes, bank statements.

vii) It is further submitted that while framing the assessment, the AO has strongly relied on the statement of alleged third parties recorded under section 132(4)/133A in the course of search/survey action. The assessee has consistently denied any linkage between much less any dealings with the alleged RK Kedia or Shri Manish Arora or any of the alleged entry operators/exit providers or directors of penny stock companies. When the assessee sought for cross-examination of those third parties whose statements were relied upon by the assessee, no proper opportunity was given; and when a specific date was given to the assessee for that purpose, but on that date none of the witness appeared. It is pertinent to note that in post-search investigations/assessment proceedings, the said RK Kedia has taken contradictory stands and on 13.06.2014 he

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retracted statement recorded under section 132(4), which was further retracted on 26.3.2015. Therefore, his statement is not trustworthy and has little evidentiary value for the adjudicating authority to proceed on with it. In this regard, the ld.counsel for the assessee relied upon various case laws viz. judgment of Hon'ble Kolkata High Court in the case of CIT Vs. ester Commercial Enterprises, 201 ITR 103, ITAT decision in the case of DCIT Vs. Bhola Nath Radha Krishna, ITA No.5149/Del/2012, and Smt.Smita P. Patel Vs. AFCIT, 159 TTJ 182 etc. Unless statements are corroborated with incriminating material seized during the course of search, the same cannot be used against the assessee to draw an adverse inference.

vii) In sum and substance, the ld.counsel for the assessee reiterated that no concrete evidence has been unearthed in the course of search in the cases of the assessee herein to conclusively establish that the assessees herein had booked bogus LTCG or that their own unaccounted money was routed through transactions in shares of the said scrips or that they had made any compensatory payments to the buyers of the said scrips.

72. The Ld. DR while appraising us with the facts and circumstances very eloquently submitted that the present appeals relate to the abated assessment years and therefore no reference can be made to the order of the ITAT in the own case of the present assessee of the earlier years which was unabated and rendered in his favour on the reasoning that

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there was no incriminating documents found during the course of search from the premises of assessee. Thus in the earlier years, being unabated years, no addition was sustained by the ITAT. But it is not so in the present case being abated assessment years.

73. The ld. DR further appraised us that the facts/ particulars of the case of Shri Brij Bhushan Singal, the father of the assessee, bearing ITA Nos. 1415 to 1417/Del/2018 for the AYs 2013-14 to 2015-16 order dated 7-12-2018, relied by the learned AR for the assessee in support of his claim, are different in terms of law and facts from the specifics of the present cases. For this purpose, the learned DR has highlighted certain factual differences as detailed under:

i. In the assessment of Shri Brij Bhushan Singal, there was no disclosure made by him in the statement furnished under section 132(4) of the Act with respect to any undisclosed income whereas in the present case there was a disclosure of Rs. 250 crores on account of bogus long-term capital gain in the statement furnished under section 132(4) of the Act which was subsequently affirmed in a statement posts search dated 6 March 2014 detailing the breakup of the undisclosed income of Rs. 250 cores. Such statement was never retracted but the impugned income was not offered to tax in the returns of income. Such non-disclosure of income cannot be equated with the retraction of the statement. As such there is no concept under the law for deemed/ implied retraction of the statement which was recorded under the specific provisions of law.

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ii. In the present case, various materials of incriminating nature and statements were gathered/ collected during the search at the premises of the entry-operators and accomplices which were evidencing that the assessee has taken bogus long-term capital gain. Accordingly the assessee, on confrontation of such materials and the statement of the entry operators has accepted to have generated bogus long-term capital gain. However, in the case of Shri Brij Bhushan Singal, there was no such material/ statement which was confronted to him.

iii. All the entry-operators, brokers and their accomplices have reaffirmed and restated before the income tax authorities and before the other authorities under PMLA that they were engaged in providing accommodation entries for bogus long-term capital gain. But it is not so in the case of Shri Brij Bhushan Singal.

iv. The assessee in the past has also admitted that he has earn unaccounted income which was introduced in the company in the form of share capital and premium. Such unaccounted income was offered to tax on different occasions by the assessee. Thus, there remains no doubt that the assessee was in the habit of adopting such dubious techniques for laundering the unaccounted income. However in the case of Shri Brij Bhushan Singal, there is no such history available on record.

Likewise, the learned DR has also highlighted certain legal/ technical difference between the case of the assessee viz a viz Shri Brij Bhushan Singal as detailed under:

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i. The Hon'ble Supreme Court the case of NRA Iron &Steel (P.) Ltd reported in 103 taxmann.com 48 has categorically held that the onus to justify the nature and of source of the cash credit under section 68 of the Act lies upon the assessee. It was held by the Hon'ble apex court that once the AO has conducted certain enquiry and point out the defects in the explanation of the assessee then it is the duty of the assessee to prove the cash credit as genuine in light of available facts/ information. This judgement of the Hon'ble Supreme Court was passed on 5thMarch 2019 whereas the decision in the case of Shri Brij Bhushan Singal was rendered in the month of December 2018. Thus the Delhi ITAT did not had the benefit of this judgements of the Hon'ble Supreme Court. Had this judgement being available at the time of passing the order in the case of Shri Brij Bhushan Singal before the Delhi bench, the outcome would certainly have been different.

ii. The predominant reason for allowing the appeal in the case of Shri Brij Bhushan Singal by Delhi bench of ITAT was that the opportunity of cross examination was not provided. Thus, the evidence relied upon by the Revenue for holding the long-term capital gain as bogus, were discarded. But at the same time it is important to note that the Hon'ble Supreme Court in many cases has held that the opportunity of cross examination is not necessary where the addition has been made based on the documentary evidence. However,

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such decisions of the Hon'ble Courts were not made available to the co-ordinate bench (Delhi) at the time of hearing. Otherwise, the fate of the case of Shri BrijBhushanSingal would have been different.

iii. It was also submitted that the Hon'ble Punjab and Haryana High Court in the case of Smt. KusumLataThakral Vs. Commissioner of income tax in ITA No. 253 of 2009 dated 24th of July 2019 has stated in unequivocal terms that the necessity of giving the cross examination depends on the facts of each case. Thus in a situation where there were evidences available on record which were strongly suggesting that the assessee has taken bogus long-term capital gain, then such evidence cannot be discarded merely on the reasoning that the opportunity of cross examination was not provided.

In view of the above, the learned DR vehemently contended that the principles laid down by the Honourable Delhi bench in the case of Shri Brij Bhushan Singal cannot be applied in the given facts and circumstances.

74. The learned DR further submitted that the onus lies upon the assessee to explain nature and sources of credit under section 68 of the Act. The primary onus is to furnish the details with respect to the identity, creditworthiness and genuineness of the parties under the provisions of section 68 of the Act. Once the assessee furnish primary explanation then burden shift on Revenue to make further enquiry and

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point deficiency in primary explanation. Upon such enquiry, thereafter the burden once again shifts on the assessee to explain satisfactory with regard to nature and source of credit. In the case on hand, based on the materials gathered during the search proceedings conducted at premises of various entry operators and brokers and the statements collected of various entry-operators and their accomplices were confronted to the assessee and therefore he admitted to make a disclosure of Rs.250 crores. The statements gathered during the search proceedings of various persons were not retracted rather the statements were also reiterated during the proceedings under PMLA. However, the assessee has not brought anything on record based on materials to dispel the results of the enquiries conducted by the revenue. As such, the onus was upon the assessee to counter the statements of the parties collected during search proceedings of various persons as well as the documents gathered therein. Accordingly, all these documents/details cannot be brushed aside merely on the contention of the assessee that the opportunity of cross examination was not afforded to him and material was not found from his premises. The assessee has admitted the income of bogus long-term capital gain in the statement furnished under section 132(4) of the Act which was subsequently reaffirmed about 3 weeks later in his own handwriting. Therefore, the contention of the assessee that he has given such statement/admission of income under stress or coercion is not believable/ acceptable. There were various statements of brokers, entry-operators and other players who accepted to have been involved in providing accommodation entries by way of dubious techniques with the purpose of avoiding the tax liability. These statements were not retracted

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rather these were reaffirmed and restated before the authorities under PMLA. Likewise Shri RK Kedia the broker of the assessee indeed made a retraction but soon thereafter filed an affidavit to by re-affirming with this original statement. Furthermore, all the statement furnished by Shri RK Kedia or other witnesses like Sirish C Shah, JagdishPurohit were backed by the documents and other materials recovered during the search proceedings. All these documents were duly cross checked, cross tallied which establishes the complete chain depicting the flow of transaction. Thus the statements were duly supported by the incriminating documents. The learned DR further submitted that once the assessee admitted to the unexplained income, it can be disputed at higher forum without retracting such statement before appropriate authority. At the same time, such retraction has to be backed by adequate materials. The learned DR in support of his contention relied on the judgements as detailed below:

a. Rajnish Jain vs. CIT reported in [2018] 402 ITR 12 (Allahabad)
b. Kantilal C. Shah vs. ACIT in IT(SS) No. 21/Ahd/2009 reported 142 TTJ 233
c. ACIT vs. Hukum Chand Jain [2011] 337 ITR 238 (Chhattisgarh)
d. Bhagirath Aggarwal vs. CIT [2013] 351 ITR 143 (Delhi)

75. In the above judgements of Hon'ble Delhi High Court the CBDT circulars have also been dealt wherein it was discouraged to the revenue officers by stating that there should not be any force/coercion for the admission of any income on the assessee. As such, there has to be other materials available on record for the income of the assessee besides the statements recorded during the search and survey operations. In the

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present case, there are enough materials besides the statements of various parties including the assessee proving that the assessee has earned bogus long-term capital gain. There were many glaring facts that the companies, in whose scrip the assessee has generated bogus long-term capital gain, were neither carrying out sufficient business operations nor having any future business plan. Therefore, any abnormal rise in the price of the script that too within a short period of time cannot be justified. In such facts and circumstances there is more onus upon the assessee to justify the nature and source of credit and genuineness of the transactions. Likewise there were investigation reports from SEBI wherein it was alleged that these companies were involved in artificially jacking up the price. In such facts and circumstances, the transactions cannot be justified merely on the basis that it was carried out on the stock exchange and through the banking channel. The learned DR in support of his contention relied on the following judgements:

i. Smt. M.K. Rajeshwari vs. ITO [2018] 99 taxmann.com 339 (Bangalore-Trib)
ii. Sanjay Bimalchand Jain vs. PCIT [2018] 89 taxman.com 196 (Bom)
iii. Harish Kumar reported in (2019)-TIOL-1200-ITAT-Mad 1200
iv. Satish Kishore vs. ITO [2019] 179 ITD 333 (Delhi-Trib)

76. The learned DR also contended that the principles laid down by the Hon'ble Supreme Court in the case of Sumati Dayal vs. CIT reported in 214 ITR 801 regarding the principle of preponderance of human probabilities should be adopted in the given facts and circumstances after evaluating the surrounding circumstances. The learned DR further

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contended that the assessee has not brought anything against the concurrent finding of the authorities below that these companies were managed and controlled by the entry-operators to provide the accommodation entries in the market. These concurrent findings were based on various statements and the documents found during the search proceedings. Therefore such concurrent findings should not be hampered based on finding given in the case of Shri Brij Bhushan Singal. In a situation where there were several differences in fact and circumstances of both the cases as discussed, the decision given in case of other assessee earlier assessment year in own case of assessee cannot be relied for the reason that decision in those batches of appeal were pronounced on the question of jurisdiction and not on the basis of merits. It is settled law that decision of a court is precedent only for the issue which has been decided in such order. The learned DR in support of his contention relied upon the judgment of Hon'ble Supreme Court in case of Sun Engineering Limited reported in 198 ITR 297.

