IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI

Before Sh. N. K. Saini, Hon'ble Vice President
and
Sh. K. N. Chary, Judicial Member

ITA No. 1412/Del/2018 : Asstt. Year : 2010-11
ITA No. 1413/Del/2018 : Asstt. Year : 2011-12
ITA No. 1414/Del/2018 : Asstt. Year : 2012-13

Sh. Brij Bhushan Singal, W-29, Greater Kailash, Part-II, New Delhi-110048	Vs	ACIT, Central Circle-3, New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AEFPS6298M		

ITA No. 1476/Del/2018 : Asstt. Year : 2010-11
ITA No. 1477/Del/2018 : Asstt. Year : 2011-12
ITA No. 1478/Del/2018 : Asstt. Year : 2012-13

Smt. Ritu Singal, W-29, Greater Kailash, Part-II, New Delhi-110048	Vs	ACIT, Central Circle-3, New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. ABHPS3711N		

ITA No. 1482/Del/2018 : Asstt. Year : 2010-11

Smt. Uma Singal, W-29, Greater Kailash, Part-II, New Delhi-110048	Vs	ACIT, Central Circle-3, New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. ANRPS7987A		

ITA No. 1485/Del/2018 : Asstt. Year : 2010-11
ITA No. 1486/Del/2018 : Asstt. Year : 2011-12
ITA No. 1487/Del/2018 : Asstt. Year : 2012-13

Sh. Neeraj Singal, W-29, Greater Kailash, Part-II,	Vs	ACIT, Central Circle-3,

New Delhi-110048		New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. ANRPS7986B		

Assessee by : Sh. S. K. Tulsiyan, Adv.,
Sh. Ashwani Kumar, CA,
Ms. Abha Agarwal, CA,
Ms. Bhoomija Verma, Adv.,
Sh. Aditya Kumar, CA &
Sh. Rahul Chaurasia, CA
Revenue by : Sh. S. S. Rana, CIT DR

Date of Hearing : 02.08.2018		**Date of Pronouncement : 31.10.2018**

ORDER

Per Bench:

These appeals by different assessees are directed against the common order dated 29.12.2017 of the ld. CIT(A)-23, New Delhi.

2. Since, the issues involved are common in these appeals which were heard together, so, these are being disposed off by this consolidated order for the sake of convenience and brevity.

3. At the first instance, we will deal with the appeal in ITA No. 1485/Del/2018 for the assessment year 2010-11 relating to the assessee Sh. Neeraj Singal. Following grounds have been raised in this appeal:

> *"(1) That the order dated 29-12-2017 passed u/s 250 of the Income-tax Act, 1961 (hereinafter called "the Act") by the Ld Commissioner of Income-tax (Appeals) 23, New Delhi 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 passing the order u/s 153A of the Act without appreciating the fact that the order passed by Assessing Officer is without jurisdiction and bad in law as the jurisdiction u/s 153A of the Act is vitiated since no incriminating material pertaining to A/Y 2010-11 had been found during the course of search.

(2) That the order dated 29-12-2017 passed u/s 250 of the Act by the Ld. Commissioner of Income-tax (Appeals) 23, New Delhi 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 making an addition of Rs. 20,05,651/- on account of Long Term Capital Gains which was exempt u/s 10(38) of the Act by treating it as an allegedly unexplained cash credit u/s 68 of the Act and unjustifiably and independently holding that the purported transactions of acquisition and sale of shares of certain companies which have resulted in the impugned long-term capital gain are, allegedly, sham.

(3) That the order dated 29-12-2017 passed u/s 250 of the Act by the Ld. Commissioner of Income-tax (Appeals) 23, New Delhi 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 making addition of Rs.1,20,339/- on account of alleged unaccounted Commission expenses @ 6% on the Long Term Capital Gains on sheer presumptive basis.

(4) That the order dated 29-12-2017 passed u/s 250 of the Act by the Ld. Commissioner of Income-tax (Appeals) 23, New Delhi is against law and facts on the file in as much as he was not justified to partly uphold the action of the Ld Assessing Officer in restricting the addition on account of alleged bogus jewellery purchased by the Appellant to Rs.3,32,905/- (being 10%

of cost of jewellery purchased) by ignoring the documentary evidences and submissions made on behalf of the Appellant on the sheer presumptive basis that reasonable profit must have allegedly been made by the Appellant by an alleged "out of books sale" of the impugned jewellery.

(5) That the order dated 29-12-2017 passed u/s 250 of the Act by the Ld. Commissioner of Income-tax (Appeals) 23, New Delhi is against law and facts on the file in as much as he was not justified to hold that the income allegedly generated in cash due to alleged clandestine diversion and sale of raw materials and payment of transportation charges by M/s Bhushan Steel Ltd., of which the Appellant is the Managing Director, is the income of the Appellant and to enhance his income by Rs. 62.52 crores (to be telescoped against the additions already made in the assessment proceedings and income surrendered during the course of search u/s 132 of the Act on 03.03.2010.)

(6) That the order dated 29-12-2017 passed u/s 250 of the Act by the Ld. Commissioner of Income-Tax (Appeals) 23, New Delhi is against law and facts on the file in as much as he was not justified to initiate penalty proceedings u/s 271(1)(c) of the Act against the Appellant for concealment and furnishing of inaccurate particulars of income on the unjustified ground that the top management of the Bhushan Steel Ltd (of which Appellant was Mg Director) was allegedly involved in planned and deliberate activities thereby resulting in alleged under reporting (because of alleged siphoning off) of profits of the Bhushan Steel Limited and alleged non-declaration of true and accurate state of affairs before the Income-tax Department.

(7) That the order dated 29-12-2017 passed u/s 250 of the Act by the Ld. Commissioner of Income-tax

(Appeals) 23, New Delhi is against law and facts on the file in as much as he was not justified to uphold the action of the Assessing Officer in framing the assessment by ignoring the basic principles of natural justice by relying on statements of various persons and data without affording the Appellant any opportunity to cross examine such persons, thus, making the assessment bad in law by considering the same as a general ground, not requiring any separate adjudication."

4. The assessee also moved an application dated 14.07.2018 for admission of the following additional grounds:

"1. That the Ld. C.I.T.(A) acted beyond jurisdiction in enhancing income of Sri Neeraj Singal u/s 251(1)(a) of the Income-tax Act, 1961 (the 'Act') by assessing new sources of income beyond the record (i.e. the return of income and assessment order) and outside the subject matter of assessments appealed against.

2. That without prejudice to the above, the Ld. CIT(A) exceeded the jurisdiction conferred u/s 153A of the Act by enhancing income of Sri Neeraj Singal for the unabated Assessment Year 2010-11 without any incriminating materials pertaining to the impugned issues [viz. (i) alleged unaccounted sale of clandestinely diverted raw materials (zinc) and (ii) alleged cash generated on account of alleged bogus transportation expenses claimed in the books of BSL] being found in course of search u/s 132(1) of the Income-tax Act, 1961.

3. That the Ld. C.I.T.(A) erred in upholding addition to the extent of 10% of cost of jewellery purchased by the assessee for A.Y. 2010-11 on the sheer presumption that reasonable profit must have been earned by alleged 'out of books sale' of the said jewellery although no incriminating material pertaining to 'out of books sale' of the impugned jewellery was found in course of search

in the case of the assessee and accordingly unabated assessment for A.Y. 2010-11 could not be re-opened u/s 153A of the Act."

5. The ld. Counsel for the assessee submitted that since all the relevant material relating to the additional grounds was available on the record and no fresh investigation is required. Therefore, the additional grounds which are purely legal grounds deserve to be admitted. The reliance was placed on the judgment of the Honôble Apex Court in the case of National Thermal Power Corporation Vs CIT 229 ITR 383.

6. The ld. CIT DR opposed the admission of the additional grounds and submitted that the grounds were not raised before the ld. CIT(A), therefore, these should not be admitted at this stage.

7. We have considered the submissions of both the parties and perused the material available on the record. In the present case, it is noticed that the additional grounds raised by the assessee are purely legal grounds which go to the root of the matter and all the relevant material is already available on the record. Moreover, these are co-related to the main grounds raised by the assessee, so, these may be admitted.

8. On a similar issue relating to the admission of the additional legal grounds the Honôble Apex Court in the case of National Thermal Power Corporation Vs CIT 229 ITR 383 (supra) held as under:

"Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. The Tribunal should not be prevented from considering questions of law arising in assessment proceedings, although not raised earlier. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner (Appeals) is too narrow a view to take of the powers of the Tribunal."

It has been further held as under:

"Undoubtedly, the Tribunal has the discretion to allow or not to allow a new ground to be raised. But where the Tribunal is only required to consider the question of law arising from facts which are on record in the assessment proceedings, there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee."

9. So, respectfully following the ratio laid down by the Hon'ble Apex Court in the aforesaid referred to case, the legal grounds raised by the assessee are admitted.

10. Vide these legal ground, the assessee challenged jurisdiction of the ld. CIT(A) in enhancing the income of the assessee assessed u/s 153A of the Income Tax Act, 1961 (hereinafter referred to as the Act) for unabated assessment order, in the absence of any incriminating material pertaining to the issues found during the course of search. Similar issue has been raised by the assessee vide Ground No. 1.

11. The facts related to this case in brief are that a search and seizure proceedings u/s 132 of the Act were conducted in the case of M/s Bhushan Steel Ltd. (BSL) Group, its group concerns and residential/factory premises of partners, directors and proprietors of the group on 13.06.2014. Subsequently, notice u/s 153A of the Act dated 08.09.2014 was issued to the assessee. In response, the assessee filed his return of income on 12.07.2016 declaring an income of Rs.125,90,39,860/- which was the same income as was furnished in the original return of income filed on 31.07.2010. Thereafter, the AO issued notices u/s 143(2) & 142(1) of the Act alongwith detailed questionnaire to the assessee, in response thereto the assessee filed necessary details and the written submissions.

12. The AO during the course of assessment proceedings observed that BSL group had been indulging in suppression of taxable profits on a large scale and unaccounted income so generated had been introduced in the books of family members & promoters of BSL group and the tax exempt bogus Long Term Capital Gains of hundreds of crores of rupees by pre-arranged trading in shares of some non-descript listed companies has been shown and such bogus pre-arranged tax exempt Long Term Capital Gain was nothing but a form of accommodation entry obtained with the help of known accommodation entry operator, Sh. R. K. Kedia. He further observed that on the basis of above information a search& seizure action was carried out on BSL Group & other related entities/persons and on Raj Kumar Kedia simultaneously on

13.06.2014. He also observed that during the course of search & seizure action, large number of incriminating documents found and seized/impounded, including numerous papers, number of hard discs and other electronic storage devices which were analyzed and confronted to the assessee during the search. The AO discussed the modus operandi in para 4.2.1 of the assessment order dated 30.12.2016 which read as under:

> ***"Terms:***
> ***Accommodation entry:*** *It is a financial transaction between the two parties where one party enters the financial transaction in its books to accommodate the other party. These transactions are accommodated mostly in lieu of cash of equal amount and commission charged over and above at certain fixed percentage for providing such accommodation entry. These accommodation entries are taken by various beneficiaries for introducing their unaccounted cash into their books of accounts without paying the due taxes.*
>
> ***ii) Entry operator:*** *It is the person who is in the business of giving accommodation entries in lieu of cash/cheque of equal amount after charging certain percentage of commission in cash.*
>
> ***iii) Long Term Capital Gain on shares:*** *It is defined by the value of such shares, which are shares of a stock exchange listed company, held by assesses for more than a year. Needless to add, it is exempt from tax under section 10(38) of the Act.*
>
> ***iv) Penny Stock:*** *is a stock that trades at a relatively low price and market capitalization. These types of stocks are generally considered to be highly speculative*

and high risk because of their lack of liquidity, large bid-ask spreads, small capitalization and limited following and disclosure.

II. ***Penny stock companies:***
Broadly speaking there are two types of Penny stock companies:

i) An old already listed company, the entire shareholding of which is bought by the syndicate to provide LTCG entries. These are generally dormant company with no business and with accumulated losses.

ii) A new company which is floated just for the purpose of giving LTCG entries. Such new companies are often floated after the initial booking is complete and the capital base is decided keeping in mind the entries to be provided.

III. ***Persons involved:***
There are three categories of individuals who are involved in the transactions:

i) *Syndicate Members: They are the promoters of the Penny Stock companies who own the initial shareholding mostly in the name of paper companies either in a fresh IPO or purchased from the shareholders of a dormant company. They are usually a group of 4-5 individuals who also referred to as Syndicate Members and are sometimes also referred to as Operators, Their nominees are directors of the Penny Stock companies which is indirectly controlled by them through such dummy directors. The whole operation is managed by them. They get the net commission income from the transactions.*

The shares of the penny stock companies are closely held as the general public is not interested in these stocks due to the poor financials of these listed

companies. The operator chooses one of such penny stocks for the implementation of the scheme. The promoters/directors of the penny stock company are paid some cash commission and in return they allow the operator to manage the affairs of the company. The operator then issues shares of these penny stock companies to the beneficiaries through the route of preferential allotment (Private Placement).

As per the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, the shares that are allotted through private placement, have a lock-in period of 1 year. Therefore, these shares can be sold by the allottees only after a period of one year from the date of allotment. This qualifies them for the benefit of claim of exempt LTCG.

These penny stock companies have no actual business or establishment. They have no financial credentials also. Thus, the fact that beneficiaries subscribe for their shares through private placement is in itself a suspicious thing. No genuine person in the right state of mind would invest in these penny stock companies. The shares are subscribed only for the purpose of claiming LTCG at a later stage. The promoters/directors of the companies work hand in glove with the operator to implement this scheme of availing bogus LTCG.

ii) ***The Brokers:*** *They are registered brokers through whom shares are traded both online and off-line. They are fully aware of the nature of transactions and get paid a commission over and above their normal brokerage. Some of the big broking houses are also indulging in such transactions mostly through sub-brokers. The brokers often compromise on KYC norms of the clients to help the Syndicate Members.*

As per the guidelines of SEBI and the stock exchanges, the brokers are supposed to comply with stringent KYC norms before registering any entity as their client. They are supposed to perform detailed background checks of their clients. However, it is seen that these share brokers have done trading for various paper/bogus companies. These paper/bogus entities have no business or establishment. This clearly implies that the share brokers are hands in glove with the paper/bogus companies in the whole scheme. The share brokers receive cash commission for allowing these paper entities to trade through their terminal. In fact it has been learnt that these brokers perform the trading themselves on behalf of the paper/bogus entities.

iii) ***The Entry Operators:*** *They are individuals who control a large number of paper/shell companies which are used for routing cash for the transactions as well as buying and selling shares during the process of price rigging. They work for commission to be paid by the Syndicate Members. To cut cost sometimes in smaller operations, the same group performs more than one function.*

iv) Exit Providers: *they are individual/ entities controlled by entry operators who purchase shares of various beneficiaries once their shares reaches desired level. They provide profitable exit to beneficiaries. Mostly they are paper company/jamakharchi company.*

IV. Methods for providing LTCG:

i) Preferential Allotment of Equity Shares:- *A preferential issue is an issue of shares or of convertible securities by listed companies to a select group of persons under Section 81 of the Companies Act, 1956 which is neither a rights issue nor a public issue. This is a faster way for a company to raise equity capital. The*

issuer company has to comply with the Companies Act and the requirements contained in Chapter pertaining to preferential allotment in SEBI guidelines which inter-alia include pricing, disclosures in notice etc. Since it does not require any prior approval of SEBI, the operators chose to adopt this route for raising the capital as an alternate to the merger and chose to provide gain to a close group of people. The shares are bound to be in lock-in-period for tenure of one year from the date of allotment, the operators chose to allot the shares to ultimate beneficiary only. During the tenure of this gap of one year they rig the price to promised level and reroute the transactions through shell companies.

ii) <u>Price rigging:</u> *After the shares have been allotted to the beneficiaries, the syndicate members starts rigging the price gradually through the brokers. In these transactions the volume is almost negligible. Two fixed brokers who are in league with the Syndicate buy shares at a fixed time and at a fixed price. These low volume transactions are managed through paper companies of entry operators.*

iii) <u>Splitting of the shares:</u> *It is the most effective way to camouflage the price of shares. The shareholder does not get affected by any of such proceeding adopted by the company except the effect of Corporate Action of NSDL/CDSL thereby releasing old shares and getting the spitted shares in Demat Account. After split of shares the price of shares on the exchange goes down automatically in proportion with the ratio of split and one doesn't see anything adverse happening in the scrip.*

iv) <u>Final sale by the beneficiary:</u> *This is done after the beneficiary has already held the share for one year. The period of holding may be a little more to match the amount of booking with the final rate. The beneficiary is*

contacted either by the Syndicate member or the Broker (Middle man) through whom the initial booking was done. The beneficiary provides the required amount of cash which is route through some of the paper companies of the entry operator and is finally parked in one company which will buy the share from the beneficiary. The paper company issues cheque to the beneficiary."