77. We have duly considered rival contentions and perused material available on record. According to the assessee, all the minor details brought to notice of the Bench by the ld.counsel for the Revenue have been considered in the cases of the assessee's father and mother viz. Shri Brij Bhusan Singal and Smt. Uma Singal i.e. ITA No.1415 to 1417/Del/2018; 1979 to 1481/Del/2018 and 1483 &1484/Del/2018 decided on 7.2.2018 for the Asstt.Years 2013-14 to 2015-16. Copy of the order has been placed on record by the ld.counsel for the assessee.

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78. We have perused this detailed order running into 173 pages. We will be reproducing major part of this order vide which the Tribunal has applied its mind on the details brought on its notice. To our understanding there is no variation in the facts and circumstances and nature of evidence. The department has cited more than 35 judgment before the ITAT in the case of Shri Brij Bhusan Singal and citations of all these judgments have been noticed in para 21 of internal page no.91 of the order. Thereafter, the Tribunal has reproduced comments of the assessee on all the judgments which have been given in tabulated form and these comments have been noticed in page no.93 to 144. We find that ld.cousnel for the Revenue has placed on record copies of following judgments before us.

i) *Sh. Brii Bhushan Singal & others — Unabated Years Rainish Jain v. Commissioner of Income-tax*
ii) *Kantilal C. Shah. V.ACIT*
iii) *ACIT v. Hukum Chand Jain*
iv) *Ms. Privanka Chopra v. DCIT*
v) *Bhagirath Aggarwal v. CIT*
vi) *Gopal S. Pandith v. DCIT*
vii) *CIT v. Vegetable Products*
viii) *Smt. M.K. Raieshwari v. ITO*
ix) *Harish Kumar v. ITO*
x) *Satish Kishore v. ITO*
xi) *UditKalrav.ITO*
xii) *Smt. Kusum Lata Thakral v. CIT*
xiii) *CIT v. Nova Promoters & Finlcase (P) Ltd.*
xiv) *V3S Infratech Ltd. v. ACIT*
xv) *Sanat Kumar v. ACIT*
xvi) *Pooja A j in a iii v. ITO*
xvii) *CIT v. Vegetable Products*
xviii) *ITOv. Shamim M. Bharwani*
xix) *PCIT v. NRA Iron and Steel*
xx) *DCIT v. Bhogilal Mulchand*
xxi) *Manidhari Stainless Wire Fvt. Ltd, v. Union of India*

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xxii) Rajiv Arora v. Union of India Kishanlal Agarwalta v. The Collector of Land Customs & ors.

xxiii) Nokia India (P. Ltd, v. DD1T Vice-Chairman. KV Sangathan v. Girdharilal Yadav

79. A perusal of order in the case of Shri Brij Bhusan Singal would indicate that most of these orders have also been noticed by the Tribunal viz. Bhagirath Aggarwal Vs. CIT, CIT Vs. Nova Promoters & Finlease P.Ltd. and CIT Vs. N.R. Portfolio P.Ltd. (supra) and most of these decisions have been considered by the Tribunal which are part of this order. The Tribunal thereafter did its own research and tabulated some sixty two judgments which will be discernible in the finding of the Tribunal, which we are going to take note on this point. Therefore, we are fully convinced that there is no disparity on facts though some artificial attempts have been made at the end of the ld.counsel for the Revenue because of novelty of eloquence possessed by Shri G.C. Srivastava for persuading us to believe that facts are distinguishable, but we fail to persuade ourselves to concur with him. Therefore, at this stage, we deem it appropriate first to take note of question framed by the Co-ordinate Bench in the cases of father of appellant no.1 and others which reads as under:

25. "It is not in dispute that assessee has furnished all the details such as purchase bills, allotment details, demat accounts, bank statements , details of payments by cheques and sale on BSE electronic platform, proof of payment of Securities Transaction tax and receipt of payment through Cheque by an independent broker, sale bills etc which is not doubted by the revenue. The facts have already narrated by us in earlier paras, which are undisputed by both the parties. only following issues are to be decided in this appeal:-

i. Whether AO can use the statements of third parties without granting cross-examination of those parties.

ii. Whether without providing the copies of the statements as well as the cross examination of alleged exit

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providers, such evidences can be used against the assessee for making addition.

iii. *Whether the interim orders of The SEBI relied up on by the ld AO implicate the assessee for making addition u/s 68 of the act on alleged bogus long-term capital gains.*

iv. *Whether Cash Trails of The buyers of the securities as stated by the ld AO makes the long-term capital gain of the assessee bogus.*

v. *Whether the disclosure of some other persons as their undisclosed income of Long-term capital gain affects the case of the assessee also.*

vi. *Whether de hors all the above facts addition in the hands of the assessee u/s 68 of long term capital gain can be made*

26. *On the first issue of Cross-examination, it is apparent that ld AO has made addition based on the statement of Shri R.K. Kedia (alleged entry provider), Manish Arora (employee of Sri R.K. Kedia), alleged exit operators, directors of penny stock companies etc. recorded by various officers of the Department. The Assesses herein made a categorical request for allowing an opportunity to cross-examine the persons whose statements were intended to be used against them; however, no such opportunity was provided to the Assesses. The Assesses was directed to appear on certain dates to cross-examine such persons but on the appointed dates, none of the parties turned up though Assesses were duly present on the specified dates through their Authorised Representative. The learned assessing officer vide para number 4.11 of his assessment order has discussed this issue. It was stated that the opportunity to cross-examine Mr. Rajkumar Kedia and Sri Manish Arrora was granted to the assessee by issuing summons under section 131 of the act directing these parties to appear on 06/12/2016 but both of them did not appear. The assessee vide letter dated 19/12/2016 once again requested that if any adverse inference against the assessee is drawn on the basis of the statement of these persons, an opportunity to cross-examine them may kindly be provided. The learned AO issued summons to 15 other parties under section 131 of the act to appear on 26/12/2016, however, none appeared on the appointed date. Therefore, the learned assessing officer stated that finding in this case is not merely based on the oral statements given by these entry operators, but it is also based on documentary evidences recovered during the course of search in form of electronic data. It was further held by him that these statements corroborate the evidences found. Then he stated that the main person of the group Mr. Neeraj singal during the*

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course of his statement recorded on 24/4/2015 was asked to cross-examine Shri Raj Kumar Kedia however, in answer to question number 25 he stated that he does not want to cross-examine Mr. Rajkumar Kedia, Shri Manish Arora or Shri Ankur Agarwal. The learned assessing officer further stated that cross-examination cannot be right and it is not required by law. For this proposition, he relied upon the decision of the Hon'ble Allahabad High Court in Moti Lal Padmapat Udyog Limited vs. CIT, 160 Taxman 233 and the decision of the Hon'ble Bombay High Court in satellite engineering Ltd vs. Union of India, 1983 ELT 2177 Bombay. He further relied upon the decision of the Hon'ble Delhi High Court in CIT vs. Nova promoters and Fin lease private limited 342 ITR 169 where in para number 27 where non-provision of opportunity to cross-examination of certain persons were not found fatal to the assessment. Against this, the assessee has also put his case that non-provision of cross-examination opportunity is fatal to the assessment. In this background, whether the assessee has been granted the opportunity of the cross-examination or not is required to be seen. The fact, which has not been denied by the learned authorised representative that Mr. Neeraj Singal in his statement dated 24/4/2015 was offered an opportunity to cross-examine Mr. Rajkumar Kedia. However, in answer to question number 25, he refused and stated that he does not want to cross-examine Sri R. K. Kedia or Shri Manish Aurora or Shri Ankur Agarwal. Apparently, the search took place on 13/06/2014 and first notice was issued under section 153A on 8/9/2014. The first notice under section 143 (2) and 142 (1) was issued on 25/7/2016. Therefore, at the time when the statement of Sri Neeraj single was recorded on 24/4/2015, It was not known whether the statement of Mr. Rajkumar Kedia, Manish Aurora, et cetera would be used against him or not. Therefore, apparently at that particular time assessee did not thought it fit to cross-examine them. Hence, apparently such opportunity cannot be said to be an opportunity of cross-examination granted to the assessee with respect to the addition. The opportunity of cross-examination in present case is also important because of the reason that Mr. Rajkumar Kedia subsequently retracted his statement. This issue has been decided by the coordinate bench in assessee's own case vide order dated 31/10/2018, wherein it has been held that material found during search cannot be incriminating material as statements recorded by the revenue of Mr. Rajkumar Kedia, Manish Arora and others were used by revenue without granting cross opportunity. The issue of the cross-examination was dealt with by the coordinate bench as under:-

> *"107. We, therefore, by respectfully following the aforesaid referred to order of the Co-ordinate*

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Bench are of the confirmed view that the assessment for the assessment year 2012-13 although was not framed u/s 143(3) of the Act, however, the time to issue the notice u/s 143(2) of the Act had already expired before the search took place on 13.06.2014. Therefore, for the purpose of Section 153A of the Act, processing of the return of income u/s 143(1) of the Act was also an assessment. As such the assessment for the assessment year 2012-13 was also unabated. It is well settled that the addition u/s 153A of the Act can only be made on the basis of incriminating material found during the course of search. In the present case, no incriminating material/document was found during the course of search. The AO made the additions on the basis of the statement of the third parties recorded u/s 132(4) of the Act on the basis of alleged entry in hard/soft data seized from premises of third parties in the course of search action in their cases. In the present case, copies of the Panchanama are placed at page nos. 1 to 58 of the assessee's compilation. From a bare perusal of the Panchanama of the assessee, it may be seen that nothing incriminating was found in the course of search. It is also apparent from the search document that no incriminating material in the form of undisclosed, document, unaccounted money, bullion, jewellery etc. indicating the factum of undisclosed income were found or seized in the course of search operation u/s 132(1) of the Act for any of the assessment years under consideration. In the instant case, the AO relied upon the statement of Sh. Raj Kumar Kedia his employee Sh. Manish Arora, Sh. Ankur Agarwal, an employee of BSL and Sh. Chandrakant Mahadev Jadhav. However, Sh. Raj Kumar Kedia retracted his statement on 14.10.2014 (copy of which is placed at page nos. 446 to 451 of the assessee's compilation). Thereafter, he filed letter dated 31.03.3015 withdrawing his retraction, copy of which is placed at page nos. 452 to 455 of the assessee's compilation. Therefore, he was changing his stand as such his statement cannot be considered to be reliable. Similarly, Sh. Ankur Agarwal also retracted his statement vide letter dated 20.12.2016 which is placed at page no. 190 of the assessee's compilation. Similar was the position with regard to the statement of Sh.

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> *Chandrakant Mahadev Jadhav recorded on 13.06.2014, the said statement was also retracted vide letter dated 24.11.2016. Now question arises as to whether the addition can be made u/s 153A of the Act in the absence of any incriminating material emanating from search u/s 132(1) of the Act, only on the basis of the statement recorded u/s 132(4) of the Act, particularly, when the opportunity to cross-examination of the witness whose statement were relied, was not given to the assessee."*

The coordinate bench further relied upon the decision of Hon'ble Supreme Court in case of Andaman Timber Industries (Supra) and several other judicial precedents and thereafter noted in para number 113 of the order as under:-

> *"113. In the present case, the opportunity to the assessee to cross-examine the person whose statements were relied upon by the AO was required to be given, on the date fixed by the AO, the assessee presented himself through his Authorized Representative but the concerned person did not turn up, so it cannot be said that the opportunity to cross-examination was provided to the assessee, although the statements of third parties were used against the assessee. In the instant case, it is an admitted fact that the persons whose statements were recorded at the time of search, later on retracted from their statements and one person, namely, Sh. Raj Kumar Kedia first retracted on 14.10.2014 and thereafter withdrew the retraction vide letter dated 31.03.2015. Therefore, no reliance can be placed on the testimony of the said person who was indulging in double speaking and taking contrary stands."*

In the above paragraph, the coordinate bench has already given a finding that the persons whose statements were recorded at the times of search, later on retracted from the statement and thereafter further withdrew the retraction. Therefore, no Reliance can be placed on the testimony of the said persons who are taking contrary stands. It was further held that on the appointed date, it could not be said that the opportunity to cross-examination was provided to the assessee although; the statements of third parties were used against the assessee. The coordinate bench thereafter referred the decision

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of Hon'ble Calcutta High Court in the case of CIT Vs Eastern Commercial Enterprises (1994) 210 ITR 103 and circular issued by the central board of direct taxes and further held in para number 117 of the decision as under:-

> *'117. From the aforesaid Circulars, it is clear that the assessments made pursuant to search operation are required to be based on incriminating materials discovered as a result of search operation in the case of the assessee and not on the recorded statement. In the instant case, the persons who gave the statements retracted the same and even the opportunity to cross-examine was not afforded to the assessee…"*

Thus, it is apparent that the assessee has not been granted an opportunity of the cross-examination of Sri R. K. Kedia and Shri Manish Arora. The learned authorised representative has relied upon the decision of the Hon'ble Supreme Court where in relying on case of state of Madhya Pradesh vs. Chintaman sadashiv Waishampayan AIR 1961 SC 1623 wherein in para number 11, It has been held referring another decision in Union of India vs. TR Varma "stating it broadly and without intending it to be exhaustive, it may be observed that the rules of natural justice require that the party should have the opportunity of producing all relevant evidence on which he relies, that the evidences of the appellant should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no material should be relied on against him without he is being given an opportunity of explaining them." It was further stated that it is hardly necessary to emphasize that the right to cross-examine the witnesses who give evidences against him is a very valuable right, and if it appears that effective exercise of this right has been prevented by the enquiry officer by not giving to officer relevant documents, to which he is entitled, that inevitably would be that the enquiry had not been held in accordance with the rules of natural justice. The Hon'ble Supreme Court thereafter, referring to the another decision of the Hon'ble Supreme Court held that the importance of giving an opportunity to the public officer to defend himself by cross-examining witness produced against him is necessary for following the rules of natural justice. Further, the decision of the Hon'ble Supreme Court in case of Anadaman Timber industries vs. Commissioner of Central Excise (2015) 281 CTR 241 (SC) has held as under :-

> *"According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those*

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witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch 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 ex-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.

As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their 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

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appeal on merits giving its reasons for accepting or rejecting the submissions.

In view 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."

In the present case, also the assessee sought opportunity of cross-examination of the witnesses whose statements are used by the learned assessing officer against the assessee for making the addition. The assessee has contested the truthfulness of the statement of the witnesses recorded by the assessing officer. The truthfulness is also tested by the changing stands frequently. It is also not for the assessing officer to decide that no opportunity is necessary because he is not aware what could be the purpose for the cross-examination asked by the assessee. Therefore not granting of opportunity of the cross-examination of the brokers Sri RK Kedia, Manish Arora, Ankur Agarwal, directors of the companies who have purchased shares from the assessee through electronic platform of the Bombay stock exchange/ NSE and various other people as were mentioned in the assessment order is fatal to the assessment made by the assessing officer.

We are also conscious of the decision of the Hon'ble Supreme Court in case of M. Pirai Choodi vs. ITO 334 ITR 262, wherein the Hon'ble Supreme Court while considering the decision of the Hon'ble MP High Court in 302 ITR 40 has held that not granting an opportunity of cross-examination to the assessee is merely an regularity and therefore the High Court was not correct in cancelling the order of the adjudicating authority. Therefore, Hon'ble Supreme Court thought it fit to set aside the matter to the adjudicating authority with a direction to grant opportunity of cross-examination to the assessee. Before us, an issue arises that whether the matter should be set aside to the file of the learned assessing officer to grant assessee an opportunity of cross-examination of all the witnesses whose statements have been used by the learned assessing officer in the assessment order for the purpose of making the addition under section 68 of the act or to annul the assessment order itself. On careful perusal of the decision of the Hon'ble Supreme Court, it is noted that such direction were given by the Hon'ble Supreme Court in the case of writ petition filed by the assessee before the Hon'ble High Court and therefore Supreme Court held that the assessee could have gone before the Commissioner Appeals to agitate this issue of cross-examination and therefore the opportunity was available to the assessee at that particular

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point of proceedings. In the present case, assessee has also raised the same issue before the learned CIT A that cross-examination has not been provided to the assessee despite asking for the same. The learned CIT A has also brushed aside the above argument of the assessee without giving any plausible reason. Therefore, when the assessee has not exhausted all the judicial process before reaching to the higher forum, but has bypassed them by invoking the different rights, then in such circumstances, the violation of the principles of natural justice, such as not granting of opportunity of the cross-examination, becomes any regularity and not an illegality. However, when the assessee has exhausted all the remedies available to him by exercising his right of the judicial process, then in such circumstances violation of the principle of natural justice, such as not granting an opportunity of cross-examination of the witness becomes an illegality. Therefore, in such circumstances, the order/addition made based on the statement of third parties and no opportunity has been granted to the assessee for their cross-examination despite repeated requests, addition deserves to be deleted.

27. *The second issue relates to the evidence and data seized from the premises of the Raj Kumar Kedia and pen drive seized from the residential premises of Shri Ankur Agarwal in the search operations, whether can be used against the assessee. The first contention of the assessee is that these documents or evidences are not seized from possession and control of assessee and they are not shown to have been belonging to assessee. Therefore, the presumption under section 132 (4A) and section 292C is not available with revenue. Therefore, the legal validity and even the evidentiary value are under challenge. The contention of the assessee is that from the computer file named, as ABCD.xls is merely the record of purchase of shares, which is also recorded in the books of accounts of the assessee. Therefore, even otherwise, that does not give any occasion to make any adjustment to the total income. As the shares were purchased through a broker, Mr. Rajkumar kedia naturally he might have also maintained such records for purchase of shares. Therefore, there is no infirmity in these two statements. Further, another two excel sheets found from Mr. Agarwal by the name of Job.xls and Comm.xls does not show the name of the assessee. Therefore, there is no linkage available with those documents with the assessee. Further, the argument of the assessee also find support that it was found from Mr. Agarwal therefore, it is owned by him and belongs to him. Therefore, it is for him to explain who owns this Pen drive. Further, those documents do not show any unaccounted income flowing from the assessee to anybody. In the second file Comm. xls, the learned assessing officer has*

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noted that names of the person such as R. K. Kedia HUF and others are mentioned. According to the AO All, these persons are accommodation entry providers as stated by Shri Raj Kumar Kedia in his statement. Based on these findings, the learned AO reached at the conclusion that Bush and steels Ltd family has taken accommodation entry of long-term capital gain from Raj Kumar Kedia and other entry operators. Firstly, in that particular file, there is no reference of any name of the family of the assessee. All these entries are pertaining to a single's day that is 21/05/2014. The assessing officer has not correlated with any of the transactions on that date or nearby that date to show that assessee has incurred this expenditure. Further, the data allegedly seized from the search of Shri Raj Kumar Kedia cannot be used against the assessee, unless the assessee is given an opportunity of cross-examination of the men with respect to the documents found relating to the assessee or where the names of the assessee are mentioned. On this issue also the coordinate bench in assessee's own case, has held that such material found from third-party who was not allowed to be cross-examined by the assessee cannot be relied upon:-