13. The AO asked the assessee to furnish the details of Long Term Capital Gains which was summarized as under:

Sl. No.	*Name of the Script Companies*	*Amount of capital gain as per information with this office (In Us.) (A.Ys.)*					
		2010-11	*2011-12*	*2012-13*	*2013-14*	*2014-15*	*2015-16*
1	*Prraneta Industries Ltd.*	*783851*	*--*	*--*	*--*	*--*	*--*
2	*G-Tech Info. Ltd.*	*1221800*	*--*	*--*	*--*	*--*	*--*
3	*IMD Telefilms Industries Ltd.*	*--*	*348640496*	*.--*	*--*	*--*	*--*
4	*Splash Media Works Ltd.*	*--*	*7691026*	*114879706*	*--*	*--*	*--*
5	*Nouveu Multimedia Ltd.*	*--*	*12311483*	*12597337*	*--*	*--*	*--*
6	*Santrowin Corporation*	*--*	*--*	*49384906*	*--*	*--*	*--*
7	*The Hingir Rampur Coal Company Ltd.*	*--*	*--*	*--*	*86531088*	*--*	*--*
8	*First Financial Services Ltd.*	*--*	*--*	*--*	*60188476*	*--*	*--*
9	*Sequent Scientific Ltd.*	*--*	*--*	*--*	*2229662*	*--*	*--*
10	*Indian Infotech & Software Ltd*	*--*	*--*	*--*	*--*	*423446797*	*--*
11	*Anukaran Commercial*	*--*	*--*	*--*	*--*	*192024968*	*--*
12	*Radford Global Limited*	*--*	*--*	*--*	*--*	*221641340*	*--*
13	*Rander Corporation Limited*	*--*	*--*	*--*	*--*	*93401543*	*8949084*
14	*Parag Shilpa Inv Ltd.*	*--*	*--*	*--*	*--*	*--*	*81417840*
15	*Rajlaxmi Industries Limited*	*--*	*--*	*--*	*--*	*—*	*234870686*
Total		***2005651***	***368643005***	***176861949***	***148949226***	***930514648***	***325237610***

14. The AO pointed out that during the course of search, statement of Sh. Manish Arora was recorded who is an employee of Sh. Raj Kumar Kedia. In his statement, he had admitted that seized documents so found pertained to the records of cash received from various beneficiaries to whom bogus Long Term Capital Gains

(LTCG) was arranged by Sh. Raj Kumar Kedia. The relevant portion of the said statement has been incorporated by the AO in para 4.2.5 of the assessment order, for the cost of repetition, the same is not reproduced herein. The AO on the basis of the statement of Sh. Manish Arora held that Sh. Raj Kumar Kedia is an accommodation entry provider who took cash from various persons in order to provide them accommodation entry of bogus Long Term Capital Gain and that the said statement of Sh. Manish Arora was confronted with Sh. Raj Kumar Kedia during the search when his statement was recorded. In his statement he had confirmed that Sh. Mainish Arora was his employee and the statement given by him was correct. The AO reproduced the relevant portion at page nos. 12 to 15 of the assessment order which read as under:

"Q.11 Please state about your interest, stakes, business involvement and any other relation with the following companies?

1. Rander Corporation Ltd.
2. Mishka Finance & Trading ltd.
3. MatraKaushal Enterprises Ltd.
4. Vishjyoti Trading Ltd.
5. P.S. Infrastructure & Services Ltd.
6. Pine Animation Ltd.
7. Global Infratech& Finance Ltd.
8. First Financial Services Ltd.
9. Splash Media Infra Ltd.
10. Anukaran Commercial Enterprises Ltd.
11. DB (International) Stock Brokers
12. Ms Unisys Software & Holding Industries Ltd.
13. Blue Circle Services Limited.
14. M/s Action Financial Services
15. Fact Enterprises Ltd.

16. Grandma Trading Agencies Ltd.
17. Parikh Herbal Ltd.
18. Premier Capital Services
19. Rutron International Ltd.
20. Shalimar
21. Avance Technologies Ltd.
22. Karma Industries Ltd.
23. Partani Appliances Ltd.
24. LN Industries Ltd.
25. M/s Shree Shaleen Textiles Limited
26. Ws Radford Global Limited
27. JMD Telefilms Industries limited
28. Dhanleela Investments & Trading Company Limited
29. SRK Industries Ltd.
30. DhenuBuildcon Infra Limited.
31. Indo Pacific Software Ltd.
32. Surabhi Chemicals & Investments Ltd.
33. *Sharp Trade Financial Ltd.*
34. Naveau Multimedia Ltd.

Please tell who is controlling these companies and above their business profile and nature of activities carried out by these companies one by one? Please also furnish the address of these companies from where these companies are operating?

"Ans. Sir, I would like to state that most of these companies are paper companies controlled and managed by various accommodation entry operators. These Companies are not doing any actual work but are being used for providing long term (LT) entries to various beneficiaries. Company wise details along with my business interest and name and address of the entry operators controlling these companies as per above list are as under:

7. First Financial Services Ltd: I have arranged investment in the shares in this company on behalf of

some of the beneficiaries who wanted to reap LTCG in future out of the funds received from them for the purpose. This company is controlled and managed by Mr. Anil Aggarwal (Mobile number 9820066768) having office in Malad, Mumbai He is an entry operator functioning from Mumbai.

8. Anukaran Commercial Enterprises Ltd. : I have arranged investment in the shares in this company on behalf of some of the beneficiaries who wanted to reap LTCG in future out of the funds received from them for the purpose. This company is controlled and managed by Sh. Suresh Jajodia. He is an entry operator and having his office and residence in Andheari and having its Mobile number 9987411344.)

Q. 13. I am giving you last opportunity to tell in detail about the nature of business activities carried out by you or your family member's along with the sources of your income?

Ans. Sir, I have told about my business activities and the sources of income of me and my family members in my reply to question no 4. In my reply to question no4, I forgot to mention at that time about my one more business activity of giving accommodation entries to various beneficiaries. The commission income earned in cash from the activities of giving accommodation entries has also not been told by me earlier. Therefore, I stand corrected now and I am accepting that I am indulging in the business of providing accommodation entries and earning commission income in cash.

Q. 17. Kindly provide details of some persons who used to provide cash on behalf of major beneficiaries & who used to collect cash from you.

Ans. Some persons who provide cash on behalf of major beneficiaries are:

a) Pankaj** Tewari for **Bhushan Steel Ltd.

b) Suresh Gupta in Delhi, Alkesh Sharma in Kolkata for Bhushan Power and steel limited

c) G D Gupta for Dhanuka Agritech Ltd

d) Akash Jain for Ajit Industries

e) Harinder Singh for Master Trust Group some persons who generally collected cash were:

a) Shivam for Jagdish Purohit

b) Other transfers of cash were generally through angadiya

Q. 18 Who were the main persons in the groups of major beneficiaries who requested you for accommodation entries in shape of LTCG, OT, etc

*Ans. The persons from whom I got request for accommodation entries in shape of LTCG, OT, etc in major groups were **Shri Brij Bhushan Singal and Sh. Neeraj Singal for Bhushan Steel Ltd.,** Shri Sanjay Singal for Bhushan Power & Steel Ltd., Shri Akash Jain for Ajit Industries Ltd., Rajender Singhaniaji of Ludhiana for Master Trust and Shri Mahendra Dhanuka in Dhanuka Agritech Ltd.*

Q. 23 Please give the list of beneficiaries of various accommodation entries which have been given through your paper concerns or which have been arranged by you from other entry operators from 2003 to till date. I am again reminding you that this statement is being taken on oath u/s 132(4) of the IT Act, 1961.

Ans. I have given LT entries, OT entries, Unsecured loan entries.ST entries etc. to various beneficiaries. These accommodation entries have been given through my paper concerns or I have arranged

above accommodation entries from various entry operators for different beneficiaries after charging fixed percentage of commission. I have helped the following beneficiaries in bringing back their unaccounted cash into their books of accounts through the earlier explained modus operandi:

1) Bhushan Steel Ltd., group companies of Bhusan steel and their promoters.

Q.No. 27: I am showing you statement of Shri Manish Arora S/o Shri Ram Lal Arora R/o A-125, FF, Shardapuri Ramesh Nagar, New Delhi-110015 recorded on oath under section 132(4) of the I.T. Act, 1961 during the search proceedings at D-45, back side ground floor, Saraswati Garden, New Delhi-110015. During his statement, he has stated that he is your employee since last 20 years and getting salary of Rs.25,000/- p.m. and brokerage and commission of Rs.25,000/- p.m. in cash. Please go through the complete statement of Sh. Manish Arora and tell since when he is your employee, how much salary he gets and what is his designation and work profile in your business.

Ans. (After 40 mnts) Yes Sir, I have gone through the complete statement given by Sh. Manish Arora. He is my employee since last 20 years and maintains books of accounts related to my business activities since beginning. He is maintaining the record, books of accounts, cash receipt and payment details of my business of providing accommodation entries since last 7 years. I used to pay him salary by cheque till March, 2013 but, he is getting salary of Rs. 25,000/- p.m. and brokerage and commission of Rs.25.000/- p.m. -which has now been increased to Rs. 60,000/- p.m. in total. The entire salary is paid to him in cash.

Ques.30. During the course of search at this premise i.e. back side of D-45, Ground Floor, Saraswati Garden, New Delhi, your books of accounts related to the business of providing accommodation entries have been found maintained in 3external hard discs, 14 pen drives and some loose papers which have been annexerised from Sl. No. 1 to 38 of Annexure-A of Panchnama dated 15.6.2014. These hard disks, pen drives and loose papers (Annexure A) were in the custody of Sh. Manish Arora which were kept in an almirah and were seized. I am showing you the loose papers from Sl. 1 to 26, Sl. No. 31 to 35 and Sl. 37 to 38 of the said annexure, please go through every annexure and confirm that these annexures are related to your business and transactions entered on these documents pertains to your business of providing accommodation entries. (One hour break given forgoing through the documents).

Ans. (After one hour)- Sir, I have already told you that books of accounts and other details of my business of providing accommodation entries are maintained by Mr. Manish Arora at my instructions. These details of financial transactions cash receipt and payment details and other books of accounts are maintained in soft copy in external hard discs and pen drives. As per my instructions he keeps these hard discs and pen drives at my back office, i.e. back side of D-45, Ground Floor, Saraswati Garden, New Delhi. I have gone through all the documents from the Sl. 1 to 26, Sl. No. 31 to 35 and Sl. 37 to 38 of the said annexure, and Icon firm that financial transactions entered and recorded are related to my business of providing accommodation entries. Some of the documents are written in handwriting of Sh. Manish Arora and have details related to day today receipts and payments including cash of my business of providing accommodation entries."

15. The AO on the basis of the aforesaid statement observed that Sh. Raj Kumar Kedia received unaccounted cash from various beneficiaries, including promoters of BSL group, in order to provide them accommodation entries such as bogus Long Term Capital Gain and that during post search enquiries, statement of Sh. Mainish Arora was again recorded under oath on 08.07.2014 and 09.07.2014 asking him for the details of data seized related to BSL group in the records of accommodation entries provided by and found from back office premises of Sh. Raj Kumar Kedia. In his statement, Sh. Mainish Arora decoded ledgers. Some part of which is reproduced by the AO at page nos. 16 & 17 of the assessment order was as under:

- *NP - This account refers to account of Bhushan Steel group. Here NP acronym refers to Nehru Place where corporate office of Bhushan Steel group was situated.*

- *Ankur Agarwal - This account refers to Sh. Ankur Agarwal, an employee of Bhushan Steel group. Here an opening balance of liability of Rs. 7.70 lakhs of Sh. Ankur Agarwal is there as on 01.04.2013. Cash payment to him under the name Thakur is also mentioned.*
- *NP_Ankur - This account has already been converted in NP account explained earlier. This account is merely an adjustment account and ultimately this account is vanished after adjustments with NP account.*

- *Nitin Johari - This account refers to account of Sh. Nitin Johari who is an employee (CFO) of Bhushan Steel group. He has made some payment on 26.05.2014 to Shrim Investment Solutions Private Limited of Sh. R. K. Kedia, the purpose and accounting of which shall be furnished within two days. Further on 02.06.2014 he*

invested in the shares of Action Financial Services for reaping bogus LTCG in future.

- *Pankaj Tiwari - This account refers to Sh. Pankaj Tiwan (phone no. 9560180124) an employee of Bhushan Steel group. This account is also an adjustment account just as account of NP_Ankur where mostly cash payments at the end or immediate beginning of the month are temporarily entered. These entries are finally adjusted with and are reflected in main account of Bhushan Steel group i.e. "NP".*

- *Pankaj Tiwari_Loan - This account refers to Sh. Pankaj Tiwari, an employee of Bhushan Steel group. The entries related to this account are known to Sh. R. K. Kedia only since I used to punch entries in this account on the instructions of Sh. R. K. Kedia only. On 03.05.2014 RTGS payment of Rs. 8 lakhs has been received from Smt. Seema Tiwari by Shrim Software Private Limited, the accounting and purpose of the same shall be furnished within two days.*

- *Pankaj Agarwal - This account refers to Sh. Pankaj Agarwal, an employee of Bhushan Steel group. The entries related to this account are known to Shri R.K.Kedia only since I used to punch entries in this account on the instructions of Sh. R. K. Kedia only. However as per my knowledge, this account refers to some loan from Sh. Pankaj Aggarwal or Bhushan Steel group since in F. Y. 2013-2014 in this ledger, there are cash payments to and from him and interest to be paid for cash loan is regularly being credited to him. However complete details of this person can be obtained from Sh. R. K. Kedia only."*

16. The AO observed that the decoding of ledger by Sh. Manish Arora revealed that the accommodation entries were taken by the Signal family and Pankaj Tewari who was an employee of Bhushan

Steel Ltd. and who was delivering cash to Sh. Raj Kumar Kedia and the assessee was beneficiary of such entries. The AO further observed that the statement of the assessee was recorded on oath on 13.06.2014 u/s 132(4) of the Act wherein in response to the Question No. 25, the assessee stated that Mr. Ankur Agarwal an employee of BSL group was the person who dealt in trading of shares of promoters of M/s BSL. The AO also observed that statement of Mr. Ankur Agarwal revealed that Sh. Neeraj Singal was heading the team for such trading for the BSL group and obtained bogus Long Term Capital Gain by pre-arranged trading of shares of those non-descript listed companies. It has further been observed that during the course of search on Sh. Raj Kumar Kedia group of cases, the statements of director of the penny stock companies were also recorded, those statements are incorporated at page nos. 19 to 26 of the assessment order, for the cost of repetition, the same are not reproduced herein. The AO further observed that during many searches conducted by the Directorates of Income Tax (Inv.) of Mumbai and Kolkata, it had been established and brought on record that Sh. Jagdish Purohit was an accommodation entry provider and was involved in providing different types of accommodation entries including those of bogus Long Term Capital Gain to various beneficiaries in lieu of some commission in cash. Relevant portion of his statements has been reproduced by the AO at page nos. 26 to 29 of the assessment order, for the cost of repetition, the same is not reproduced herein. The

AO also observed that Sh. Suresh Jojodia was an operator of M/s Anukaran Commercial Enterprises Ltd. and his statement was recorded on 10.06.2015 during the course of survey on M/s Anukaran Commercial Enterprises Ltd. The relevant portion of his statement has been reproduced at page nos. 29 to 32 of the assessment order, for the cost of repetition, the same is not reproduced herein.

17. The AO on the basis of statement of Sh. Raj Kumar Kedia, directors of companies and accommodation entry providers, was of the view that pre-arranged trading in shares companies had been done in which the family members of promoters of BSL group obtained bogus Long Term Capital Gain and that the accommodation entry providers themselves admitted that shares of their respective companies were artificially traded to provide bogus Long Term Capital Gain to various beneficiaries and BSL group was one of the beneficiary of bogus Long Term Capital Gain from those scripts. The AO observed that during the course of search on Kedia group of cases, a number of incriminating evidences, loose documents/PAN drives/HDDs were found and seized, which strengthened the allegations that the shares of those listed companies had been used for pre-arranged trading in order to provide bogus Long Term Capital Gain to various beneficiaries including family members of promoters of M/s BSL group. The detail of alleged incriminating material seized from the premises of

Sh. Raj Kumar Kedia and from premises of Sh. Ankur Aggarwal was as under:

<table>
<tr><th>S.No.</th><th>Premise/ Party</th><th colspan="2">Annexure/ Page No.</th><th>Description of document seized</th></tr>
<tr><td>1.</td><td>D-45, Saraswati Garden, New Delhi, Party : MNS</td><td colspan="2"><table><tr><td>Annexure</td><td>Page No.</td></tr><tr><td>E-l</td><td>4, 5 & 7</td></tr><tr><td>E-2</td><td>2, 4, & 9 to 11</td></tr><tr><td>E-4</td><td>19 to 21</td></tr><tr><td>E-5</td><td>205</td></tr><tr><td>E-6</td><td>6 to 8, 27 to 31 & 33 to 48</td></tr><tr><td>E-11</td><td>3</td></tr><tr><td>E-12</td><td>6, 9, 22 & 23</td></tr><tr><td>E-13</td><td>3, 4, 6, 11, 13 to 16 & 31</td></tr><tr><td>E-14</td><td>33, 35, 47, 49, 54, 55 & 56</td></tr><tr><td>E-l 8</td><td>3, 5, 7, 9, 11, 13 & 15 to 18</td></tr><tr><td>E-19</td><td>22</td></tr><tr><td>E-20</td><td>4, 6, 8, 10, 12, 14, 16 to 18 & 31</td></tr><tr><td>E-21</td><td>186 to 169</td></tr><tr><td>E-23 & 24</td><td>NP Ledger</td></tr><tr><td>E-29</td><td>31, 33, 46, 47, 48, 53, 54 & 55</td></tr><tr><td>E-31</td><td>98 & 107</td></tr><tr><td>A-35</td><td>1 to 15</td></tr><tr><td>A-l</td><td>85, 86 & 88</td></tr><tr><td>A-2</td><td>6, 7, 45, 46, 47, 50, 51 & 52</td></tr><tr><td>A-8</td><td>24</td></tr><tr><td>A-9</td><td>15</td></tr></table></td><td>These seized documents contains the investment details of family members of BSL Group in various penny stock companies, cash payment to Shri Raj Kumar Kedia and transaction of their bogus LTCG earned with the help of Shri Raj Kumar Kedia.</td></tr>
<tr><td>2.</td><td>Flat No. 60, Pink partments, Sector 18-B, Dwarka, New Delhi Party: CBR 4</td><td colspan="2"><table><tr><td>Annexure</td><td>Page No/Folder</td></tr><tr><td>A-1</td><td>Excel sheet (ABCD.xls) (Jobb.xls) (Comm.xls) and other folders</td></tr></table></td><td>This pen drive contains details of LTCG book by Shri Brij Bhushan Singal, Shri Neeraj Singal, Smt. Ritu Singal & Smt. Uma Singal from penny stock companies M/s Rander Corporation Limited, M/s Anukaran Commercial Pvt. Ltd. and many other companies. Name of brokers & entry operators are also present in the sheet of this pen drive.</td></tr>
</table>

18. The AO observed that the material found and seized from the premises of Sh. Raj Kumar Kedia contains ledgers of one NP (acronym for óNehru Placeô, referring to Bhushan Steel group since earlier, the corporate office of Bhushan Steel group was at Nehru Place) and many other entries under the narration of persons related to BSL group such as Sh. Neeraj Singal, Sh. B. B. Singal, Smt. Uma Singal and Smt. Ritu Singal. He also observed that the entries in the names of family members of promoters of BSL group in the books of Sh. Raj Kumar Kedia revealed that many persons/entities related to BSL group including its promoter family members were among the beneficiaries of bogus Long Term Capital Gains obtained by pre-arranged trading in shares of many non-descript listed companies through Sh. Raj Kumar Kedia. He also observed that the record of the aforesaid seized material was maintained by Sh. Manish Arora who is an employee of Sh. Raj Kumar Kedia whose statement was recorded on oath, in all the statements he admitted that the documents so found and seized pertained to the records of cash received from various beneficiaries to whom such accommodation entries of bogus Long Term Capital Gains were arranged by Sh. Raj Kumar Kedia who also identified many of the beneficiaries in such records, one of which was BSL group. The AO held that these transactions which recorded in the ñNPò ledger matched with the trade transactions obtained from BSE and the transactions recorded, were in coded language and a dot (.) had been put after two zero (00) while recording the transactions. Thus,

the total amount of transaction would be Rs.83,61,917/- which was recorded as Rs.83,619.17. Thereafter, the AO discussed the analysis of seized data found from the premise of Sh. Ankur Aggarwal at page nos. 35 to 39 of the assessment order, for the cost of repetition, the same is not reproduced herein. The AO observed that the above two sheets namely Jobb.xls & Comm.xls were also extracted from the pendrive A-1 seized from the residential premises of Sh. Ankur Aggarwal. In the above sheets, names of the persons/entities such as R.K. Kedia HUF, Bakul Bhai, Krishan Khadarai, Sirish & Jagdish Purohit were mentioned. Those persons were, accommodation entry providers as stated by Sh. Raj Kumar Kedia in his statement and the other names such as Baba Boothnath, Krishna Securities & Anand Rathi etc. were the name of the brokers & entry providers who were involved in the business of accommodation entry of Long Term Capital Gains from Sh. Raj Kumar Kedia and other entry operators. The AO also mentioned that during the course of assessment proceedings, a summon u/s 131 of the Act was issued to Sh. Ankur Aggarwal to appear on 22.12.2016. However, Sh. Ankur Aggarwal filed his retraction on 20.12.2016 from his statement recorded in the course of search and did not appear on the date given u/s 131 of the Act. The AO also observed that the assessee was asked to produce Sh. Ankur Aggarwal but he could not produce and had not given any logical reason from retracting his statement recorded during the course of search. The AO referred to the following case laws:

- *Roshan Beevi Vs Joint Secretary to the Govt. of Tamil Nadu, Public Deptt. Etc. (1983) LW (Crl. 289*
- *K.T.M.S. Mohammad Vs VOI (1992) 65 Taxman 130 (SC)*
- *Narayan Bhagwant Roa Gosavi Balajiwale Vs Gopal Vinayak Gosavi AIR (1960) SC 100*
- *Ramji Dayawal & Sons P. Ltd. Vs Invest Import AIR (1981) SC 2085*
- *Pullangode Rubber Produce Co. Ltd. Vs State of Kerala (1973) 91 ITR 18 (SC)*
- *Y. Ramachandra Reddy Vs Addl. CIT(Assessmetn) (2015) 57 Taxmann.com 43 (AP & Tel)*
- *CIT Vs Lekh Raj Dhunna (2012) 20 Taxmann.com 554 (P&H)*
- *CIT, Kozhikode Vs O. Abdul Razak (2012) 20 Taxmann.com 48 (Ker.)*
- *Nathu Lal Vs Durga Prasad AIR (1954) SC 355, 358*
- *Union of India Vs Moksh Builders and Financiers Ltd. AIR (1997) SC 409, 415*
- *Biswanath Prasad Vs Dwarka Prasad AIR (1974) SC 117, 119*
- *Bharat Singh Vs Mst. Bhagirathi AIR (1966) SC 405*
- *Thiru John Vs Returning Officer AIR (1977) SC 1724, 1726*

19. The AO was of the view that the retraction of Sh. Ankur Aggarwal was baseless which was filed to save the assessee from using the evidences recovered from his premise. Therefore, the retraction filed by Sh. Ankur Aggarwal was not accepted. The AO in paras 4.4 to 4.4.6 discussed the analysis of financials and trade data to establish that penny stock companies had been abused for generating illicit Long Term Capital Gains, he observed that the manipulation in the market price of the shares of the company was evident from the graphical presentation which he had discussed at

page no. 43 the assessment order. He also observed that in the investigation report, ñProject bogus Long Term Capital Gain/Short Term Capital Loss through penny stock companiesò of Kolkata Directorate of Investigation, had analyzed 84 scripts in which manipulative trading had been done and the company M/s Prraneta Industries Ltd. was part of that report which strengthen that manipulative trading had been done in those scrips. The AO also made the analysis of exit providers in paras 4.5 to 4.5.2 of the assessment order and observed that many of the dummy buyer companies were buying shares of listed scrips at elevated prices in order to provide bogus Long Term Capital Gain and profitable exit to initial preferential allottees of penny stock scrips. The AO mentioned that statements of some of the directors and controllers of some of such dummy buyer companies were also recorded in which they deposed under oath that their companies did not have any actual business and bank accounts thereof were used to provide accommodation entries of various types to various beneficiaries including that of bogus ñLong Term Capital Gainò by purchasing shares of listed companies at elevated price in lieu of equivalent cash amount from the beneficiaries apart from some commission in cash. The AO reproduced the statement of the exit provider Sh. Devesh Upadhyay recorded on 30.12.2014 at page nos. 48 to 52 of the assessment order, for the cost of repetition, the same is not reproduced herein. The AO observed that one Sh. Bikash Sureka, 7, Lyons range Kolkata had been involved in trading in shares of

many of those scripts and a survey u/s 133A of the Act was conducted at the residence of Sh. Bikash Sureka. During the course of survey, it came to the notice that the premises was within the complex of Kolkata Stock Exchange and was being run by Sh. Bikash Sureka, who was controlling some of the companies by introducing his employees as dummy directors in those companies and the work of those companies was nothing but to provide accommodation entries of various types including accommodation entries of bogus Long Term Capital Gain which had been revealed by Sh. Raj Kumar Kedia also in his statement. Therefore, all the facts were in line with the investigations done by SEBI and Investigation Wing of Income Tax Department, thereby confirming that pre-arranged trading in many listed scripts had taken place and beneficiaries including family members of promoters of BSL group had taken Long Term Capital Gain to evade income tax.

20. The AO discussed the analysis of trading data obtained from BSE and found that M/s Dreamlight Exim Pvt. Ltd. had provided profitable exit to single family members in some scripts which had been discussed by the AO at page nos. 53 to 58 of the assessment order, for the cost of repetition, the same is not reproduced herein. The AO mentioned that bank statements of those purchaser companies namely M/s Duari Marketing Pvt. Ltd. and M/s Dreamlight Exim Pvt. Ltd. also called for analysis by the Investigation Wing and cash trail was prepared which revealed that there were regular back to back transactions of the same amount,

i.e. credit and debit of the amount and same date(s)/following date (s) with no other deposits and transactions which was typical of entry providing companies, funds through whose bank accounts were utilized to provide accommodation entries to various beneficiaries, as confirmed by the director in those companies, namely, Sh. Sanjoy Dey & Sh. Devesh Upadhyay. The AO mentioned some instances of contents of bank statements, where such frequent fund had taken place which are tabulated at page nos. 59 to 76 of the assessment order, for the cost of repetition, the same is not reproduced herein. On the basis of those tables, the AO was of the view that the exit providers were not genuine as there was no proper compliance to the notices issued u/s 133(6) of the Act and that from trade data obtained from BSE, it had been observed that some companies controlled by Sh. Raj Kumar Kedia such as M/s Esha Securities Ltd., Sh. Gauri Buildtech Pvt. Ltd., Shrigauri Realtors Pvt. Ltd., M/s Shrim Investment Solutions Pvt. Ltd., M/s Krishna Securities Ltd. and even Sh. Raj Kumar Kedia, had purchased shares from family members of promoters of BSL Group to provide them profitable exists. The AO also observed that the various share brokers were the bridges between stock market and investors who had done trading for various paper/bogus companies, which had no business or establishment, which clearly implied that the share brokers were hands in glove with the paper/bogus companies in the whole scheme. He also observed that those brokers were covered under search and survey action by Directorate

of Kolkata Investigation, and statements of key persons were recorded, in their statements some of them had accepted that they were involved in this scam and the others accepted that they had allowed their trade terminals to be used by the entry operators for providing bogus ñLong Term Capital Gainò, accommodation entries in the non-listed paper scripts. The AO mentioned the name of following companies:

i. M/s Calcutta Stock Exchange Ltd.
ii. M/s Gateway Financial Services Ltd.
iii. M/s SMC Global Securities Ltd.
iv. M/s Anand Rathi Share & Stock Brokers Ltd.
v. M/s Comfort Securities Ltd.
vi. M/s Korp Securities Ltd.
vii. M/s Religare Securities Ltd.
viii. M/s Destiny Securities Ltd.
ix. M/s Eureka Stock & Share Broking Services Ltd.
x. M/s Baba Boothnath Trade & Commerce Pvt. Ltd.
xi. M/s Fort Share Broking Pvt. Ltd.
xii. M/s RNA Capital Markets Ltd.