> *"121. In the present case also, the AO made the additions on the basis of the statements of third parties recorded u/s 132(4)/133A of the Act and third parties evidences/documentation. However, no live nexus with the incriminating material found in the course of search in the case of the assessee was established. The statements of the third parties were recorded behind the back of the assessee but the opportunity of cross-examination of such parties was not allowed to the assessee, even the statements were retracted later on. It is well settled that the presumption u/s 132(4A)/292C of the Act, is available only in the case of the person in whose possession and control, the documents are found but it is not available in respect of the third parties. In the present case, there was no independent evidence to link the seized documents found in the premises of the third party with any incriminating material found in the course of search operation at the premises of the assessee. Therefore, the entries in the documents seized from third party's premises would not be sufficient to prove that the assessee was indulged in such transactions. In the present case, the pen drive of Sh. Ankur Agarwal corroborated/substantiated, the share transactions carried out by the assessee, which was duly found recorded in the regular books of the assessee, and the said pen drive did not contain anything incriminating against the assessee. Therefore, merely based on the*

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statement of Sh. Ankur Agarwal, the addition made u/s 153A of the Act was also not justified, particularly when Sh. Ankur Agarwal retracted his statement later on. In the instant case, the AO also failed to establish any link/nexus of the alleged cash trail. We, therefore, by considering the totality of the facts and the various judicial pronouncement discussed in the former part of this order are of the view that the additions made by the AO and sustained by the ld. CIT (A) u/s 153A of the Act in the absence of any incriminating material found during the course of search u/s 132(1) of the Act in respect of unabated assessment years i.e. the assessment years 2010-11 to 2012-13 were not justified. Accordingly, the same are deleted.

122. A similar view has been taken by the Hon'ble Jurisdictional High Court in the case of CIT Vs Rajesh Kumar (2008) 306 ITR 27 (Del.) (supra) wherein it has been held as under: "That the material collected by the Department behind the back of the assessee was used against him without disclosing the material or giving an opportunity to cross-examine the person whose statement had been used by the Department against the interest of the assessee. There was violation of the principles of natural justice."

123. Similarly, the Hon'ble Delhi High Court in the case of CIT Vs Dharam Pal Prem Chand Ltd. (2007) 295 ITR 106 (supra) held as under: "That the Assessing Officer had based his assessment order on the report obtained from the research institute. The correctness of that report itself having been under challenge by the assessee who had not only filed objections thereto but also sought permission on several occasions to cross-examine the analyst even agreeing to pay the necessary expenses, the report could not automatically have been accepted. Since the Assessing Officer did not permit the correctness or otherwise of the report to be tested, there was a clear violation of the principles of natural justice by him in relying upon it to the detriment of the assessee. Even if the strict rules of evidence may not apply to assessment proceedings, the basic principles of natural justice would apply to the facts of the case." 124. On a similar issue, the Hon'ble Madhya Pradesh High Court in the case of Prakash Chand Nahta Vs CIT (2008) 301 ITR 134 (supra) held as under: "That as the Assessing Officer had not summoned R in spite of the request made under section 131 of the Act, the evidence of R could not have been used against the assessee and in the absence of

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affording a reasonable opportunity of being heard by summoning the said witness the assessment order was vitiated."

28. *On this issue, Hon Rajasthan High court in case of CIT vs. Sunnita Dhadha, against which special leave petition has been dismissed by the Hon'ble Supreme Court, clinches the issue in favour of the assessee. It is held that based on the document, which was recovered from a Third party, the income cannot be added in the hands of the assessee, without giving cross examination. Accordingly, the documents seized and found from Shri Raj Kumar Kedia and Shri Ankur Agarwal cannot be used for addition in the hands of the assessee. The assessee has also referred to several other judicial precedents canvassing the above proposition.*

29. *In view of our above findings, findings of the coordinate bench in assessee's own case for earlier years, and based on the various judicial precedent relied upon, we do not agree that document seized from third-party can be used for making addition in the hands of the assessee without assessee being granted an opportunity of cross-examination of those parties.*

30. *Further, the assessing officer has heavily relied upon the various orders passed by The Securities and Exchange Board Of India in various companies in which the assessee has earned the long-term capital gain as well as in case of the assessee. First Such order relied upon is interim ex parte orders dated 19/12/2014 passed in case of M/s First financial services Ltd and M/s Redford global Ltd. The learned CIT-A was also heavily harping upon the orders of the SEBI for confirming the addition. In interim order in Redford global Ltd, dated 19/12/2014 assessee was restricted to access the securities market till further directions. Subsequently, on 20/09/2017, SEBI passed an order in that company holding that there are no adverse findings against the aforementioned 82 entities, which included the family of the assessee, and the assessee himself with respect to their role in the manipulations in prices of the script of the company. Therefore, it revoked the original order passed on 19/12/2014. Similarly, in case of first, financial services Ltd; the learned assessing officer took note of interim order passed on 19/12/2014. SEBI passed t final order on 02/04/2018. Vide para number 74 and 90 of that order[WTM/GM/EFD/ 1 /2018-19], SEBI has given a clean chit to the assessee and his family members as under:-*

"<u>Singal Group</u>

70. Brij Bhushan Singal, Neeraj Singal, Uma Singal, Marsh Steel Trading Ltd. and Vision Steel Trading 70. Brij Bhushan Singal, Neeraj Singal, Uma Singal, Marsh

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Steel Trading Ltd. and Vision Steel Trading Ltd.: The SCN mentions that Brij Bhushan Singal, Neeraj Singal and Uma Singal were preferential allottees. FFSL transferred Rs 1 crore and Rs. 50 lakh to Marsh Steel Trading Ltd and Vision Steel Ltd respectively by way of investments in these companies on September 19, 2011. One entity named Aarti Singal, a relative of Brij Bhushan Singal, Neeraj Singal, Uma Singal and Ritu Singal (hereinafter referred to as 'the Singals') was a director in Marsh Steel Trading Ltd and Vision Steel Ltd during the relevant period. It has been mentioned in the SCN that as per the disclosures made on BSE, Aarti Singal was a promoter in Bhushan Steel Ltd till quarter ending September 30, 2011 along with Sanjay Singal, Brij Bhushan Singal, Neeraj Singal, Uma Singal and Ritu Singal. Therefore, it was alleged that these entities are connected among themselves and the aforesaid transfer of Rs 1.50 crore out of the allotment proceeds towards investments in Marsh Steel Trading Ltd. and Vision Steel Ltd resulted in an indirect transfer of allotment proceeds to the Singal group allottees.

71. Marsh Steel Trading Ltd. and Vision Steel Trading Ltd. have submitted that the amount of Rs.100 lakh received by Marsh Steel Trading Ltd. from FFSL on September 16, 2011 and December 14, 2011 was towards capital contribution in the company. The company had allotted 40,000 equity shares to FFSL on December 31, 2011 and requisite filings with regard to the allotment was also made with the Registrar of Companies. Similarly, with respect to the amountof Rs.50 lakh received by Vision Steel Limited from FFSL on September 16, 2011, it has been submitted that the amount was towards capital contribution in the company and the company allotted 20,000 equity shares on December 13, 2011 to FFSL. Requisite filings in ths regard were made with RoC. It has been also stated that funds received by them were invested in Bhushan Power and Steel Ltd.

72. Brij Bhushan Singal, Neeraj Singal, Uma Singal have submitted that these was a festering family dispute between Brij Bhushan Singal and Niraj Singal (younger son) on the one side and Sanjay Singal (elder son) and his family members on the other side. In this connection litigations before various courts were filed in the years 2006 and 2007. These disputes were finally settled by way of a compromise in November 14, 2011 and terms of settlement were fully implemented by

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February 2012. Appropriate disclosures in this regard were also made to the exchanges at that time. Post settlement, the complaints and litigations filed before various forums were withdrawn. It has been also stated that owing to the family dispute, Brij Bhushan Singal, Uma Singal, Niraj Singal and Ritu Singal had no role to play in the affairs of Marsh Steel Trading Ltd. and Vision Steel Ltd. in which Aarti Singal (wife of Sanjay Singal) was a director. It has been submitted that since material disputes existed during the relevant period, it can not be alleged that the funds received from FFSL by Marsh Steel Trading Limited and Vision Steel Limited, which are controlled by Mr. Sanjay Singal and his family members, came to Brij Bhushan Singal group.

73. With regard to the fund transaction between Neeraj Singal and Pine Animation Ltd., it has been submitted that Rs.80,00,000/- was paid as consideration amount for allotment of 8,00,000 preference shares on December 12, 2012 and Rs.40,00,000/- towards subscription of 4,00,000 preference shares on March 15, 2013. With regard to the query as to why they purchased the shares of FFSL, it ha of s been stated that they relied on the information and feedback received from various professionals, friends and other persons who are actively involved and having adequate knowledge of the securities market.

74. I find that during the course of proceedings, Marsh and Vision were represented jointly and Brij Bhushan Singal, Uma Singal and Neeraj Singal were jointly represented, as part of two factions of the family. It is seen from the SCN that these entities have been implicated becauseof receipt of funds by Marsh and Vision from FFSL and Aarti Singal's association as a director in Bhushan Power and Steel Ltd. which transferred Rs.6.50 crore to in March 2012 to Ranisati Dealers, which was a major buyer or exit provider to the preferential allottees. The preferential allotttes have adequately explained as to how they are unconnected to Ranisati and how there was a settlement family-wise with respect to Bhushan Power & Steel Ltd. Likewise, with respect to Marsh and Vision, it has been brought out that the fund transfer by FFSL was equity investment and not otherwise. In view of this, I find that that none of these entities can be proceeded against, namely, Brij Bhusan Singal, Uma Singal, Neeraj Singal, Marsh Steel Ltd. and Vision Steel Ltd."