21. The AO pointed out that when confronted with the evidences gathered by the department, the beneficiaries of Long Term Capital Gain provided by Sh. Raj Kumar Kedia and other entry operators disclosed & surrendered additional income. Some of them who earned through Sh. Raj Kumar Kedia were following:

i. Smt.Kanika Agarwal Wife of Sh. Charchit Agarwal, Resident of 81, Anand Lok, New Delhi
ii. Rajdhani Floor Mills Group of New Delhi
iii. M/s Delhi Test House Group
iv. M/s Genesis Finance Group
v. M/s Kamdhenu Ispat Ltd. Group
vi. M/s Ajit Industries Group

vii. M/s Neha Jewellers Group

22. The AO also pointed out that SEBI had carried out investigations in few listed companies on the basis of common trading pattern and identical developments like stock splits, preferential allotments, insignificant economic activity and exorbitantly high stock prices, some of those companies investigated by the SEBI were as under:

Sr. No.	*Name of the Company*
1.	*M/s Radford Global Ltd.*
2.	*M/s Maa Jagdambe Tradelinks Ltd (MJTL)*
3.	*M/s Mishka Finance and Trading Ltd(MFTL)*
4.	*M/s Parag Shilpa Investments Ltd (PCSL)*
5.	*M/s Surabhi Chemicals & Investment Ltd (SCIL)*
6.	*M/s Premier Capital Services Ltd. (PCSL)*
7.	*M/s Global Infratech & Finance Ltd (GIFL)*
8.	*M/s Dhenu Buildocn Infra Ltd.*
9.	*M/s First Financial Services Ltd.*
10.	*M/s DB (International) Stock Broker Ltd.*
11.	*M/s Dhanleela Investments Trading Company Ltd.*
12.	*M/s Grandma Trading & Agencies Ltd.*
13.	*M/s Matra Kaushal Enterprises Ltd.*
14.	*M/s Pine Animation Ltd.*
15.	*M/s Rajlaxmi Corporation Ltd.*
16.	*M/s Rander Corporation Ltd.*
17.	*M/s Action Financial Ltd.*
18.	*M/s Prraneta Industries Ltd.*

23. The AO pointed out that out of the above said 18 companies, BSL family and group had taken bogus Long Term Capital Gain, accommodation entries by trading shares of companies at S. Nos. 1, 3, 4, 8, 9, 14, 16, 17 & 18 and that the SEBI in its investigation had pointed out that price discovery in above companies was distorted and not in consonance with the fundamental of those

companies, most of them had resorted to preferential allotment for increasing paid up capital. The AO also pointed out that the SEBI in its order had specifically mentioned the names of the members of Singal Family and observed that those persons had been beneficiaries of dubious trading in shares of those scrips such that after preferential allotment of shares of those companies to them, the Singal Family members had been provided profitable exit once the prices of those shares rose suspiciously beyond a threshold. The AO observed that in the order of M/s First Financial Services Ltd., it was highlighted by SEBI that after preferential allotment, the Singal Family Members indirectly received the funds back from M/s First Financial Services Ltd. in the name of investment by M/s First Financial Services Ltd. or otherwise, which prima facie indicated that money received through preferential allotment was again routed to the same source i.e. Singal Family and that the SEBI also observed that those members of Singal Family had been preferential allottees in such type of companies which had a history similar to that of M/s First financial Services Ltd., implying thereby that those Singal Family members had been regularly investing in companies for namesake and the money invested by them in those companies was being returned to them indirectly. He also pointed out that in the case of M/s Radford Global and M/s M/s First Financial Services Ltd., preferential allotment shares at a miniscule price was initially made to Singal Family members even in the case of most of those scrips and within a short period of preferential allotment, a significant increase in the price of shares of those scrips was observed which continued during the period of lock in on the share allotted to the preferential allottees. The AO pointed out that it was observed by SEBI that in over 50% of the

instances of trades establishing new high price in the case of M/s First Financial Services Ltd. scrips, four entities namely, Prem Lata Nahar, Shyam Kanheyalal Vyas, Bharat Bagri Bagri and Sumitra Devi Agrawal contributed substantially in jacking up the share prices scrip and these persons were found to be connected to the broking houses through which they have traded in the respective scrips. He also pointed out that the SEBI noted in its order that the selection of scrips for trading, the trading pattern and connectivity with brokers cast doubt on the intent of those entities trading in the securities market and that the sheer number of scrips with such dubious price-rise track record in which the said entities and their connected brokers were involved also cast doubts on their conduct in the securities market. He also pointed out that on the basis of its inquiries, the SEBI noted that those persons were instrumental in contributing to the price rise to other stocks as well. The AO observed that the SEBI in its interim order dated 19.12.2014 in the case of M/s Action Financial and M/s Radford Global Ltd. restrained the members of Bhushan Group from trading in stock exchange stating as under:

> *"In order to protect the interest of the investors and the integrity of the securities market, I, in exercise of the powers conferred upon me in terms of section 19 read with section 11(1), section 11(4) and section 11B of SEBI Act, 1992, pending inquiry/investigation and passing of final order in the matter, hereby restrain the following persons/entities from accessing the securities market and buying, selling or dealing in securities, either directly or indirectly, in any manner, till further directions*.ò

And this list included the name of Sh. Brij Bhusan Singal, Sh. Neeraj Singal and Smt. Uma Singal which clearly proved that family members of M/s Bhushan Steel Group had taken accommodation entries of Long Term Capital

Gain from penny stock companies. The AO accordingly issued a show cause notice dated 30.09.2016, on the bogus Long Term Capital Gain accommodation entries received from various penny stock companies with the help of accommodation entry provider Sh. Raj Kumar Kedia and served upon the assessee. In response, the assessee vide his reply dated 14.12.2016 submitted to the AO as under:

- *"The transactions in the shares of the impugned companies entered into by the Assessee duly conform to the said conditions in as much as while they have been entered with the F/Y 2010-11 i.e. much after* 1st O*ctober, 2004 (the date on which the provisions came into force) they were also chargeable to Securities* Transaction *Tax(STT) which facts also stands duly documented and is not disputed and accordingly the long term capital gains arising to the Assessee will not form a part of the total income in his case.*

- *It should be noted that In the case of the Assessee, the purchase of shares, whether through preferential allotment or by direct purchase from the market, stands duly documented in all cases. Moreover, the sales of the securities took place through a registered broker on the NSE/BSE in accordance with the prescribed regulatory procedures, rules and applicable laws. The transactions were also, in all cases, concluded through regular banking channels. The said facts and circumstances though not necessary from the point of view of determining the taxability or otherwise under the Income-tax Act, 1961 are decisive determinants of the genuineness and validity of the transactions and their being in compliance with all the relevant statutory provisions.*

- *Further in the facts of the Assessee's case, the sale of shares was conducted online through a broker at the prevailing rate on the exchange under the BOLT platform of the Bombay Stock Exchange. It should be importantly emphasized here that in terms of the applicable, recognized and prevalent procedures*

and practices, the broker acts as the intermediary on the online market place where the identity of the counter-party (whether buyer or seller) is not disclosed/available and is consequently also not known to the party entering into the transaction. The entire transaction duly and emphatically stand documented and evidenced by contract notes/bills of the relevant brokers (Copies of which have already been filed before Your Honour)

- *Since the Assessee was not/could not be aware of the person/entity buying the shares there was no way formal, informal or even collusive, what to talk of legal whereby he could have any control to ensure that the shares could be sold to a particular person/entity. The entire trading, is based on an online, a system of matching bids and offers wherein the deal is executed when the bid price offered by the buyer matches with the offer price of the seller or vice versa. In such a regulated and formalized scenario the possibility of rigged trading to generate allegedly bogus LTCG accommodation through a syndicate of accommodation entry operators through dummy entities is not only negligible, but well-nigh impossible.*

- *Carrying on the above argument further it should be noted here that the transactions were entered into by the Assessee as an investor with a view to profit from the appreciation, whether long term/short term in the price of the underlying shares. The Assessee did not have any kind or degree of relationship/ or control with/over the said companies, save as that of a passive investor, and neither was he involved in the management thereof at any point of time what to talk of its capital market operations or influencing to any degree or extent its stock market prices. The transactions were entered into as a stock market investor on the basis of information available, the Assessee's perception and anticipation as to future price movements, performance of the Company etc. and as soon as in his opinion they reached a particular level, considered as optimal, the same were divested. The Assessee's objective was to keep a track of the prices of the securities only, which consideration formed the sole pivot for all his actions related thereto.*

- *Reliance has been sought to be placed on the phenomenal rises in the prices of the shares compared to their small gross revenue and net profit which apparently defies logic of share trading pattern of primary or secondary markets. The said argument goes against the basic grain, manner and functioning of the capital market wherein price discovery of the underlying security and its movement are the result of a set of complex, intricate and diverse set of factors, sometimes mutually exclusive, sometimes even-conflicting/competing and on almost all of whom an investor has no control. The price movement is dependent on a host of factors including the general economic sentiment, political situation, specific sectoral growth, liquidity, future growth prospects, reputation of the promoters industrial situation etc. all of which act in tandem and correlation to determine the movement of prices. Of course, the entire process Junctions within the framework of the rules/regulations of the stock exchange(s) and ever watchful eyes of the market regulator and watchdog viz the Securities and Exchange Board of India (SEBI). In this scenario particularly in a situation where the Assessee does not have any role direct, indirect or even notional in the management of the subject companies or any degree of control thereon, it cannot and does not have any role in the movement of prices of the said companies. Moreover in such a situation the Assessee cannot be a part of any wrong doing/'non-compliance including price manipulation or insider trading to which the company or any its promoters may be a part. It should be noted that in a free-market environment fluctuation in share price is a natural phenomena and cannot be made the basis for doubting any transaction for the purchase/sale of shares.*

- *By virtue of the impugned notice an attempt has also been made to arrive at a co-relation between the gross-revenue/net profit of the companies relative to the movement in the price of the underlying shares. In this connection as discussed above it may be submitted by way of a rebuttal that movement of prices of any shares is the result of the complex interplay of*

diverse even competing factors of which sale/gross revenue/ is just one solitary factor. Without prejudice to the arguments listed out above if is also submitted that the movement of prices on the stock exchange and even the various underlying indices do not function only in accordance with sales/profits. In fact, in the modem day inter connected world wherein global linkages and factors have acquired prominence, several intricate and even notional factors come into play. In fact, an analysis of the security price movements of all companies on the stock exchange would make it clear that in no case have the prices been determined solely or even majorly/predominantly by their sales/revenue/profits.

- *To sum up the genuineness of the transactions and its being compliant with all the applicable regulatory provisions can be summed up as follows:-*

(i) *The transactions have been entered into F/Y 2010-11 and are accordingly covered by the provisions of Section 10(38);*
(ii) The transactions have been subjected to STT;

(iii) The purchase and sales of shares stand duly reflected in the statutory records of relevant companies and also in the DEMAT account of the Assesses.

(iv) Purchase/preferential allotment of the shares and their sale has been done in accordance with the prescribed and applicable regulatory procedures and laws.

(v) The Assesses neither had any control over the manner in which the affairs of the said companies were conducted or any relationship with the management.

In view of the above scenario, the charge that the impugned long term capital gains arising on the sales of the various companies are bogus is denied, both factually and legally. As already stated above the transactions, being fully compliant with the provisions of the Income-tax Act as the other applicable regulatory

provisions, no cause arises to treat the same as bogus and ignores the actual and true nature of the transaction."

24. The AO after considering the submission of the assessee, rebutted the same by observing as under:

"i. In his reply, assessee is claiming that his LTCG is exempt u/s 10(38) Of the Act and same is traded through online platform on BOLT at prevailing market rate . However, assessee did not furnish any comment on evidences recovered during the course of search which clearly proves that manipulative trading has been done on these penny stock companies to misuse section 10(38) of the Act. Having claimed the exemption, the primary onus is on the assessee to prove its claim. Upon being confronted with solid evidence establishing the transaction of sale of shares of penny stock companies as sham transactions undertaken through a syndicate of entry providers mere filing of Demat account, bank account, contract notes, bills etc is not adequate to discharge the heavy onus cast on it. To prove his claim it was required to prove that the brokers through whom transactions were undertaken in stock exchange are genuine, the penny stock companies are doing real business and price rise of these companies is based on the performance and financial data of these companies and the counter parties who purchased the shares are genuine had have creditworthiness to purchase the shares on a such high price. Hence, the LTCG earn by the assessee is a SHAM transaction with the accommodation entry providers which is taxable."

The reliance was placed on the following case laws:

- *CIT Vs N. R. Portfolio Pvt. Ltd. in ITA Nos. 1018, 1019/2100, order dated 22.11.2013*
- *CIT Vs Nova Prompters and Finlease (P) Ltd. 342 ITR 169 (Del.)*
- *CIT Vs Krishnaveni Ammal 158 ITR 826 (Mad.)*
- *Madathi Brothers Vs DCIT 30 ITR 345 (Mad.)*

The AO also observed as under:

"ii. Further, in his reply, assessee has submitted that he was not aware of persons/ entity buying the shares and stated that in a regulated and formalized scenario the possibility of rigging is negligible. Further assessee in his submission stated that he did not have any relation/ control with the said companies in whom he has invested and transaction were entered on the basis of information available. In this regard it is important to mention that assessee was allotted preferential Board of directors of the companies and the preferential allottees have to attend the meeting and the issue of preferential allotment itself prove that assessee is having direct connection with the companies. Hence, assessee claim that he did not have any degree of relationship with these companies is incorrect.

iii. Further, assessee has submitted that phenomenal rise in the shares prices is due to market forces and dependent on a host of factors including the general economic sentiment, political situation, specific sectoral growth, liquidity, future growth prospects, reputation of the promoters industrial situation etc. all of which act in tandem and correlation to determine the movement of prices and stated that same was 'regulated by Securities and Stock Board of India. In this regard, detailed financial analysis of all the companies has been done in chapter financial analysis of penny stock companies. From the financials of these companies it is clear that any genuine investor will never invest in these companies. Further, the phenomenal price rise is also not market guided, and there was an artificial demand created by entry operators which is clearly visible from the financial & trading data obtained from BSE and same has already been discussed in while analysing Penny stock companies in this order above. Further, Securities and Exchange Board of India, in its order ***WTM/RKA /ISD /161*** */2014,* ***dated 19.12.2014*** *in case of M/s Radford Global Ltd and others explained the nexus of beneficiaries and entry operators involved in prices manipulation of these companies and how price discovery based on market forces kept aside. Further, the assessee is beneficiary of LTCG*

from the shares of M/s Radford Global Ltd .Relevant part of the order is reproduced here:

> *17. The transactions wherein the entities of Radford Group & Suspected Entities bought most of the shares sold by the allottees cannot be just a coincidence particularly when sellers by virtue of being allotees and prima facie connected / have nexus with Radford and its promoters/ directors and buyers are the entities connected with Radford and its observed that the shares of Radford were not in demand by the general investors of the market and saw very low volume on most of the trading days and hence could not have commanded the price as observed in Patch 1. In any market, a sudden supply, if not matched by similar demand, leads to price fall Considering the same, any rational investor would not have dumped a large number of shares -without facing the risk of a significant price fall until and unless he was sure of the demand side absorbing the supply. In this peculiar case, the entities of Radford Group & Suspected Entities created the demand against the supply from the preferential allotters. In the whole process, the principle of price discovery was kept aside and the market lost its purpose. It is evident from the above analysis that the Radford Group & Suspected Entities provided a hugely profitable exit to the allottees. This could be only possible if the allottees, Radford Group & Suspected Entities and Radford and its promoter/ directors were hand in glove with each other. The said finding is also corroborated by the fact that in few instances/cases, it is observed that the buyers are related /connected entities of preferential allottees.*

iv. In an another order, ***WTM/RKA/ ISD/ 162 /2014 in case of M/s First Financial Services Ltd*** *SEBI had restrained the assessee from trading in stock exchange which further proves that assessee was involved in this scam of bogus LTCG. Hence assessee's claim that he does not have any role direct, indirect or even notional is unacceptable. Further many of the entry operator and exit provider have accepted their role in rigging of price through circular trading. From the order of SEBI and statements*

of entry operators it is clear that assessee is beneficiary of manipulated LTCG through stock exchange with the help of Shri Raj Kumar Kedia and other entry operators.

4.10.2. The nexus between different entry providers operating from various locations has been adequately established. It is not necessary that only one entry provider works on share for jacking up the price of share. Evidence found, suggests that different entry operators worked in tandem in trading of shares of penny stock companies for jacking up the price and for final purchase.

4.10.3 It is unusual in share trading business that majority of trades are executed within minutes of placing the order, unless and until the acts of seller and buyer are artificially synchronized. The fact that trades were executed within minutes, verified from the trade data received from BSE, corroborates the finding that there was unnatural nexus between the sellers and buyers.

4.10.4 With respect to the concrete evidence showing cash transactions against accommodation entries recorded in Ledgers "NP, Ankur, and Tewari in tally seized from premise of Raj Kumar Kedia, the assessee remained silent. The assessee did not comment or offer any explanation on the merits of the evidence found, but choose to ignore it.