CONCLUSION

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89. As regards FFSL, the sequence of events is that one of its directors, Natarajan, Noticee No. 4 entered into an MoU on 27th May, 2010 with BP Jhunjhunwala, Noticee No.6 (who consciously manipulated the scrip price later, i.e. during 15 May, 2012 to 8th February 2013), to acquire 58.08 percent of paid-up share capital of FFSL. It has been brought out in the investigation that FFSL got its trading suspension on BSE (that was operating for a period between June, 2000 to July, 2011) revoked on 8th July, 2011. It traded for just two days on July 8, 2011 and November 16, 2011. In the meanwhile, the company made two tranches of preferential issue – one in December 2011 and the other in April, 2012. Soon after the expiry of the lock-in period, the preferential allottees started trading and exiting taking advantage of the huge price rise that was prevailing then and made gains. The investigation was done at the behest of letters received from Director General of Income Tax (Inv.), as the background of this order states.

90. In the ultimate analysis, I am driven to the conclusion that such fraudulent schemes are conceived and executed by a set of core entities which are connected and which are bound by the common objective of making wrongful gains by manipulating the market and undermining its integrity. In this process, certain entities are lured into the artifice with the promise of quick returns but their roles do not extend to price manipulation or facilitating such manipulations by means of fund transfers or any other activity of abetment. The whole scenario covering various entities with different motives makes it imperative for the regulator to step in and secure the market place by weeding out those entities which have misused the securities market and meting out deterrent penalties on such entities.

91. The limitations in an investigation of this magnitude was realized and the SEBI Board had decided in December 2016 to restrict its scope of actions to those entities that are connected to the company involved in the price manipulation, i.e. LTP contributors and the company and its directors if connection or relationship is established with the market manipulation. Keeping this background in mind, on a review of the entire proceedings beginning from the SCN, the replies and submissions of the entities and the stage at which the entities stand today, I am inclined to continue with the debarment and restraint orders against certain entities, including the company and its noticee directors, and

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certain other entities who are observed to be liable in the relevant parts of this order, based on their connection with the company; or market manipulation; or their role as conduits in fund transfer to the market manipulators. Accordingly, I am inclined to pass orders against various noticees as shown under the head 'Directions'.

.....

93. As against the remaining noticees, the interim directions issued vide interim orders dated December 19, 2014 and August 11, 2015 and confirmed vide confirmatory orders dated April 20, 2015, June 02, 2016, June 14, 2016 and August 25, 2016 shall stand revoked, with immediate effect.

.....

95. The Hon'ble SAT had directed SEBI to pass final orders in the instant matter on or before 31st of March, 2018. However, due to intervening holidays from 29th of March to 1st of April, 2018, the same is being passed on the 2nd April, 2018, in due deference with the orders of the Hon'ble Tribunal. It is relevant to bring on record that the hearing for all entities got concluded on 22nd of March, 2018 and the last submissions were received on 26th of March, 2018.

96. A copy of this order shall be served on the Director General of Income Tax (Inv.), Delhi and the Principal Directors of Income Tax (Inv.) Kolkata and Chandigarh, for such action, as deemed appropriate at their end."

31. *Almost similar orders were passed in all the companies wherever the income tax department asked the SEBI to enquire. The assessee has placed all these orders at page number 302 – 419 of the paper book. Furthermore, the para number 96 of the above order clearly shows that the intimation is also given to The Director General Of Income Tax Investigation, New Delhi and The Principal Director Of Income Tax Investigation Kolkata and Chandigarh for necessary action. From this, it is apparent that reliance on the interim order of securities exchange control Board of India by the revenue authorities is misplaced as in each of these companies in which the income tax department requested SEBI to investigate has given a clean chit to the assessee and his family. Therefore, reliance on SEBI interim order was misplaced and even otherwise now do not survive in view of subsequent final orders of SEBI.*
32. *The learned AO also heavily relied upon the cash trail of the bank accounts of the purchaser companies. He stated that cash*

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was deposited in several bank accounts and after 3- 7 layers same reaches the bank account of the companies. From such cash coming through several bank accounts to the bank account of purchaser companies was used for buying the shares held by assessee. Stock exchange trading is screen based, it is not possible to know who the buyer, and seller is. Only prices offered along with quantity is shown. Anybody who bids for purchase or sale of those shares can enter in to trading. It is an electronic trading platform whenever an assessee buys or sales the share, in either case identity of the other party, i.e. buyer or seller nor the timing at which the shares are purchased or sold by the other party are known beforehand unless it is a synchronized trading. No such allegation is made by the ld AO nor has SEBI found it so. Assessee has sold all the shares through the recognized share broker registered with the SEBI on online trading platform of the Bombay stock exchange after the payment of the securities transaction tax, payments are settled by the settlement mechanism of the stock exchange to the broker, and in turn the broker makes payment to the seller, the assessee. Money comes in to the bank account of the broker through settlement mechanism of stock exchange. As it is apparent from the order of the securities and Exchange Board of India, No such transactions entered into by the assessee are not at all the synchronized transactions .There is no involvement alleged of the selling broker of the assessee involved in such synchronized trades. of on the Bombay stock exchange. There is no such finding given by the securities and exchange Board of India or Bombay stock exchange / National Stock exchanges as per its surveillance scheme and mechanism. Further, there is no evidence gathered by the assessing officer that the cash deposited in the bank account of the multiple companies is given by assessee. There is no funding pattern available, wherein the name of the assessee appears. Furthermore the notices issued by the assessing officer under section 133 (6) were either remained unserved or not responded by those companies, for which no fault can be found with the assessee. In fact, when the learned assessing officer has relied up on statements of the real owners or operators of those companies, then the learned assessing officer should have asked them to provide the information which AO has sought under section 133 (6) from those companies. As mentioned in the order of the ld AO, that the companies who have purchased the shares are having their Permanent Account Numbers. Naturally, to trade on BSE / NSE platforms, those companies have their client registration with the stock exchanges also according to the established KYC Norms. According to trading regulations the securities have been transferred in their demat accounts. For

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the purposes of holding of shares in demat accounts, those companies are also required to have their KYC with the depositories. Further the companies are required to file their return of income compulsorily, they hold the PAN, AO should have enquired with the AO of those companies. There is no finding that what happened to the shares purchased by those companies, no inquiry of their demat holding is also made. Further, there is no finding that prior to purchases of those shares whether throe companies have deposited margins also as per Stock exchange and SEBI Norms. There is nothing placed on record to show that those companies are debarred from trading in securities or not. All these investigations / finding of ld AO have many loopholes, which remains unanswered. In the statement of the director of the penny stock company stated that the preferential allottees are involved in market manipulation of the prices of the script, however, it is contrary to the order of the securities and exchange board of India. Such references available in the statement of Director of Rander Corporation at Q No. 13. Further, the claim of the ld AO is that the companies whose shares are purchased are not carrying on any business whereas, in answer to Q No. 32 Shri Kushal Praveen Shah Director of Anukaran Commercial Enterprise Ltd has given the detailed description of the business been carried out by that company. He has stated that out of 15 crores the Rs. 1.5 crore was for acquisition of the shares and further Rs. 13.5 crores were deposited to BMC to carry out some infrastructure project. Further, in the statement of Shri Ram Kumar Kedia the reference was made of Mr. Jagdish Purohit (such statement was retracted and then once again confirmed). However, in the statement of Shri Jagdish Purohit there is no reference of any work carried out with Shri Raj Kumar Kedia. The ld AO has merely stated that as Mr. Jagdish Purohit is an accommodation entry provider and as Mr. Raj Kumar Kedia has named Mr. Jagdish Purohit, without corroborating has linked assessee's case with Jagdish Purohit. The ld AO has also stated by the statement of Shri Devesh Upadhaya noted that one Mr. Bikash Surekha was involved in trading of many scripts and also held that Mr. Sanjoy Dey was operating the terminal and then entering into synchronize trading. However, none of these persons was examined to ascertain that how they have entered into synchronized trading. Necessarily such synchronized trading has to be with the broker of the assessee. No such link was established. Furthermore, merely because of the matching of the transaction with stock exchange the ld AO reached at the conclusion that there is a synchronized transaction. Surprisingly, no such synchronized trading was referred to SEBI. On this issue on synchronized trade no orders of SEBI were placed before us

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under SEBI (prohibition of fraudulent and unfair trade practices relating to securities market) Regulations 2003, and against the broker for violating provisions of SEBI (Stock Brokers and Sub Brokers) Regulations 1992. Merely an action under the Income Tax Act, 1961 against those brokers it is not proved that actually synchronized trade has taken place. Further, the allegation of the ld Assessing Officer of providing exit to the assessee by Dream light Exim Pvt. Ltd and Duari Marketing Pvt. Ltd only the stock exchange trading sales detail of the assessee are maintained which are undisputed as assessee has recorded them in the books of accounts but time and date stamp of the buyers were not matched. This is also merely an allegation. Further, those directors, real owners of those companies have not been cross-examined by the assessee despite requested by assessee. Therefore, in these circumstances, it cannot be proved that these are the dummy companies, especially when they are having PAN, KYC with stock exchanges, DEMAT Accounts, assessed by income tax Departments etc . For receipt of money through various layers, they should have been responsible in their own cases to show the genuineness of those funds. Assessee cannot be compelled to show the same. In view of this, the allegation of the cash trail of the buyers of those shares remains unproved and merely an allegation.

33. *Next, claim of the assessing officer that many beneficiaries of the bogus long-term capital gains have disclosed the above sum as their undisclosed income. According to us, If some other parties have obtained the bogus long-term capital gain in their own case, in some of the case even the SEBI, while exonerated the assessee and his family, has implicated some of the parties who obtained the bogus long-term capital gain, but it does not lead that assessee is also sailing into the same boat. Even otherwise, there are thousands of entities who have earned the long-term capital gain in those scripts, which are challenged by the ld AO who are also exonerated by the SEBI by various orders, along with the orders passed in case of the assessee and his family members or individual orders. Hence, cases are also that in those persons case their claim of LTCG is not challenged. Interestingly the ld AR also referred to the news item in Moneylife.in dated 10/4/2018 where in internal Memo of SEBI dated 29/12/2016 is discussed. It shows that SEBI issued an elaborate interim order in respect of 12 entities connected with LTCG booking. These are First Financial Service Ltd, Kailash Auto Finance Ltd, Kamalakshi Finance Corp Ltd, Kelvin Fincap Ltd, Mishka Finance and Trading Ltd, Moryo Industries Ltd, Pine Animation Ltd, Radford Global Ltd, Eco Friendly Food Processing Park Ltd, Esteem Bio Organic Food*

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Processing Ltd, Channel Nine Entertainment Ltd and HPC Biosciences Ltd. However, in none of these interim orders the assessee was found to be involved in any of the wrong doings. Such orders of SEBI are also elaborately discussed in this order itself. Therefore, merely because some of the persons have disclosed the LTCG earned by them as dubious, does not improve or hamper the case of the assessee and his family members.