4.10.5 Further, Sh. R.K. Kedia has admitted on oath on 13/6/2014 that he had provided accommodation entries to the assessee group from which he earned commission, Sh. R.K. Kedia's statement was again recorded under oath on 26/3/2015 during post search proceedings and on 15.12.2016 during assessment proceedings , wherein he was confronted with the evidences gathered and he confirmed that he is an accommodation entry provider and also confirmed all the sworn statements given earlier. It is to be noted here that the strength of the present case is not only sworn statement but the incriminating evidence found & seized from the premises of Shri Raj Kumar Kedia & Shri Ankur Aggarwal and other corroborative evidences gathered from agencies such as Bombay Stock Exchange & Orders of SEBI and disclosure made

by the various beneficiaries who have taken accommodation entries of LTCG from Shri Raj Kumar Kedia. The statements only corroborate and support the primary evidence.

4.10.6 Further, it was noticed that in the submission dated 14.12.2016 the assessee did not make any comment on the contents of "NP" ledger, vide order sheet entry dated 13.12.2016 & 14.12.2016 assessee was provided other relevant seized material recovered from the premises of Shri Raj Kumar Kedia and statements of various entry provider and directors of penny stock companies to the assessee. It has been elaborated in chapter analysis of seized material above and in the show cause notice that the documents seized from possession of these entry providers contained details cash payment to Shri Raj Kumar Kedia through his employees such as Shri Pankaj Tewari, Ankur Aggarwal, Nitin Johari and Shankar Batra etc. There are plethoras of judicial pronouncements that if any entry of a seized/impounded document is tallied by the regular books of accounts, then it is deemed that all the contents of that document are true and correct. The assessee cannot simply deny commenting on the entries mentioned in these documents. These documents conclusively prove that all these entry providers and beneficiaries were working hand in glove for benefit of each other."

25. The AO, on the contention of the assessee for the cross examination of persons whose statements were relied by the department, observed that an opportunity to cross examine Sh. Raj Kumar Kedia and Sh. Manish Arora was provided to the assessee and in this regard summons u/s 131 of the Act were issued to both those persons to appear in the office of the AO. However, they did not appear which proved that there was a clear nexus between beneficiaries and the entry operators. The AO observed that the summons u/s 131 of the Act were issued to the following 15 persons:

SI. No.	*Name of the person*	*Date of issue of Summons*
1	*Shri Natwar Lal Daga*	*19.12.2016*
2	*Shri Vishu Jain*	*19.12.2016*
3	*Sanjay Kumar*	*19.12.2016*
4	*Sanjoy Dey*	*19.12.2016*
5	*Govind Prasad Aggarwal*	*19.12.2016*
6	*Devesh Upadhyay*	*19.12.2016*
7	*Amarchand Ratanlal Rander*	*19.12.2016*
8	*Shri Jagdish Prasad Purohit*	*19.12.2016*
9	*Shri Krishan Kumar Khadaria*	*19.12.2016*
10	*Shri Sajjan Kedia*	*19.12.2016*
11	*Shri Praveen Kumar Aggarwal*	*19.12.2016*
12	*Shri Praveen Agarwal*	*19.12.2016*
13	*Shri Suresh Brahmanand Jajodia*	*19.12.2016*
14	*Shri Kushal Pravin Shah*	*19.12.2016*
15	*Shri Subrata Haldar*	*19.12.2016*

According to the AO, the utmost efforts were made to provide the assessee with the opportunity to cross examine above persons but none of them responded to the summons and none attended the AOôs office. The AO also mentioned in para 4.11.4 of the assessment order that the assessee had requested for providing opportunity for cross examination of all the parties whose statements had been relied upon. The AO observed that in this case, the finding was not merely based on the oral statements given by the entry operators but also based on the various evidences in the form of electronic data and documents found independently on various dates from various locations during the course of search on Sh. Raj Kumar Kedia and other entry operators and that in their statements various entry operators and their key employees had explained the modus operandi and had explained the interpretation of the coded

entries recorded in the data/evidences found and seized, those statements corroborated the evidences found. According to the AO, the cross examination was required only where there were no documentary evidence and where the addition was made merely on the basis of statement of a third person and that in this case, solid evidences were found and the statement corroborated the evidences found. According to him, the assessee was specifically asked to cross examine Sh. Raj Kumar Kedia during the post search proceedings but he had straightaway refused. The AO reproduced relevant part of statement of the assessee recorded on 24.04.2015 which read as under:

> *"25. In view of your consistent denial of the observations that you and your family members have taken accommodation entries such as that of bogus LTCG through Shri R K Kedia or otherwise on one hand, and numerous incriminating evidences in the form of statements of various persons and documents found and seized / impounded from various premises during the course of search and post search enquiries and observations made by the revenue and intimated to you that you and your family members have been involved in pre-arranged trading in shares of many listed scrips controlled by various entry operators, in order to reap bogus LTCG in your and your family members' names, on the other hand, you are hereby been given an opportunity to cross examine Shri Raj Kumar Kedia and I or Shri Manish Arora and I or Shri Ankur Agarwal in this regard to establish / strengthen your stand. Kindly state a convenient date to you for the same so that due procedural and quasi-judicial arrangements may be made and availability of you and Shri R K Kedia and / or Shri Manish Arora and / or Shri Ankur Agarwal may be ensured for such cross examination.*
>
> *Ans.* ***I do not want to cross-examine Shri R K Kedia or Shri Manish Arora or Shri Ankur*** *Agarwal since 1 don't find any need for the same. As I have stated in my earlier statements*

and I just want to say once again that I or my family members have not reaped any bogus LTCG."

26. The AO was of the view that the cross examination was not a right and observed as under:

i. It is important to mention here that the evidence in form of electronic data was seized from premises of Shri Raj Kumar Kedia and Shri Ankur Aggarwal. These data though collected independently and from different locations, entries of these data tallied and match with each other. The assessee was confronted with all the data and evidences collected by the department. In response, the assessee did not explain or comment on merits of the evidence but merely denied the transactions with entry operators even though most of the details mentioned in the data found/seized absolutely matched with the share transactions of the assessee. The assessee further sought cross examination of the entry providers. The fact that none of the persons to whom summons were issued appeared for cross examination coupled with the fact that the assessee failed to offer any reasonable explanation on merits of the hardcore evidences establishes the unholy nexus between the entry providers and beneficiaries. It is not to be forgotten here that for the "service of providing accommodation entries for evading tax" hefty commission was charged from the beneficiaries by the entry providers which has been disclosed by Shri Raj Kumar Kedia and offered to tax. Once service is provided for money, a contractual nexus is created between the service providers and beneficiary which cannot be easily broken. Honesty in the dishonest business is the key element here. Request for cross-examination and non compliance of summons exposes the unnatural bonding between the assessee and entry operators, which is being used by the assessee to thwart income tax proceedings in the name of natural justice.

ii. Further, the Assessing Officer must place before the assessee all evidence gathered from private sources but he is not duty bound by law to give to the assessee the right to cross-examine the parties from whom the evidence was gathered. In fact, he need not

even disclose the names of the parties because in that event confidentiality of the names of the parties would not be maintained."

The reliance was placed on the following case laws:

- *Moti Lal Padampat Udyog Ltd. Vs CIT 160 Taxman 233 (All.)*
- *Satellite Engineering Ltd. Vs Union of India & Ors. (1983) ELT 2177 (Bom)*
- *DCW Ltd. Vs Collector of Central Excise*

27. The AO held that the rules of natural justice are not rigid rules, they are flexible and their application depends upon the setting and background of statutory provision, nature of the right which may be effected and the consequences which may entail its application depending upon the facts and circumstances of each case. It was stressed that natural justice is mistress and not the master of justice and that it is used to support the cause of justice, it can never be used to defeat the cause of justice. The reliance was placed on the judgment of the Hon'ble Delhi High Court in the case of CIT Vs M/s Nova Promoters & Finlease (P) Ltd. 342 ITR 169 (Del.).

28. The AO was of the view that the cross examination was not relevant and not necessary for the finalization of the assessment and observed as under:

"4.11.8 From the above discussion it is clear that cross examination is done to support the cause of justice and can never be used to defeat the cause of justice. In the present case evidences gathered prove that the assessee has taken accommodation entries. The statement of the entry providers supports and corroborates the primary evidence. These documentary evidence and the statements were provided to the assessee for its explanation. In response the assessee did not offer any explanation of the merits of the evidence but merely denied any such transactions and knowledge of existence of such evidence. The

assessee however sought cross examination of the entry providers whose statements were relied upon by the department. Summons u/s 131 were issued to 15 such persons but none responded. Having confronted with evidences indicating sham transaction, the burden of proof shifts back on the assessee to prove its case beyond doubt. There is unnatural nexus between the assessee and the entry provider to thwart and delay the assessment proceedings in the name of natural justice, it is concluded that cross examination is not relevant and not necessary for the finalization of the assessment."

29. The AO applied the principle of preponderance of probabilities by observing as under:

"4.12.2 In the instant case there are plethora of statements duly supported by evidences that the individuals of BSL group, received bogus LTCG entries from various companies managed & controlled by entry operators. Further, the investments were made by the individuals of BSL Group in shares of various penny stock companies which were not doing any meaningful business and even the earning per share was minimal. No prudent investor will ever invest huge sums in a company which has no history of declaring dividends and do not have sound financial condition.lt is pertinent to mention here that in none of the investment by any person of the BSL group, losses have been incurred by them, in fact in all the transactions of sale of shares of these penny stock companies huge abnormal profits has been earned, which is not possible in normal course of investment. More so, in the various investigations most of such companies were found to be managed and controlled by various entry operators. The entry operators were in the habit of deleting the old records so as to leave no trace/trail in case of stern action by the department. As a result, evidence indicating sham transaction by all the investors were not founded by the department, but the pattern of investment, the modus operandi adopted is largely same for 100% of investors. The rate of return, the pattern of movement of funds for layering, non existence of genuine business activities of such investors etc.

safely lead to conclusion that LTCG received from these penny stock companies is bogus and taxable."

The reliance was also placed on the judgment of the Hon'ble Supreme Court in the case of Sumati Dayal Vs CIT (1995) 125 CTR (SC) 124.

30. The AO observed that in the assessee's case, it had been established that the assessee indulged in sham transactions to receive back his unaccounted money in the garb of exempt Long Term Capital Gain. Therefore, the total Long Term Capital Gain of the assessee against those bogus/sham transactions had to be treated as unexplained income of the assessee alongwith the unaccounted commission expenditure @ 6% of the total Long Term Capital Gain for arranging those entries. The AO determined the total bogus Long Term Capital Gain for the year under consideration at Rs.20,05,651/- and by adding 6% of the said gain towards commission expenses amounting to Rs.1,20,339/-. Accordingly, the AO made the addition of Rs.21,25,990/- on account of bogus Long Term Capital Gain.

31. The AO further observed that a search and seizure operation was conducted in the case of Sh. Rajendra Jain Group, Sh. Sanjay Choudhary Group and Sh. Dharmchand Jain Group on 03.10.2013 wherein the investigation conducted had proved that the above mentioned persons were engaged in providing accommodation entries to various beneficiaries and assessee was also one of the beneficiary of such accommodation entry. He also observed that the statements of the key persons of the aforesaid group were recorded on oath wherein they admitted that all the concerns controlled and managed by them were not doing any real trading in diamonds but indulged in paper transactions

only. The AO reproduced the statement of Sh. Rajendra Jain at page nos. 112 to 117 of the assessment order, for the cost of repetition, the same is not reproduced herein. The AO on the basis of the statement of Sh. Rajendra Jain was of the view that Rajendra Jain Group was involved in providing bogus bills of diamond jewellery to the various beneficiaries and had received back the equal amount of cash. He made the addition of Rs.33,32,905/- in the hands of the assessee on account of purchases of the diamond jewellery from M/a Kriya Impex Pvt. Ltd. (Company controlled by Rajender Jain Group). Accordingly, the income was assessed at Rs.126,44,98,755/- as against the income declared by the assessee at Rs.125,90,39,860/-.

32. Being aggrieved the assessee carried the matter to the ld. CIT(A) who passed the common order dated 29.12.2017 in the case of all the assessees under consideration. The assessee challenged the validity of assumption of jurisdiction de horse incriminating material found during the course of search and that the jurisdiction u/s 153A of the Act was vitiated since no incriminating document pertaining to the year under consideration had been found during the course of search. It was stated that on the date of search i.e. 13.06.2014, assessment proceedings for the assessment year under consideration i.e. assessment years 2010-11 to 2012-13 had already been completed u/s 143(3) of the Act and no incriminating material had been found during the course of search with respect to those years. It was further submitted that as per the provisions contained u/s 153A of the Act, where an assessment order had already been passed for a year within the relevant six assessment years, the AO is duty bound to reopen those proceedings and reassess the total income by taking note of the undisclosed income, if any, unearthed during the search. It

was further stated that the legislative intent behind incorporating the said provisions into statute book was to establish a live link / undeniable nexus between some incriminating material / document etc. found /unearthed / discovered in the course of search u/s 132 of the Act and undisclosed income arising therefrom. It was contended that the provisions of law, as enshrined in Section 153A of the Act and as interpreted by various Courts including the Jurisdictional High Court, from time to time, in a number of cases, clearly laid down that only those assessment proceedings which were pending before an Assessing Officer on the date of initiation of the search shall be abated and merged into assessment proceedings initiated u/s 153A of the Act and that undoubtedly, in such cases, the scope of assessment is wide open and would cover matters reflected in the original return of income and also matters reflected from the seized material in the course of search u/s 132 of the Act. However, importantly and pertinently it should be noted that completed proceedings will not merged with the proceedings initiated u/s 153A of the Act but will survive and their sanctity inviolably to be respected unless indelibly violated by any incriminating material found during the course of search u/s 132 of the Act, to put it differently completed proceedings u/s 143(3) of the Act or even u/s 143(1)(a) of the Act can be interfered with by proceedings u/s 153A of the Act only on the basis of some positively incriminating search material found during the course of search action u/s 132 of the Act. It was further contended that since no incriminating document pertaining to the year under consideration had been found during the course of search, no cause lies for the issue of the notices and resort to the provisions of Section 153A of the Act. The

reliance was placed on the judgment of the Hon'ble Delhi High Court in the case of CIT (Central)-III Vs Kabul Chawla (2015) 61 Taxmann.com 412.