34. *The next issue discussed by the learned assessing officer was with respect to the preponderance of the probabilities in para number 4.12 of the assessment order. The learned assessing officer noted that in the instant case, there are many statements duly supported by the evidences that the individuals of Bhushan steel Ltd group has received bogus long-term capital gain entities s from various companies managed and controlled by entry operators. Further, the assessee has invested in shares of various penny stock companies, which were not doing any meaningful business, and even the earning was minimal. No prudent investor will ever invest huge sums in a company, which does not have history of declaring dividends and sound financial conditions. None of investments, losses has been incurred by them. All the transactions of the sale of shares have resulted into huge abnormal profits, which is not possible in normal course of investment. However, evidence-indicating sham transactions by all the investors were not found by the Department, but r, the pattern of investment, the modus operandi adopted is largely same for 100% of investors. The rates of return, pattern of movement of funds were glaring, nonexistence of genuine business activities of such investors etc. Safely lead to conclusion that long-term capital gain received from these penny stock company is bogus and taxable. The learned assessing officer relied upon the decision of the Hon'ble Supreme Court in case of some of Sumati Dayal vs. CIT, 125 CTR 124. The learned authorized representative vehemently opposed the same and stated that long-term capital gain were originally disclosed by the assessee in his return of income for earlier assessment years for assessment year 2010 – 11 and 2011 – 12, which were assessed under section 143 (3) of the income tax act. Therefore, it is not the case of the revenue that there are no positive evidences produced by the assessee. Even in those cases, the assessee has produced the complete details of the purchase, share applications, payment by cheque, sale on a stock exchange, receipt of sale consideration and most importantly the holding period of those shares in the balance sheet of the assessee's which were accepted by the revenue for all those years. He therefore submitted that the theory of*

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preponderance of probabilities invoked by the learned assessing officer is merely a conjecture and surmises. He further stated that when the originally the assessees are assessed under section 143 (3) of the act, long-term capital gain were accepted after detailed enquiries, now it cannot be said that the capital gain earned by the assessee is to be taxed u/s 68 of the act on the principles of preponderance of the probabilities. He further submitted that it was argued before the bench in appeal from earlier years that no incriminating evidences were found during the course of search. The order is awaited. He further stated that the preponderance of probabilities would come into play only when the basic test of direct and factual evidences fails. He stated that in the present case the complete evidences have been placed by the assessee before the revenue authorities, they are not found to be false but only allegation has been made that transactions are sham. He further stated that the decision relied upon by the learned AO of honourable Supreme Court is quite distinct on its fact. On careful analysis of the evidences placed before us, findings rendered by the lower authorities, we proceed to consider the taxability of the long-term capital gain earned by the assessee under section 68 of the income tax act whether in situations like this, one may fall into realm of "preponderance of probability" where there are many probable factors, some in favour of the assessee and some may go against the assessee. However, the probable factors have to be weighed on material facts so collected. Here, in this case, material facts strongly indicate a probability supported by the evidences produced by the assessee that assessee has earned long-term capital gain on sale of the shares. The another very strong probability arises is that assessee has introduced its unaccounted money in the guise of profit on sale of shares holding it is a long term capital gain and showing it is a tax exempt income. The probable factors could have gone against the assessee, only if,

i. *there would have been some evidence found from searches conducted by the department that Assessee was the person who at the time of purchase of the shares has issued the cheques to the companies for purchase of shares and has received cash back and at the time of sale of those shares have paid cash to the alleged by or their associates, and then only has received the cheques towards sale of those shares.*
ii. *Such evidences found were duly corroborated with the statements of the parties*
iii. *Cross examination of those parties afforded to the assessee*

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iv. Opportunity to the assessee to confront and rebut the materials gathered.

Firstly, No such evidences were found during the course of search and all those evidences which are relied upon by the learned revenue authorities have been held by the coordinate bench in assessee's own case to not to be an incriminating material which can impact the taxable income of the assessee and his family members. Even the investigation made by the Securities and Exchange Commission of India has also held that assessee is not at all involved in the manipulation of the prices of those scripts. The revenue has also not shown us any security and exchange Board of India's order which even implicated the share broker, which is alleged to have arranged these long-term capital gains fraudulently for the assessee. At least something would have been unearthed from such high-level investigation by two Central Government authorities. Further whatever evidences were found by the revenue; they were not confronted to the assessee for rebutting the same. Statements recorded of several persons by revenue were not allowed to be cross-examined by the assessee. In this situations, only on the theory of preponderance of probabilities addition cannot be sustained. The theory of "preponderance of probability" is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn based on certain admitted facts and materials and not based on presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee. The reliance placed by the learned AO on the decision of the honourable Supreme Court is clearly distinguishable. So far as the facts of that case with the case on hand before u are compared, in that particular situation before the honourable Supreme Court where the assessee was constantly earning money from the jackpot, further was not having any losses, it was confessed before the settlement commission that the expenditure incurred or the losses suffered by the assessee have been adjusted against the unaccounted income of the assessee, books of the assessee did not show in that particular case any drawings for purchase of tickets and incurring travel expenditure to 3 different cities prior to the date of winning of the jackpot races. The assessee has given up the winning from the jackpots immediately on same becoming taxable due to the amendment in the income tax act. Contradistinction to the above facts in the present case, assessee is consistently an investor in the shares. The holding period of the shares is also quite long. The

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assessee is also a shareholder in various companies of the Bhushan steel group limited. The assessee has shown purchase consideration paid by the cheque and recorded in its books of accounts and accepted by the revenue in earlier years under the scrutiny assessment. The prices at which the shares have been sold are traded prices on a stock exchange on which assessee does not have any control. The regulatory authority i.e. securities and exchange board of India, stock exchange authorities has not questioned the conduct of the assessee and broker selling the shares , on price variation in the shares of the companies in which assessee has made investment. The assessee has also paid securities transaction tax on the sale of shares and the sale consideration has been received from the SEBI registered broker against which there is no allegation. In view of this, it is apparent that assessee has produced overwhelming evidences that were not found to be false. In view of this, the reliance by the learned AO on the decision of the honourable Supreme Court is misplaced. Therefore In view of this we do not subscribe to the opinion of the learned assessing officer that on the preponderance of the probabilities the income should have been taxed in the hands of the assessee.

35. *The ld AR has submitted the plethora of judicial precedents where in it has been held that in such circumstances, addition u/s 68 of the act cannot be made and such income is chargeable to tax as a long-term capital gain only. He submitted that all these decisions are also rendered on similar facts where the broker was tainted; cross-examination was not afforded, changing statements of broker, Allegation of accommodation entry provider etc. He further submitted that almost all the authorities have held that either the assessment is invalid on account of violation of principles of natural justice or on the complete documentation furnished or on the basis of changing statements of broker or on inadequate evidences or the facts that such evidences are not reliable as in the case of the assessee same are held to be not incriminating material on which addition can be made. We also have found that the facts of the issue before us are also similar to the facts dealt with by those judicial authorities.*

36. *As the issue involved before us is of chargeability of long term capital gain as undisclosed income of the assessee u/s 68 of the act, we have also conducted some research and found that now many high courts and coordinate benches have held in favour of the assessee. In one of the cases, SLP filed by the revenue against the order of the Honourable Bombay high court has also been dismissed by Honourabel Supreme Court. Many of the decision of the coordinate benches have also discussed*

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the facts similar to the issue before us. Such recent cases are listed here under:-

serial number	*Title of the case*	*Appeal number/ date of decision*	*authority rendering that decision*
1	*CIT V Shreyashi Ganguli*	*ITA 196 of 2012*	*Cal High court*
2	*Classic Growers Ltd V CIT*	*ITA 129 of 2012*	*Cal High court*
3	*CIT V Lakshamangarh Estate & Trading co Limited*	*40 taxmann.com 439*	*Cal high court*
4	*CIT V Rungta Properties Limited*	*ITA No 105 of 2016*	*Cal High court*
5	*CIT V Bhagwati Prasad Agarwal*	*2009 TMI 34378*	*Cal high court*
6	*THE COMMISSIONER OF INCOME TAX-16. VERSUS MRS. KESAR A. GADA*	*INCOME TAX APPEAL NO. 300 OF 2013*	*Bombay High court*
7	*CIT V Prempal Gandhi*	*ITA 95 of 2017 401 ITR 253*	*Punjab & Haryana Hihcourt*
8	*PCIT V Hitesh Gandhi*	*Ita 18 of 2017*	*Punjab & hryana High court*
9	*CIT V Pooja Agarwal*	*Ita No 385 of 2011*	*Rajasthan High court*
10	*CIT V sudeep Goenka*	*29 taxmann.com 402 dated 3/1/2013*	*Allahabad high court*
11	*CT V Anupam Kapoor*	*299 ITR 0179*	*Punjab & Haryana High*

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			court
12	*CIT V arunkumar Agrwal HUF*	*26 taxmann.com 113*	*Jharkhand High court*
13	*CIT V Shyam R Pawar*	*54 taxmann.com 108* *229 TAXMAN 0256*	*Bombay High court*
14	*PRINCIPAL COMMISSIONER OF INCOME TAX-5 VERSUS DIPALI MAHENDRA SHAH*	*2018 (3) TMI 1084 - GUJ*	*GUJARAT HIGH COURT*
15	*THE COMMISSIONER OF INCOME TAX VERSUS SHRI MUKESH RATILAL MAROLIA.*	*2011 (9) TMI 919*	*Bombay High court* *SLP Dismissed by Hon SC on 27/1/2015* *Special Leave to Appeal (Civil) No(s).20146/2012*
16	*Principal Commissioner of Income Tax-5 v. Dhwani Mahendra Shah*	*Tax Appeal No.674 of 2017*	*Gujarat high Court*
17	*COMMISSIONER OF INCOME TAX VERSUS PUSHPA MALPANI*	*IT Appeal No. 50 of 2010* *2010 (11) TMI 799*	*Rajasthan High court*
18	*Smt. Bharti Arvind Jain vs. ITO*	*6102/Mum/2016)*	*Mumbai ITAT*
19	*ITO vs. M/s Indravadan Jain HUF*	*4861/Mum/2014*	*Mumbai ITAT*
20	*Swati Mall V ITO*	*7/12/2018*	*Kolakatta ITAT*