33. It was submitted that since in this case no incriminating document/material or information had been unearthed/discovered in the search operation u/s 132A of the Act, the completed assessments cannot be interfered with and accordingly the assessment order was bad in law void and infructuous. The reliance was placed on the following case laws:

- *CIT Vs Anil Kumar Bhatia (2012) 24 taxmann.com 98 (Del.)*
- *CIT Vs Chetan Das Lachman Das (2012) 25 taxmann.com 227 (Del.)*
- *Sanjay Aggarwal Vs DCIT, Central Circel-5, New Delhi (2014) 47 taxmann.com 210 (Del.-Trib.)*
- *Smt. Rashmi Wadhwa Vs DCIT, Central Circle-8, New Delhi in ITA No. 5184/Del/2014, order dated 18.01.2016*
- *M/s Siriago Pharma (P) Ltd. Vs DCIT, Central Circle-3, Jaipur in ITA No. 1010/JPI/2013, order dated 13.01.2016*
- *DCIT, Central Circle-23 Vs Sh. Himanshu B. Kanakia in ITA No. 3187/Mum/2014, order dated 18.01.2016*

34. As regards to the addition of Rs.20,05,651/- on account of disallowance of Long Term Capital Gains earned by the assessee and the commission of Rs.1,20,339/-, it was submitted that the action of the AO was based on various arguments/evidences/investigations as discussed in the body of the assessment order including results of search/survey actions carried out on various alleged entry operators, the statements of the different persons recorded, hard as well as soft data found therein, the seemingly irrational decision to invest in the shares of an alleged paper company, the somewhat unusual movement in the stock market prices of alleged penny stocks, the results of investigations/enquiries carried out by the Investigation Wing of the Income-tax Department across the

country, the orders passed by various other statutory bodies including the Securities and Exchange Board of India, the statements of the so called Dummy Directors of the alleged Penny Stock Companies, the nature of transactions in the books of various companies, the disclosures made by various parties having similar transactions etc. in addition to alleged incriminating documents and findings based on the search u/s 132 of the Act on the BSL group. It was further submitted that the said findings had also been sought to be supported by legal principles such as preponderance of probabilities and the denial of the right to cross-examination of the persons whose statements had been used to the detriment of the assessee, on the basis of which it had been rather unfairly and unjustly concluded that the Long Term Capital Gain was allegedly bogus. It was stated that the assessee had earned Long Term Capital Gains (LTCG) of Rs.20,05,651/- on which the Securities Transaction Tax (STT) had been duly paid and the same was exempt u/s 10(38) of the Act since all the conditions specified under said Section for grant of exemption were duly satisfied. However, the AO ignoring the specific provisions of law and relied on various reasons & factors including statements of various persons, analysis of the financial and trade data of the companies etc. but disregarded the documentary evidences/submissions filed/made on behalf of the assessee. It was contended that whatever data had been used by the AO in making the impugned additions did not even remotely suggest that the Long Term Capital Gains earned by the assessee were allegedly not genuine and was the result of alleged sham transactions. It was stated that the reasons and evidences which formed the basis for the action of the AO were based on a rather shaking edify and that the shares of the companies on which Long Term Capital Gain had been earned

were allotted to the assessee by way of a preferential allotment and were subsequently credited to the assesseeôs DEMAT account and their sale (undisputedly after being held by the assessee for a period of more than twelve months) was effected through a broker registered on a recognized Stock Exchange and that the Securities Transaction Tax was duly paid on the transaction, the sale proceeds from the sale of shares were received through normal banking channels from the stock broker through whom the shares had been sold and stood duly credited to the assesseeôs Bank Accounts. In support of the aforesaid contention, the assessee furnished copies of the share purchase documents, DEMAT account, share certificates, contract notes and bank statements highlighting the relevant entries, regarding receipts against sale of the shares, were furnished before the ld. CIT(A) and it was claimed that the same were furnished to the AO. It was stated that the provisions of Section 10(38) of the Act provides that any Long Term Capital Gain arising from the transfer of equity shares shall not form part of the total income provided the twin conditions viz. the transaction having been entered into on or after 1st October, 2004 and Securities Transactions Tax having been duly paid thereon, were cumulatively satisfied. It was contended that in the assesseeôs case, the transactions giving rise to LTCG entered by the assessee duly complied with the said conditions specified u/s 10(38) of the Act in as much as while they had been entered in the financial year 2009-10 i.e. much after 1st October, 2004 (the date on which the provisions came into force) they were also chargeable to Securities Transaction Tax which fact also stood duly documented and was not disputed. Therefore, the LTCG earned by the assessee will not be a part of his total income as covered by the provisions of Section 10(38) of the Act and that

the provisions of Section 10(38) of the Act also need to be viewed in conjunction with the manner of securities market in particular stock exchanges and that the entire dealing in securities takes place electronically whereby there is no physical contact/communication and all the transactions get consummated through online matching of the bids and offers of the respective parties viz. buyers or sellers. It was further submitted that the securities traded being invariably held in DEMAT form, were transferred directly from/to the accounts of the relevant parties involved and the accounts were settled inter-se brokers and with their clients in terms of the payout mechanism of the concerned exchange. It was contended that by considering the functioning of the stock exchanges, the manner, mode and procedure for the purchase of shares had not been disputed, the shares sold at the prevailing rates through the Bombay Stock Exchange Online Trading (BOLT) platform of the Bombay Stock Exchange were of a listed company, and all the payments against the same were received through account payee cheques/RTGS from the stock broker, through whom the shares were sold, who, in turn received the payment from the stock exchange as per the specified designated payment mechanism. It was pointed out that under the online web-based trading platforms of the relevant exchanges as per the applicable, recognized and prevalent procedures & practices, the broker only acts as the intermediary in the online market place where in the absence of any physical interaction between the parties, the identity of the counter-party (whether buyer or seller) was not available and was consequently also not known to the parties entering into the transaction, thereby almost completely eliminating the possibility of any collusion between the parties. Therefore, in such a regulated and formalized scenario the possibility of rigged

trading to generate allegedly bogus LTCG accommodation through a syndicate of accommodation entry operators through dummy entities was not only negligible but wellï nigh impossible. Moreover, the assessee did not have any kind of degree of relationship or control with/over the said companies and neither was he involved in the management thereof at any point of time what to talk of its capital market operations or influencing to any degree or extent its stock market prices. It was stated that purchase of shares was through a preferential allotment which was subsequently duly credited to his DEMAT account, stood duly and comprehensively documented and that the sales of the securities took place through a registered broker on the NSE/BSE in accordance with the prescribed regulatory procedure, rules and applicable laws, whereby both the limbs of the transaction viz. purchase and sale of shares got duly authenticated and the transaction concluded through regular banking channels, the said facts though not relevant from the point of view of determining the taxability or otherwise were decisive determinants as genuineness and validity of the transactions and their being in compliance with all the relevant statutory provisions, rules, procedures and practices.

35. It was submitted before the ld. CIT(A) that neither the assessee nor any of his family members or any entity belonging to the BSL group paid any cash either to Sh. Raj Kumar Kedia and his associates and that the assessee neither knew any person by the name of Sh. Manish Arora nor did he had any dealing with him. As such no adverse inference on the basis of their statement was warranted with regard to the hard/soft data seized from Sh. Raj Kumar Kedia/Sh. Manish Arora. It was stated that the assessee was neither aware nor could be expected to be aware of how any third party came into possession of

some information and even otherwise no credence would be placed on the statements made by Sh. Raj Kumar Kedia as would be evident from a review of the post-search investigation/assessment proceedings wherein he had been taking contradictory stands and in fact, he had repeatedly been taking about turns in as much as while in the statement recorded during the course of search u/s 132 of the Act, he admitted to a certain state of affairs on 13.06.2014 and retraced in the course of post-search investigation proceedings and the said retraction was further retracted by him again during the post-search investigation proceedings on 26.03.2015. Therefore, the shifting stands of Sh. Raj Kumar Kedia at various stages of the proceedings had given the high level of inconsistency displayed by him and no degree of reliance would be placed on any statement which may be attributed to him, in so far as, reliance placed on the statement of Sh. Raj Kumar Kedia/Sh. Manish Arora and the hard/soft data found in their possession during search u/s 132 of the Act. It was stated that all the statements attributed to them were unilateral/one sided and that the contents of statements made by them acting independently to an authority without either the physical or constructive presence of the assessee or his authorized representative or the opportunity to cross-examine them could not be, ipso-facto, applied to the case of the assessee.

36. As regards to the statement of Sh. Ankur Aggarwal, it was stated that the same was retracted by him vide letter filed on 20.12.2016 and that the statement of Sh. Ankur Aggarwal needs to be viewed in this context, overcome as he was by the sudden turn of events whereby he lost his mental balance and made certain statements, admittedly under oath, which did not convey the factual situation and ground realities. It was only later, when the assessment

proceedings were taken up in the earnest and of which he was an integral part, was the impact of the statement made by him realized and its ramifications and implications came to fore, that he had to retract therefrom since it did not convey the factual position which also delayed in filing of retraction. It was stated that there could be no bar to a retraction where there was no concrete materials / evidences /circumstances to corroborate the contents of statement made earlier and in the instant case, there was no such evidences on record to corroborate the statement of Sh. Ankur Aggarwal made during the course of search u/s 132 of the Act and accordingly, there was no ground whatsoever to reject the retraction made by him. It was also stated that a statement recorded u/s 132(4) of the Act while passing the evidentiary value is not conclusive proof and can always be retracted. The reliance was placed on the following case laws:

- *Nagubai Ammal Vs Shama Rao (1956) AIR 593 (SC)*
- *Pullangode Rubber Produce Co. Ltd. Vs State of Kerala and Another (1973) 91 ITR 18 (SC)*
- *Abdul Qayume Vs CIT (1990) 50 Taxmann 171 (All.)*
- *ACIT Vs Jorawar Singh M. Rathod (2005) 148 Taxman 35 (Ahd.)*
- *Surinder Pal Verma Vs ACIT (2004) 89 ITD 129 (Chd.)*

37. As regards to the alleged statement of Sh. Raj Kumar Kedia that the cash was provided by Sh. Pankaj Tewari on behaf of Bhushan Steel Ltd. Group, it was stated that no cash was paid to Sh. Raj Kumar Kedia or any of his employees and no so called accommodation entries were received from/through him by the assessee or any of his representatives. Therefore, no credence could be given to the statements of Sh. Raj Kumar Kedia particularly in view of the uncontroverted and undeniable facts that the shares of a listed company were

sold through BOLT platform of the Bombay Stock Exchange and all the payments against sale were received through account payee cheques from the stock broker through whom the shares were sold. It was submitted that in fact, no evidence had been found whatsoever at any stage of the assessment proceedings or even search u/s 132 of the Act proving and even suggesting payment/movement of cash. Therefore, no adverse conclusion would have been there merely on the basis of document seized, evidence collected, statements made or entries found in the books of accounts of any third person over whom an individual or entity may not have any control. Therefore, the entries in the books of accounts of any third person could not have been the basis for arriving at any conclusion with respect to the assesseeôs case. The reliance was placed on the following case laws:

- *Central Bureau of Investigation Vs V. C. Shukla & Ors. (1998) AIR 1406 (SC)*
- *Addl. CIT, Bombay City-I Vs Miss Lata Mangeshkar (1974) 97 ITR 696 (Bom.)*
- *SP Goyal Vs DCIT (2002) 82 ITD 85 (Mum.)*
- *ITO, Mumbai Vs Synthetic Hydrocarbon, Mumabi in ITA No. 5188/Mum/2011*
- *Amarjit Singh Bakshi (HUF) Vs ACIT (2003) 86 ITD 13 (Del.)*
- *Prarthana Construction (P) Ltd. Vs DCIT (2000) 118 Taxman 112 (Ahd.)*
- *Chuharmal Vs CIT (1988) 39 Taxman 190 (SC)*

38. The averments made by the assessee were summarized by the ld. CIT(A) as under:

> *"(i) No so called accommodation entries were obtained from Sh. R K Kedia or any of his associates and no cash was paid to him either by the Appellant or any of his representative. Moreover there is no concrete evidence to even suggest, let alone prove any*

cash payment having been made to Sh. R K Kedia or any of his employees, directly or through intermediaries;

(ii) No reliance can be placed on the statement of Sh. R K Kedia/Manish Arora (an employee of Sh. R K Kedia) in view of their contradictory behavior and frequently shifting stands.

(iii) The Appellant does not know nor can be expected to be in the know off how any information came into the possession of Sh. R K Kedia.

(iv) The statement of Sh. Ankur Aggarwal needs to be viewed in the context of the retraction filed by him. The statements needs to be viewed in tandem with any additional evidence that may corroborate the situation conveyed by the statements (of which here is none) and not in isolation. Moreover there is no ground for ignoring, on any ground/for any reason whatsoever the retraction filed by him.

(v) Unilateral reliance on statement/entries in the books of a third party is not legally and judicially acceptable in the light of the judgments cited."

39. It was emphasized before the ld. CIT(A) that the investment in the shares of the various companies was made on the basis of their expected growth potential, the information in respect of which the assessee came to be known through various sources and simply because the share price of a small company had appreciated substantially and the assessee had earned substantial capital gains there from did not call for the entire transaction to be viewed prejudicially with a jaundiced eye/prejudicial mind. It was stated that earning of substantial gains, translating into an astronomical rate of return could be the result of various factors including the investors foresight, ability to exploit any bits and pieces of information that may come to ruin or even sheer fortitude ï

none of which called for a negation of the entire transaction so as to strike at the roots of the authenticity, nature and character. It was stated that movement in the price of any shares was the result of the complex interplay of diverse, even competing, factors of which sales/cross revenue was just one solitary factor and in fact, in the modern day inter connected world, wherein global linkages and factors had acquired prominence, several intricate and even notional factors come into play, an analysis of the security price movements of all companies on the stock exchange would make it clear that in no case have prices been determined solely or even majorly/predominantly by their sales/revenue/profits. It was contended that the efforts of the AO unfairly seek to conjure a negative image with respect to penny stocks, notwithstanding the penny stocks was nowhere defined statutorily but was only a generally accepted term used frequently in the functioning of securities markets putting it at par with oft-used expressions such as bulls and bears. It was contended that in the context of the working of securities markets and in the normally used and terminology of people trading/advising in securities, ñpenny stocksò are those which trade at a very low price and have very low market capitalization whereby although there is a high risk, the probability of a rapid upside and the opportunity to gain even a small rise in price is very high. It was stated that the provisions of the Act have to be implemented, administered and interpreted only with reference to its specific provisions and any Income-tax authority is stopped from stepping into the shoes of any assessee so as to question its rationality, prudence or acceptability from a common sense point of view. It was further contended that the assessee only transacted in the shares of the said companies to the limited extent as an investor with a view to be benefited from

the long term appreciation in the price of underlying shares with absolutely no control (decisive, persuasive, minuscule or even a notional) or say in the management thereof, what to say in its share market price or capital market operations. It was stated that the AO had not disputed any part of the transaction relating to the purchase of shares in any manner ï whether payment, allotment, conversion or any other aspect/limb related thereto and his entire case almost solely rests on the procedure for sale and the alleged, somewhat conjectural, manipulation in the sale thereof and other circumstantial/third party evidence, the entire gamut of which was negated. Therefore, any action based and conclusion drawn on a partial view of the entire transaction, where the other part had not been disputed, even microscopically, could only be a questionable quality.

40. As regards to the reliance placed by the AO on the statement of the Directors of the Penny Stock Companies, it was stated that the assessed did not know any of those persons and was not aware as to the reasons and circumstances under which those statements were given by them and that the assessee was neither aware of nor in any way concerned/connected with the activities and composition of Board of Directors of the said companies. Moreover, the shares were sold on the online BOLT platform of BSE whereby the assessee was not and could not be aware of the ultimate buyer of shares, simply because of the fact that some shares had been purchased by companies, allegedly controlled/managed by various parties/entities could not lead to any kind of adverse conclusions let alone collusion of arrangement between them and the assessee. It was stated that the assessee was neither aware nor could be expected to be aware of any transactions between Sh. Raj Kumar Kedia and

other entities/parties transacting inter-se independently on a principal to principal basis and over whom the assessee did not have any kind of direct or indirect control and was not in a position to assert even moral/suasive pressure. It was contended that the entire purchase was through preferential allotment made by the company, after following the due procedure as laid down by the SEBI and the other applicable statutes including Companies Act. It was also stated that no cash was paid by the assessee to any entities/persons against the sale of shares and there was no concrete evidence supporting the allegation that the Long Term Capital Gain was generated through the shares against the payment of cash. As regards to the inferences sought to drawn by the AO on the basis of the aforesaid statement of the Directors that the companies were paper companies and the Directors were Dummy Directors, the entire turnover of the company was paper turnover and the shares capital of the company was a mere accommodation entry, it was stated that the investment was made considering its expansion plans and huge growth forecasts. Therefore, the assessee as an investor, was not and could not have been aware that the turnover and share capital of the company was not genuine or the expansion plans of the company would not materialize. It was also stated that the company was existing on the records of jurisdictional Registrar of Companies, listed on the stock exchange and regularly & diligently complying with all the onerous formalities as required by various applicable statues would only be a misrepresentation of facts and a travesty of justice.