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	Ward 36(2)		
21	*Vaishal Suryakant Shah V ITO*	*9 CCH 106*	*Ahmedabad ITAT*
22	*Sunita Jain V ITO*	*49 CCH 330*	*Ahmedabad ITAT*
23	*DCIT central circle V PRB Securities P Ltd*	*5/12/2018*	*Kolakata ITAT*
24	*Prakashchand BhutoriaV ITO*	*53 CCH 275*	*Kolkata ITAT*
25	*Ramprasad Agarwal V ITO*	*30/11/2018*	*Mumbai ITAT*
26	*Aditya Vikram Sureka HUF V ITO Kolkatta*	*28/11/2018*	*Kolakat ITAT*
27	*Rashmi maheshwari V ITO*	*28/11/2018*	*Delhi ITAT*
28	*Mohanlal Agarwal HUF V ITO*	*26/11/2018*	*Delhi ITAT*
29	*Jaishree Bamboly V ITO*	*8/11/2018*	*Chennai ITAT*
30	*Simi Verma V ITO*	*6/11/2018*	*Delhi ITAT*
31	*Manojkumar Gupta V ITO*	*5/11/2018*	*Delhi ITAT*
32	*Madhu Killa V ACIT*	*2/11/2018*	*Kolkata ITAT*
33	*Kanthilal Kamla Bai V ITO*	*29/10/2018*	*Chennai ITAT*
34	*K Praveenkumar HUF V ITO*	*29/10/218*	*Chennai ITAT*

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35	*RukmaniDevi Manpuria V DCIT*	*24/10/2108*	*Kolkatta ITAT*
36	*Bishwanath AGarwal V ITO*	*16/10/2018*	*Kolkata ITAT*
37	*Bhanshali Finacom P Ltd V DCIT*	*10/10/2018*	*Kolkatta ITAT*
38	*Sanjay Mehta V ACIT*	*28/9/2018*	*Kolkatta ITAT*
39	*Mina Mehta V ITO*	*28/9/2018*	*Kolkatta ITAT*
40	*Vikas Jhawar V ITO*	*26/9/2018*	*Kolkatta ITAT*
41	*Neelam Agarwal V ITO*	*26/9/2018*	*Kolkatta ITAT*
42	*Rajkumar Goenka V ITO*	*26/9/2018*	*Kolkata ITAT*
43	*Shobhit Goel V ITO*	*25/9/2018*	*Delhi ITAT*
44	*Kaushlaya devi V ITO*	*19/9/2108*	*Hyderabad ITAT*
45	*Amit Shah V ITO*	*26/9/2018*	*Kolkatta ITAT*
46	*Deepak Bhattad HUF V ITO*	*19/9/2018*	*Chennai ITAT*
47	*Arunkumar Bhaiyya V ITO*	*30/8/2018*	*Delhi ITAT*
48	*ITO V Kapil Mittal*	*29/8/2018*	*Jaipur ITAT*
49	*DCIT V Saurabh Mittal*	*29/8/2018*	*Jaipur ITAT*
50	*Sikha Dhawan V ITO*	*27/6/2018*	*Delhi ITAT*
51	*Meghrajsingh Sehawat V DCIT*	*7/3/2018*	*Jaipur ITAT*

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52	*DCIT V Vimleshkumar Singh*	*15/1/2018*	*Raipur ITAT*
53	*ACIT V Pratiksha Shah*	*03/10/217*	*Mumbai ITAT*
54	*Ketulkumar D Jaiswal V ITO*	*2017 (10) TMI 168 - ITAT AHMEDABAD*	*Ahmedabad ITAT*
55	*ITO V Arvindkumar jain HUF*	*18/9/2017*	*Mumbai ITAT*
56	*Bharti navin Cheda V ITO*	*11/9/2017*	*Mumbai ITAT*
57	*Kamladevi S Doshi V ITO*	*22/5/2017*	*Mumbai ITAT*
58	*Bhavesh Sambhulal SOmani V ITO*	*ITA No.2263/Ahd/2015 20/3/2017*	*Ahmedabad ITAT*
59	*Rachna Sachin jain V ITO*	*501 & 502/AHD/2016 7/3/2017*	*Ahmedabad ITAT*
60	*Malti Ghanshyambhai V ITO*	*6/2/2017*	*Ahmedabad ITAT*
61	*Rajendrkumar ratilal Jariwala V ITO*	*1753/ahd/2012 29/2/2016*	*Ahmedabad ITAT*
62	*ITO V Arvindkumar Jain HUF*	*51 CCH 281*	*Mumbai ITAT*

37. The Revenue has also relied up on some decisions we also deal with them. The learned departmental representative has vehemently relied upon the decision of honourable Bombay High Court in case of Sanjay Bimalchand Jain vs. Principal Commissioner Of Income Tax reported at 89 taxman.com 196. We have also perused the decision of the coordinate bench dated 18/07/2016 in that case, which was upheld by the honourable High Court. Issue before the coordinate bench was

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that whether, on sale of shares profit earned by the assessee can be charged to tax as capital gain or business income. In that particular case, the payments were made in cash for purchase of shares. The addresses of the companies who shares are purchased and address of brokers are also the same. Brokers who sold the shares did not respond to the inquiries of the learned assessing officer. Therefore, on the appreciation of the facts, coordinate bench held that the income has been correctly taxed by the AO as business income of the assessee whereas the assessee claimed it to be a long-term capital gain. The assessee challenged the case before the honourable High Court and it was held that there is no substantial question of law arising. Firstly speaking the case before us is not of chargeability of long-term capital gain as business income or as a long-term capital gain. Nevertheless, the issue is whether the sale of shares resulting into profits in the hands of the assessee, which are held for more than 12 months, is chargeable to tax as long-term capital gain or as undisclosed income of the assessee. The case of the assessee is supported by the purchase bills, payment by cheques and sale by assessee on recognized stock exchange through a registered broker receiving the sale consideration through the settlement mechanism of the exchange by cheque. There is no doubt on the brokers who purchased shares and on the brokers who sold the shares. In the case before the honourable Bombay High Court, addition was on account of absence of any information coming from the broker who sold the shares when enquired by the AO. In the present case, the AO did not raise any question to the broker who sold the shares. It is in fact, the broker who sold the shares logged in to his terminal and sold the shares on electronic online platform of the exchange. It is not the case of the assessee that the shares have not been sold by the assessee on the stock exchange. Here, the learned assessing officer is challenging the whole cycle of the transaction, starting from purchase of the shares by the assessee from the market or on preferential allotment of shares of some of the companies and subsequently holding it and selling it on stock exchange at prevailing prices as sham transaction as an attempt to convert the unaccounted money of the assessee in the form of non-taxable long-term capital gain. Further, in the case before the honourable Bombay High Court the simple issue was that there was an unusual rise in the price of the share and no enquiry was conducted by the any regulatory authority. In the case before us, the securities and exchange Board of India has conducted a detailed enquiry and has held that assessee is not involved in manipulation of prices of any scripts. Therefore, it was held by the SEBI that the transaction, as far as purchase and sale of the shares on

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Bombay stock exchange is concerned, was untainted. Therefore, the facts of the case before the honourable Bombay High Court and facts before us are clearly distinguishable.

38. *The 2nd decision relied upon by the learned CIT DR is in case of Shri Abhimanyu Soin vs. Assistant Commissioner of Income Tax [2018 – TIOL – 733 – ITAT – CHD]. In that particular case, there was a specific allegation which was proved that there is a circular transactions entered into by the assessee's brokers for the scrip and further there was no evidence that how a Calcutta-based broker from Ludhiana-based assessee has received in cash for purchase of the shares on three different dates. Apparently, the fact of payment of cash to purchase of shares to the broker situated at Kolkata became Primordial. Further, the assessee was in United States from 2009 – 2012 and the case was pertaining to assessment year 2011 – 12, where the assessee has made a payment to one of the representative, whose name could not be recollected for sending money to the broker when it was the first deal with the broker. Further, the shares were also not transacted through any recognized exchange as apparently the shares were traded of a petty private limited company. In addition, the assessee could not prove the requisite source of investment during the relevant period of investment. The facts of the case before the coordinate bench are clearly distinguishable and do not apply to the facts of the case before us. In view of this, reliance on this decision by revenue is also misplaced.*

39. *The third decision relied upon by the learned departmental representative is of Bangalore bench SMC where the shares were purchased off market by the assessee despite having the shares of the company listed on the stock exchange. Therefore, the facts of this case are also clearly distinguishable from the facts before us.*

40. *The fourth decision relied upon is in case of Chandan Gupta vs. CIT, 229 taxman 173 (Punjab and Haryana). In that, particular case the assessee expressed its inability to produce the broker and the AO conducted inquiries on his own. The quotations were also from a Gujarati diary the prices could not be substantiated by the assessee. In the present case, the assessee has produced all the evidences before the assessing officer and the learned AO did not press upon the assessee to produce anybody instead of that he went by the standard modus operandi as understood by him. Even in the present case before us whether the modus operandi is the thinking of the learned AO or has he been directed by somebody is not known. The prices at which the transactions of sale of shares*

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have taken are market rate and there is no allegation as the shares were listed on stock exchange. Therefore, the facts of the case cited by the learned departmental representative are clearly distinguishable.

41. *The 5th decision relied upon by the learned CIT DR is with respect Balbir Chand maini vs. CIT [340 ITR 161]. In that particular case, on examination of the broker the books of accounts of the broker could not be produced by him to show that he has purchased the shares from the assessee and the sale of shares has also not taken place through any stock exchange. There were cash deposits in the bank account of the broker prior to issue of cheques in the name of the assessee for purchase of shares claimed to be the sale proceeds of the shares is received in advance. The broker also could not give the details of the name of the purchase of the shares. Further, it was also found by the AO that the shares sold by the assessee were not quoted on the stock exchange and there was no trading of those shares on the exchange. The AO further noted that it was a closed circuit transaction between some persons. The AO further found that the shares claimed to have been sold through the broker had not been transferred even at the time of making the enquiry by the assessing officer and such sales continued to be registered in the name of the assessee. Therefore, there was no transfer of share at all in that particular case. On these facts, the addition under section 69 was confirmed. On comparison of facts of that, case with the facts of the present case clearly shows that such facts do not exist before us.*

42. *The learned CIT DR also relied upon several other decisions where for several reasons, the addition on sale of shares shown as a long-term capital gain is confirmed in the hands of the assessee. However, in most of the decisions cited before us, There was an off market purchase by the assessee and the assessee could not substantiate with documentary evidences the transaction of purchase and sale of the shares. In many of the cases cited there were predated contract note issued by the broker and the payment for purchase of the shares is made in cash and that too off market. , In some of the cases, there was no payment by cheque for acquisition of the shares but there was an adjustment of profits earned by the assessee through those brokers, who generated profits in cash in the name of the assessee and purchase price of the shares adjusted by the broker against that payment to be made to those assessees. In such circumstances, the additions have been confirmed by the coordinate benches. Therefore, the facts of those cases are clearly distinguishable.*

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43. The four parties we like to state that despite searches carried out on the assessee based on pre search inquiries coupled with the search on Mr. Raj Kumar Kedia and recording statements of so many persons the ld AO knowing fully well that failure to grant cross examine will make all these enquiries fruitless. Further, there are loopholes in the evidence relied upon by the revenue of not referring the issue of synchronized trading to the SEBI. Certain times the conviction under the SEBI Act would have been more stringent then the liability under the Tax laws. Further, though the AO was having reasonable evidences but has unnecessarily took the burden on him of proving that long term capital gain earned by the assessee is bogus instead of first asking assessee to prove that the above income is exempt u/s 10(38) of the Act. After granting full opportunity to the assessee to adduce as many evidence as assessee could have produce and then should have carried out vast powers bestowed upon him under the Income Tax Act, 1961 of examining the details furnished by the assessee. The ld AO could have also asked the assessee to produce all the persons whose statement AO was relying upon. However, the ld AO has unnecessarily taken the onus of proving long-term capital gain as bogus instead of first asking assessee to prove that the long-term capital gain is genuine. The ld AO should have first put the burden to put prima facie case in respect of cash credit on assessee as to how it was introduced in the books of the assessee. However, from the first paragraph of the assessment order itself the ld AO alleged that assessee has entered into a scam and they by walked into the trap of section 110 of the evidence act on him to prove that the long-term capital gain earned by the assessee is bogus. The ld AO after that could not substantiate his allegations by granting cross-examination to the assessee of various persons. It is fatal to the case, as the assessment strategy adopted by the ld AO could not prove his allegation."

80. After perusal of the above order, we are of the view that there is no disparity on the facts. All relevant case laws have been considered in this order. However, during the course of hearing, Shri G.C.Srivastava has emphasised that in the case of Sanjay Singal, he has voluntarily disclosed Rs.250 crores on account of bogus long term capital gain in the statement made under section 132(4) of the Act for the search carried out on 21 & 27-2-2014. He pointed out that not such voluntary

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disclosure was available in the case of Shri Brij Bhushan Singal. According to the ld.authorised representative, this disclosure was made by Shri Sanjay Singal on his behalf as well as on behalf of entire family. Therefore, he is bound with his disclosure which was not retracted. On the other hand, the ld.counsel for the assessee made reference to CBDT Circular Bearing no.286/2003 dated 103.2003 which has been further explained in the subsequent circulars. The Board has emphasised that no disclosure be taken from the assessee and endeavour be made for collection of the material because according to the Board the Department used to take voluntary disclosure under section 132(4) of the Act and stopped further investigation. This type of declaration later on retracted by the assessee nor honoured in the return filed by them, and the department failed to corroborate such disclosure. Thus, according to him, there is no disparity of such event on this point. No doubt, the disclosure or admission made under section 132(4) of the Act during the course of search proceedings is an admissible evidence but not conclusive one. This presumption of admissibility of evidence is a rebuttable one, and if an assessee is able to demonstrate with the help of some material that such admission was either mistaken, untrue or based on misconception of facts, then solely on the basis of such admission no addition is required to be made. It is true that admission being declaration against an interest are good evidence, but they are not conclusive, and a party is always at liberty to withdraw the admission by demonstrating that they are either mistaken or untrue. In law, the retracted confession even may form the legal basis of addition, if the AO is satisfied that it was true and was voluntarily made. But the basing

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the addition on a retracted declaration solely would not be safe. It is not a strict rule of law, but only rule of prudence. As a general rule, it is unsafe to rely upon a retracted confession without corroborative evidence. Due to this grey situation, CBDT has issued Circular No.286/2/2003 prohibiting the departmental officials from taking confession in the search. The CBDT is of the view that often the officials used to obtain confessions from the assessee and stop further recovery of the material. Such confessions have been retracted and then the addition could not withstand the scrutiny of the higher appellate authority, because no material was found supporting such addition. It is pertinent to observe that in a large number of authoritative pronouncements, it has been held that merely on the basis of declaration addition should not be made. The alleged declaration should be supported with unexplained expenditure or assets discernible in the seized material during the course of search. No such things was unearthed by the Revenue, therefore, decision relied upon by the ld.CIT-DR in the case of Bhagirath Aggarwal Vs. CIT(Supra) is distinguishable on facts. This decision has already been considered by the Coordinate Bench while dealing with the case of father of the assessee.

81. In his next fold of contentions, he submitted that there was no necessity to provide opportunity to cross-examine the persons whose statements were recorded by the Revenue during the course of search. In other words, Revenue can rely upon third party statement recorded from the back without giving opportunity to the assessee to cross-examine them. This aspect has been dealt with by the ITAT in the finding reproduced above, and the Coordinate Bench put reliance upon

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the judgment of Hon'ble Supreme Court in the case of Andaman Timber Industries Vs. Commissioner of Custom & Excise, 281 CTR 241 (SC). The Tribunal has reproduced the finding of Hon'ble Supreme Court while rejecting all the contentions of the Revenue, and held that if opportunity is not being granted to the assessee, then that part of the evidence has to be excluded. While persuading us to ignore this finding of the Co-ordinate Bench, the ld.counsel for the Revenue put emphasis on the judgment of Hon'ble Punjab & Haryana in the case of Smt.Kusum Lata Thakral Vs. CIT, 185 Taxman 237. The facts in this case are that the assessee has received gift in cash. According to the Revenue, in order to prove gift as genuine, the assessee has to prove identify of the donor, genuineness of the transaction and credit-worthiness of the donor. The assessee proved identity, but failed to prove genuineness and credit-worthiness. Donor has denied advancing of any gifts to the assessee, and in that background the assessee argued that she should have been given an opportunity to cross-examine that donor. This plea has been rejected and the Hon'ble Court has observed that there is no necessity to grant opportunity. We have perused this proposition, but it is not applicable to the facts of the present case. It is pertinent to observe that onus was upon the assessee to prove that the gifts are genuine and in order to discharge that onus, it was incumbent upon the assessee to produce the donor. Those donors should be witness of the assessee, and even if denial of the donor is excluded, then also the assessee failed to discharge her onus to prove genuineness of the gifts. In other words, non-granting of cross-examination of the donor had not impacted case of the Revenue, because it is the assessee who has to first

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prove genuineness of the gifts and it should be the endevour of the assessee to bring donor in the witness box and take a declaration from him about giving of gifts. Thus, it was not duty of the Revenue to call for the donor and then provide an opportunity to the assessee; because that exercise will not take the case any further in favour of the assessee. At the most the denial of donor could be ignored that it was not positive evidence used by the Revenue for rejecting the explanation of the assessee. The Tribunal has held that the assessee failed to prove genuineness of the gifts. In this background, there was no opportunity provided to the assessee for cross-examination, which otherwise ought to have been granted. This judgment is to be read in this line. The judgment relied upon the Revenue does not take forward the arguments of the ld.counsel for the Revenue that there is no need to provide opportunity to cross examine all those persons whose statements have been recorded by the Investigating Agency during the course of search at their residential premises, and more so these judgments cannot be given preference over the judgment of Hon'ble Supreme Court in the case of Andaman Timber Industries (supra) which has been considered by the Co-ordinate Bench. Similarly, other large numbers of order have been placed on record. They are distinguishable on facts; they have their own facts which are not applicable in the instant cases. By referring each order, we will be unnecessarily making this order more lengthy and bulky, because Co-ordinate Bench has considered more than hundred of decisions cited by both the sides, and thereafter the Bench has researched and referred sixty two orders on this point of law. Bench thereafter decided the appeals. After going through well reasoned order

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in the light of material brought to our notice, we are of the view that issue in dispute in all these appeals is squarely covered by order of the Co-ordinate Bench in the case of Shri Brij Bhusan Singal and others (supra), and hold that the long term capital gain declared by the assessee and claimed as exempt under section 10(38) are to be treated as genuine and they are not to be assessed as unexplained cash credit under section 68 of the Act.

82. As discussed earlier, grounds of appeals in all the appeals are common. Therefore, in view of the above discussion, we allow all the grounds of appeals and delete addition made by the ld.AO and confirm by the ld.CIT(A) under section 68 of the Income Tax Act, 1961 on account of unexplained cash credit in each appeal i.e.ITA Nos.708, 710, 711/Chd/2018; ITA No.714, 716 and 717/Chd/2018; ITA No.718 &719/Chd/2018; and 705/Chd/2018

83. Similarly, addition made by the AO by estimating the expenses on commission alleged to have been incurred by the assessee for arranging such long term capital gain and added under section 69C of the Act on account of unexplained commission expenses are also deleted in all these appeals as a consequence to the finding on main issue.

84. In the result, all appeals of the assessees are allowed.

Order pronounced in the Court on 20th September, 2021 at Chandigarh.

Sd/-	**Sd/-**
N.K. SAINI	**(RAJPAL YADAV)**
(VICE-PRESIDENT)	**(VICE-PRESIDENT**

Chandigarh; Dated 20/09/2021

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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण / DR, ITAT,
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण,/ ITAT, Chandigarh

Vk*

1. Date of dictation-
2. Date on which the typed draft is placed before the Dictating 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 file goes to the Bench Clerk ..
6. Date on which the file goes to the Head Clerk…….
7. The date on which the file goes to the Assistant Registrar for signature on the order……..
   Date of Despatch of the Order……