41. As regards to the statements of entry/exist providers and the investigation by DIT(Inv.), Kolkata and Mumbai, it was submitted that the AO relied to a large extent on the search and survey operations carried out by the

department on some entities. The assessee submitted that while there was no statutory/accepted definition of the term penny stocks, the said findings/investigations/recommendations could not ipso-facto and unilaterally be extrapolated to apply to the assessee since there was no evidence of any degree or form whatsoever that the assessee was a part of any organized system whereby artificial Long Term Capital Gains were created through manipulated means and moreover, no specific case had been made out against the assessee by the AO and that there was not an iota of evidence to suggest that the assessee was indulged in price rigging since he was neither connected with the alleged unusual price movement of shares nor there was any concrete evidence of his complicity in this regard and moreover, there was no allegation of any wrong doing with regard to the assessee what to talk of any conclusive evidence in this regard. It was further submitted that the AO erroneously stated that various evidences were gathered during the course of search and seizure/survey proceedings by the Investigation Wing of the Department which could allegedly prove that the transactions for LTCG were not genuine whereas the fact of the notice was that no such evidence/material was found which could implicate/involve or in any manner prejudice the assessee whether conjecturally or conclusively and even name of the assessee did not appear in any manner in the records of the said proceedings, the statements recorded therein or any data/accounts/documents found therein. Therefore, the legal validity of the reliance on such statements being in violation of the principle of natural justice was itself disputed and that the shares of the companies from whom LTCG were earned to the assessee by way of preferential allotment which did not signify any connection of the assessee with the said companies.

It was stated that as per provisions of Companies Act, a preferential allottee of the shares is not required to attend any Board meetings and even otherwise in the process of preferential allotment which is invariably spread by the word mouth, the possibility of personal contact between the promoters/management and preferential allottees , is not impossible. It was further stated that the fact that some of the said parties chose not to respond to notices u/s 133(6) or summons u/s 131 of the Act did not prejudice to any degree or in any manner effect the assessee since the issue of complying with any notices by a person/entity/authority was a matter of that personôs individual discretion over which any third person cannot be expected to have any control. As regards to the reliance of the AO on the nature of transactions in the companies under control of the alleged entry providers wherein back to back bank transactions with cash deposit on the 3rd and 7th layer of bank accounts was suggestive of providing bogus accommodation LTCG entries, it was stated that in the terms of functioning of securities markets, the assessee neither did deal with them directly nor was in the knowledge at that point of time of the actual purchaser of the shares nor did he had any relationship or control over them. In such a situation, the manner in which they managed their activities or run their operations could not have been used to the assessee. It was stated that the entire charge of price manipulation/rigging through a perceived arrangement between various parties/brokers and individuals was based merely on presumptions and without any evidence in this regard with no credence of the assesseeôs complicity or involvement therein.

42. As regards to the observations of the AO that the various beneficiary groups who allegedly obtained accommodation entries from Sh. Raj Kumar

Kedia as detailed in extract E-23 and E-24 of Annexure A-28 found and seized from the business premises of Sh. Raj Kumar Kedia at D-45, Saraswati Garden, Delhi, on the basis of which the AO had sought to unjustifiably concluded that since Sh. Raj Kumar Kedia was an entry operator and he was arranging bogus LTCG entries for various beneficiaries including M/s BSL group (since the records found at his premises also contained a ledger by the name of ñNPò) with the help of various other members of the cartel spread throughout the country, it was stated that the AO by relying upon the disclosures made by certain other parties/individuals tarred the assessee with the same brush by simply replicating the same arguments without making any attempt to consider or making allowance for the diverse facts, differing circumstances. It was also stated that the AO had ignored the fact that the situation, circumstances and facts of each persons/group were differently governed by a disparate factors, the same could not have been extrapolated, even as circumstantial evidence, to the case of the assessee and that simply because some entities/individuals who had entered into similar transactions to that of any other assurance had adopted a particular path/treatment in their Income-tax proceedings did not call for their automatically being extrapolated to other assessees and that it was perhaps only on points of law in a nuanced and subtle matter, the situation of different assesseeôs could not be replicated and if made was neither justified nor sustainable. It was also stated that the case of the department was based to a large extent on the statement of various persons recorded in the course of search/survey/investigation proceedings at various points of time by different wings of the department and in particular reliance had been placed on the following:

- *Statement of Sh. R K Kedia/Sh. Manish Arora recorded during the course of search u/s 132;*

- *Directors of the alleged Penny Stock Companies viz. Sh. Amarchand Ratanlal Rander (M/s Rander Corporation Ltd.), Sh. Sajjan Kedia (PSIT Infrastruture and Finance Ltd. (Formery Parag Shilpa Investments) and Sh. Kushal Praveen Shah (Anukaran Commercial Enterprises Ltd.);*

- *Sh. Natwarlal Daga, Sh. Jagdish Purohit and Sh. Suresh Jajodia, alleged entry operator by the DIT(Inv.), Mumbai and Kolkata;*

- *Controllers/Directors of the alleged dummy companies and brokers such as Devesh Upadhyay, Bikas Sureka, Anil Khemka, Amit Saraogi, Sunraj Jhunjhunuwala, D.B. & Co., Sajendra Mookin, Gateway Financial Services Ltd., S.MC Global Securities Ltd., Anand Rathi Share and Stock Broker Ltd., Comfort Securities Ltd., Korp Securities Ltd., Eureka Stock and Share Broking Services Ltd., Baba Bhoothnath Trade and Commerce (P) Ltd., Fort Share Broking (P) Ltd., and RNA Capital Markets Ltd."*

43. As regards to the statements of Sh. Raj Kumar Kedia/Sh. Manish Arora, it was stated that those were unilaterally and critically used to the prejudice of and to the detriment of the assessee but the opportunity to cross-examine the said persons was also crucially, denied to him and that the failure of the appointed persons to appear for cross-examination on the appointed date had prompted the AO to again rather unfairly and unjustly conjure up an imaginary unnatural nexus between the assessee and the alleged entry provider, with absolutely no evidence to back up his conclusion. It was also stated that the positive intent and desire to comply with the laws and cooperate with the department was evident from the presence of the assessee through his authorized representative on the day appointed for this purpose and even at all

stages of the assessment proceedings. Therefore, a conclusion of far reaching consequence had been proposed and drawn on the basis of statements made/records seized from a third party and it was incumbent on the department to provide the assessee an opportunity to cross-examine the said persons whose testimony forms the bedrock of its entire case which was against the principles of natural justice and accordingly bad in law.

44. It was contended that the AO greatly relied on the principle of preponderance of probabilities for arriving at his ultimate conclusion which was an enabling theory of providing and accepting proof and basing the verdict on their preponderance i.e. importance/predominance. However, in a case where the direct evidence was either of questionable quality or which had been effectively countered and negated since no prima facie evidence was available the revert to secondary evidence on the basis of preponderance of probabilities was not warranted. It was further contended that in the case of the assessee, the documents/arguments and evidences put up by the department had been effectively negated in as much as:

> *"(a) No reliance can be placed on the statements of Sh. R K Kedia/Manish Arora in the light of their frequent shifting stands casting a definite doubt on the reliance that can be placed thereon;*
>
> *(b) The statement of Sh. Ankur Aggarwal has been retracted by him and there are no valid reasons to disregard the said retraction;*
>
> *(c) Mere entries in the books of accounts or records of a third party cannot be used against the Appellant in the light of the various judgments including those of the Apex Court cited above.*

(d) In so far as the investigations carried out on various parties/entities and the statements recorded of various parties are concerned not only does the name of the Appellant not appear therein, an opportunity to cross-examine the said persons was not provided to the Appellant."

45. It was stated that it is a settled law that suspicion, howsoever strong cannot take place of proof and there could be no addition on the basis of mere suspicion and that in the instant case, there was no ground whatsoever to doubt the factual, basic and direct evidence furnished, accordingly the question of relying upon circumstantial evidence and probability theory did not arise. The reliance was placed on the following case laws:

- *Lalchand Bhagat Ambica Ram Vs (1959) 37 ITR 288 (SC)*
- *CIT Vs Paras Cotton Co. (2007) 288 ITR 211 (Raj.)*
- *Faqir Chand Chaman Lal Vs ACIT (2004) 1 SOT 914 (Asr.)*
- *Assam Tea Co. Vs ITO (2005) 92 ITD 85 (Asr.)*
- *Jhantala Investments Ltd. Vs ACIT (2000) 73 ITD 123 (Mum.)*
- *Sumati Dayal Vs CIT 214 ITR 801 (SC)*
- *Union of India Vs Azadi Bachao Andolan (2003) 132 Taxman 373 (SC)*

46. As regards to the investigation by SEBI of the listed paper scrips viz-a-viz family members of BSL group and orders passed, it was stated that since the Income Tax Act is a separate fiscal statute operating on an independent edifice, its interpretation and administration should be governed by the provisions embodied therein and not by extrapolating inward the provisions/finding of any other Act. Moreover, the provisions of other laws and the findings of any regulatory bodies/institutions/administrative mechanism creates/operates thereunder cannot be ipso-facto on as is where basis applied while administering the provisions of the Act and that the each statutory enactment operates and functions within a defined framework/apparatus and had been enacted by the

Parliament with defined objectives, accordingly the findings under the irrespective Acts should not be transported as such to any other Act and that in the instant case while no doubt SEBI, the body entrusted with the task of regulating capital markets had passed certain orders w.r.t. to BSL group in general and the assessee in particular, the same deal with issues relating to the functioning of capital markets and not with the Income-tax Act and as such have no relevance while interpreting the taxability or otherwise of any sum or interpreting the results of any particular transaction under the Income Tax Act. Therefore, an attempt to disregard the provisions of Section 10(38) of the Act by treating the Long Term Capital Gain as alleged unaccounted sources had been decisively negated by various judicial pronouncements across the country. The reliance was placed on the following case laws:

- *Chainroop Bhora and Others Vs DCIT, Kolkata in ITA Nos. 24 to 27/Kol/2013 (Kol)*
- *Ashok Kumar Gupta and Others Vs DCIT, Kolkata in ITA Nos. 501 & 502/Kol/2013 (Kol)*
- *Arvind Asmal Mehta Vs ITO, Mumbai in ITA No. 2799/Mum/2015 (Mum)*
- *Vasantraj Birawat Vs ACIT, Mumbai (2015) 61 Taxmann.com 295 (Mum.)*
- *Kamal Kishore Aggarwal & Sons (HUF) Vs ACIT, CC-11 in ITA No. 6248/Del/2011 (Del.)*
- *Shri Kamlesh Mundra Vs ITO, Ward 19(2)(3), Mumbai in ITA N. 6248/Mum/2012 (Mum.)*
- *DCIT Vs Asha V Mehta in ITA No. 6405 & 6998/Mum/2012 (Mum.)*
- *CIT Vs Udit Narain Agarwal in ITA No. 560 of 2009, order dated 12, 2012*
- *CIT Vs Smt. Sumitra Devi (2014) 49 Taxmann.com 37 (Raj.)*
- *CIT Vs Smt. Pushpa Malpani (2012) 20 Taxmann.com 597 (Raj.)*

- *ACIT Vs Smt. Sumitra Gaur (2012) 27 Taxmann.com 107 (Jodh.)*
- *ACIT, Mathura Vs Smt. Kela Devi Agarwal in ITA No. 75/Agr/2010 (Agra)*
- *DCIT, Mathura Vs Smt. Meenakshi Agarwal in ITA No. 265/Agr/2009 (Agra)*
- *Sri Paduchuri Jeevan Vs ITO, Ananthapur in ITA No. 452/Hyd/2015 (Hyd.)*
- *ITO, Agra Vs Smt. Pallavi Garg in ITA NO. 192/Agra/2009 and CO No. 34/Agra/2009 (Agra)*
- *ITO, Ward-2, Nizamabad Vs Smt. Aarti Mittal (2014) 41 Taxmann.com 118 (Hyd)*
- *ACIT, Mathura Vs M/s Ram Chand Keshav Dev (HUF) in ITA No. 233/Agra/2010*
- *Ms. Farrah Market Vs ITO, Mumbai in ITA No.3801/Mum/2011 (Mum.)*
- *ITO Vs Indravadan Jain (HUF) in ITA Nos. 4861, 5168/Mum/2014 (Mu.)*
- *ITO Vs Smt. Neelam Chawla in ITA No. 5335/Del/2004 (Del.)*
- *ITO Vs Smt. Bibi Rani Bansal (2011) 44 SOT 500 (Agra)*

47. It was submitted that the charge that the impugned Long Term Capital Gains arising on the ales of shares of various companies were bogus, was wrong both factually and legally. Therefore, the additions being based on faulty premises, suspect logic and an unsustainable interpretation /implementation of legal provisions coupled with serious procedural lacunae deserves to be deleted.

48. As regards to the commission expenses @6% on the Long Term Capital Gains, it was stated that the same was on sheer presumptive basis and there was no evidence of any form whatsoever available with the department that the assessee had incurred any expenditure in this regard, as such the addition made being unjustified deserves to be deleted.

49. As regards to the addition of Rs.33,32,905/- made by the AO on account of alleged bogus purchase of jewellery from M/s Kriya Impex Pvt. Ltd. It was submitted that the said jewellery was purchased vide bill no. KYPL/PD/DEC/12/2009-10 dated 08.12.2009 and the payment was made vide Ch. No. 688566 drawn on assesseeôs bank account maintained with PNB, Tropical Building, New Delhi and that during the course of assessment proceedings, the assessee explained the details of the said transaction along with supporting evidences which was summarily rejected by the AO who proceeded to make the addition with the following remarks:

- *"From the finding of search and statement of Sh. Rajender Jain it is clear that Rajender Jain Group was involved in providing bogus bills of diamond jewellery to the various beneficiaries;*

- *During the course of search no stock of jewellery was found at the premises of Sh. Rajender Jain;*

- *Shri Rajender Jain in his statement accepted that he is in the business of providing accommodation entry of bogus bills of diamond jewellery and also explained the modus operandi of bogus billing;*

- *On the basis of above assessee's claim that his purchase is genuine is not acceptable;*

- *The assessee has purchased these diamond jewelery from his unaccounted source of income from grey market and obtained bills from M/s Kriya Impex Pvt. Ltd. (company controlled by Rajender Jain Group) and had received back the equal amount of cash;*

- *The purchase amount of Rs.33,32,905/- is an accommodation entry and same is added back to the income of the assessed."*

50. It was submitted that the assessee furnished the copy of bill as well as bank statement reflecting payment of the said amount to the said party and duly disclosed the said jewellery in the return of net wealth filed for the assessment year 2010-11 onwards which had been duly assessed as such. Therefore, the question of the said transaction being an accommodation entry could not and did not arise and that no adverse inference was called for on that count. It was stated that a perusal of the assessment order and history of the assessment proceedings will show that various references had been made and reliance was placed on the statements of various persons recorded during search/survey/investigation by different wings of the Department, however, an opportunity to cross-examine the said persons was not made available to the assessee who was present through his representative on the appointed date to cross-examine the various persons, on which date, however, no such opportunity was provided to the assessee. Therefore, the basic principles of natural justice which involved reasonable application of prescribed procedures with a view to promote natural justice and prevent its miscarriage had been derailed and sabotaged. Accordingly, the entire exercise made in gross violation of principles of natural justice, was void ab-initio and the corresponding conclusions drawn need to be negated to prevent further miscarriage of justice. The reliance was placed on the following case laws:

- *Bagsu Devi Bafna Vs CIT (1966) 62 ITR 506 (Cal.)*
- *Kishinchand Chellaram Vs CIT, Bombay City-II (1980) 4 Taxman 29 (SC)*
- *The North Wales Police Vs Evans (1982) 1 WLR 1155*
- *R.B. Shreeram Durga Prasad and Fatechand Nursing Das Vs Settlement Commission (IT and WT) and another (1989) 49 Taxman 34 (SC)*
- *Rajesh Kumar Vs DCIT (2006) 157 Taxman 168 (SC)*

- *C.B. Gautam Vs Union of India (1992) 65 Taxman 440 (SC)*
- *CIT, Delhi-IV, New Delhi Vs Dharam Pal Prem Chand Ltd. (2008) 167 Taxman 168 (Del.)*
- *Prakash Chand Nahta Vs CIT (2008) 170 Taxman 520 (MP)*

51. The ld. CIT(A) also issued notice for enhancement of income and observed that there was a search & seizure action of Central Excise Authorities on the premises belonging to the assessee and its associates on 20.03.2013 as the intelligence collected by the Central Excise Authorities indicated that the assessee and its associates were indulging in the availment of fraudulent CENVAT credit on the quantities of zinc ingots purchased from Haridwar plant of M/s Hindustan Zinc Ltd. (HZL) without actual receipt of zinc in the factory of the group to which assessee belongs, located at Khapoli (Maharashtra) and that in order to save on transportation charges, the assessees were normally procuring the required quantities of the zinc from the Tarapore (Maharashtra) Depot of the supplier and/or Chittorgarh/Udaipur in Rajasthan. However, in respect of the invoices, where the assessee had availed fraudulent CENVAT credit, the zinc was purchased from Haridwar plant of the supplier and the assessee had intentionally arranged. The ld. CIT(A) further observed that during the course of search at the residence of Sh. Sushil Kumar proprietor of M/s Ram Overseas, Delhi and the Central Excise officers recovered incriminating documents and also cash amounting to Rs.1,59,60,000/- was seized and that during the course of search at the godown of said company stock of 694 pcs of zinc ingot weighing 17183.4 kgs and valued at Rs.23,54,131/- was seized and the concerned persons could not produce any document related to the same. He also observed that during the search at the premises of transporter M/s Mewar Transport Co. (Regd.), Sh. Salim Khan

(supervisor) informed the officers that most of the zinc loaded from the Haridwar Depot of the supplier for the assessee, was used to be unloaded at Delhi, Agra and Aligarh etc. as per the direction of Mr. Rajesh Sainani, partner of the said transport company and he also handed over a rubber stamp of the assessee which was used to stamp the challans showing fake receipt of the goods at the assesseeôs factory located at Khapoli. He also pointed out that search was conducted at the residence of Sh. Pankaj Tiwari, Asstt. Vice President of Bhushan Steel Ltd. and incriminating documents as well as Indian currency valued at Rs.6.20 lakh was recovered from Sh. Tiwari who could not explain the availability of cash, the same was seized. He also observed that after going through the various evidences recovered by the officers during the course of investigation, Sh. Pankaj Tiwari accepted that the assessee availed input CENVAT credit on zinc ingot which was diverted to other destinations and not used by the assessee in the manufacturing of final products. The ld. CIT(A) observed that Sh. Tiwari categorically admitted that the said practice of diversion of zinc sale of the diverted zinc in cash outside the books and wrong claim of CENVAT was in the knowledge of Executive Vice President (Commerce), Sh. Batra and that the assessee i.e. Sh. Neeraj Singal. The ld. CIT(A) referred to the relevant question at page nos. 124 to 126, for the cost of repetition, the same is not reproduced herein. The ld. CIT(A) pointed out that the investigations conducted by the Central Excise Authorities revealed that during the period from 16.08.2008 to 20.03.3013, the total quantity of zinc ingots supplied from Haridwar plant was in 758 consignment which involved central excise duty amounting to Rs.24,17,42,090/- and that Sh. Vijay Kumar Aggarwal, proprietor of M/s Aggarwal Cargo Movers in his statement, inter-

alia confirmed that the vehicles of their transport company were engaged in the transportation of zinc ingot from the Haridwar plant of the supplier to the destinations at Delhi, Agra and Aligarh on instruction of M/s Mewar Transport Co. (Regd.). He also pointed out that all those transactions were recorded in private documents and not in the books of account and that on the completion of the investigation, it had been stated by the Central Excise Authorities that the assessee was involved in fraudulent availing of CENVAT credit and that the zinc ingot shown to have been purchased from the Haridwar unit of the supplier, without actual receipt of the goods as the said quantity of the zinc ingot was diverted by the assessee to the open market and that the persons belonging to the group to which the assessee belonged were called upon to show-cause as to why penalty under Rule 26 of the Rules should not be imposed on them. He also pointed out that the assessee moved to Custom and Excise Settlement Commission vide application filed on 06.05.2014 and in the settlement application a Central Excise duty liability of Rs.11,91,72,494/- out of the total duty demand and an amount of Rs.2,84,82,857/- towards interest liability was accepted and that the assessee and Sh. Piyush Kumar, Advocate of M/s BSL, admitted entire duty liability. The ld. CIT(A) observed that during the course of search on BSL group of cases on 13.06.2014, at 608, Regent Chambers, Nariman Point, Mumbai, a diary was recovered from the possession of sh. Chandrakant Mahdev Jadhav, Commercial Manager of M/s Bhushan Steel Ltd. He was confronted with the contents of the diary and in his statement, he deposed under oath that he received cash payments for sale of scrap at the Khapoli plant of M/s Bhushan Steel Ltd. and such cash receipts were not accounted in the books of accounts of M/s Bhushan Steel Ltd. and

that such unaccounted sale of scrap was done at the instructions of Sh. Neeraj Singal i.e. the assessee and that he had handed over Rs.50 lacs to one Sh. Kedia on 08.02.2014. The ld. CIT(A) pointed out that during the course of earlier search dated 03.03.2010, evidence of cash generation and application were found and the various incriminating material inter-alia included the following:

> *"i) Page no. 6 of Annexure-A3 evidencing payment of cash of Rs.17,86,57,781/- on 02.05.2009. On questioning Sh. Neeraj Singal, VC & MD of the Bhushan Steel Ltd. replied that it was out of his unaccounted funds which was never declared (earlier) for taxation purposes. He offered the same for taxation in the FY 2009-10 (AY 2010-11).*
>
> *ii) Page no. 5 of Annexure-A3 evidencing cash advances to seven persons amoutnign to (total) Rs.69.00 crores. These amounts were outstanding as on 31.01.2010. On questioning Sh. Neeraj Singal, VC & MD of the Bhushan Steel Ltd. replied that it was out of his income from undisclosed sources. He offered the same for taxation in the FY 2009-10 (AY 2010-11).*
>
> *iii) Page no. 4 of Annexure-A3 evidencing cash advances on 09.06.2009 amounting to Rs.3.00 crores. On questioning Sh. Neeraj Singal, VC & MD of the Bhushan Steel Ltd. replied that it was advance given for a property at Q-1-A, Hauz Khas Enclave, New Delhi he further stated that it was out of his income from undisclosed sources. He offered the same for taxation in the FY 2009-10 (AY 2010-11).*
>
> *iv) Sh. Neeraj Singal disclosed amount of Rs.90.00 crores in FY 2009-10 (AY 2010-11) on account of above said page nos. 4, 5 and 6."*

52. The ld. CIT(A) also quoted the relevant portion of the statement of the assessee taken at the relevant time at page nos. 239 to 240 and 242 to 245 of the impugned order, for the cost of repetition, the same is not reproduced herein. It

was also pointed out that the claim of the expenses by way of payment to various companies but the same were not found at their registered address during the earlier search. The relevant discussion had been made by the ld. CIT(A) at page nos. 245 to 247 of the impugned order. However, the ld. CIT(A) admitted that as a result of the earlier search, the additions were made by the AO but the then ld. CIT(A) allowed relief on the ground that further inquiry may be required by the AO. Accordingly, the ld. CIT(A) proposed the enhancement and the assessee furnished the reply vide letter dated 21.12.2017 as under:

> *"This is with reference to the discussions held on the last date of hearing asking the Appellant to show cause as to why enhancement of income of equal amount be not made in the hands of Sh Neeraj Singal/Sh Brij Bhushan Singal in the light of the facts as discussed. In this connection, the following submissions are made for and on behalf of the Appellant: -*
>
> > *(1)(a) While it is a fact that the Appellant is a Managing Director of M/s Bhushan Steels Limited (BSL) and accordingly responsible for managing its affairs, the fact remains that BSL being a separate legal entity was operating independently with a clear demarcation drawn between his personal affairs and activities of BSL.*
> >
> > *(b) In this scenario and narration of facts, any act, if at all done or conducted in his capacity as the Managing Director of BSL would stand divorced from and have to be considered as such and not intermingled, with what to talk of extrapolation, to his personal affairs.*
> >
> > *(c) It may also be submitted that while the conclusions drawn and additions made with respect to the issues which form the basis for the issue of the enhancement notice u/s 251(2) of the Act are themselves being agitated separately, it should be*

submitted, of course without prejudice, that the decisions were made and instructions, again if any, conveyed in his capacity as the Managing Director of BSL, keeping the interests and operating scenario of the Company in mind and not his personal interests. The intention, if any and the knowledge which the Appellant had, with respect to the impugned activities had no relation to any of his acts done in a personal capacity. Moreover, there is no evidence, direct, indirect, circumstantial or even suggestive to abet a conclusion that the amount, if any generated from the impugned activities went into the personal coffers of the Appellant which conclusion, can at best be only termed as superficial and conjectural.

(d) Before going on to deal with the issue of the extent to which reliance can be placed on the statement of Sh Chander Kant Jadhav, (which, in any case, he has subsequently retracted), wherein he has allegedly deposed that he receives cash payments for the sale of scrap at the Khopoli Plant and which has not been accounted for in the books, it needs to be noted that whatever scrap is generated in the manufacturing process of BSL stands duly recorded in the books of accounts maintained. It may also be mentioned that the said Company, being subject to the rigors of Excise laws, maintains complete stock records as prescribed by the relevant rules and also files periodical returns wherein the amount of scrap generated and its sale is duly recorded. The Appellant Company is also not aware of the circumstances and basis in which the said statement was made by Sh Chander Kant Jadhav.

(e) Furthermore, it may also be submitted that the basis of the proposed enhancement viz the statement of Shri Chander Kant Jadhav has itself been subsequently retraced by him in a separate communication addressed to the Ld. Assessing Officer wherein he has specifically denied any instance of scrap being sold for cash and not recorded in the books of account. He has also stated that at the time of survey u/s 133A of the Act he was in a very disturbed state of mind due overcome as he was by the sudden action taken by the Income Tax Authorities whereby he

lost his mental balance and made the statement. The fact that the statement of Shri Chander Kant Jadhav did not represent the correct state of affairs is also further corroborated by the fact that two other employees at the Khopoli Plant of the Company viz, Shri SudamaPrasad and Shri Padam Kumar Aggarwal have denied the contents of the statement of ShChander Kant Jadhav and in fact have even contradicted the same on the same date. It may also be submitted here that Shri Chander Kant Jadhav has also reiterated the retraction in a statement recorded before Ld Assessing Officer on December 22, 2016.

(f) In this scenario wherein, there are conflicting and contradicting statements of various parties it is clear that the statement of Sh Chander Kant Jadhav, having been made under a state of extreme mental and heightened tension, did not reflect the true and correct state of affairs and accordingly no adverse inference can be drawn therefrom. Furthermore, the Appellant Company has also not been provided an opportunity to cross examine the persons whose statements form the basis for the conclusion drawn and consequent addition made by the Ld. Assessing Officer.

(g) As regards the proposed enhancement on the basis of the alleged sale of Zinc purchased from M/s Hindustan Zinc Ltd in cash and the order of the Settlement Commission (Customs and Central Excise), it is submitted that the said issue is the subject of appellate proceedings and being challenged and argued separately based as they are on conflicting evidences and may we humbly submit, debatable propositions and interpretation of law. Moreover, with reference to the proceedings before the Customs and Central Excise authorities, it is again submitted and reiterated that at no stage was the fact of consumption of zinc or its consumption in the manufacturing activities ever disputed. The decision to approach the Settlement Commission was motivated only by a desire to obviate litigation which would have been time consuming and expensive and conserve energy and resources for the operations of the Appellant Company to ensure its sustained growth and progress.

(h) To sum up the proposed enhancement on account of various issues, including alleged sale of scrap and zinc in cash by BSL, in the hands of the Appellant is not justified in view of the following facts and reasons: -

(i) There is a clear-cut dichotomy and divergence between the activities carried out and decisions made by the appellant in an official capacity and personal capacity with no cause for any intermixing of the two.

(ii) The basis on which the proposed action is being resorted to is itself being vehemently disputed by BSL in separate appellate proceedings based, as it is, on conflicting evidences and questionable surmises.

(iii) There is no evidence of any form, nature or quality to even suggest that the money, if at all, generated by BSL went into enriching the coffers of the Appellant.

(iv) The very basis on which the action is proposed to be made viz. the statement of Sh. Chander Kant Jadhav has itself been subsequently retracted by him both in a communication addressed to the Ld. Assessing Officer as well as in the statement recorded before the Ld. Assessing Officer during the conclusion of the assessment proceedings.

(v) The issue of alleged sale of Zinc purchased from M/s Hindustan Zinc Ltd in cash and the order of the Settlement Commission (Customs and Central Excise), being a contentious issue is being challenged and argued separately. Moreover, at no stage was the fact of consumption of zinc or its consumption in the manufacturing activities ever disputed. The decision to approach the Settlement Commission was motivated only by a desire to obviate litigation which would have been time consuming and expensive and conserve energy and

resources for the operations of the Appellant Company to ensure its sustained growth and progress.

(2) There is not an iota of evidence to even remotely suggest that the money, if any, allegedly received from the sale of scrap/zinc went into the personal coffers of the Appellant. Moreover no such evidence of any nature, even superficial, to suggest that such money(s) were diverted to the personal hands of the Appellant has even been unearthed during the course of search.

(3) As desired, copies of documents evidencing purchase of share on which LTCG has been claimed are being enclosed herewith. As regard the rationale for the purchases of shares, the same was based on the expectation of capital, appreciation as per the information available at that point of time."

53. The ld. CIT(A), however, held that the assessee was asked to furnish copies of the material seized by the Central Excise Authorities which had been referred in the statement of Sh. Pankaj Tiwari dated 20.03.2013. However, in spite of follow up the same had not been furnished. Therefore, adverse inference was drawn and it was logical to conclude that the said material proved that the clandestinely diverted raw material being sold for the personal benefit of the assessee. He also observed that the assessee categorically admitted 100% of Excise duty liability which mean that the fact of diversion of entire material had been admitted and the argument of the assessee was not only without legs to stand but also in fact, misleading as the sale in cash of raw material shown to have been purchased for consumption in the manufacturing process by the assessee with the help of other associates and that the claim of CENVAT credit was bogus and it was a deliberate and planned exercise. Therefore, the cash generated through this activity in the form of loans and advances detacted as a result of search on 03.03.2010 and bogus Long Term Capital Gains through

accommodation entry showing dealing in penny stocks as a result of search on 13.06.2014. Particularly when, the assessee was not able to deny the contents of the statement of Sh. Pankaj Tiwari and was also not able to deny any other corroborative material.

54. The ld. CIT(A) rejected the books of accounts and enhanced the income by observing as under:

> *"8.1 During the appellate proceedings, the undersigned was neither satisfied about the correctness of the accounts of the appellant, nor (the undersigned was satisfied) about the completeness of the accounts of the appellant because the following was observed (the same has also been discussed above):*
>
> *i) Sh. Neeraj Singal, VC & MD of the appellant, with the help of employees of the appellant, (important role played by Sh. Pankaj Tiwari, Assistant Vice President(Finance) and Sh. D.B. Gupta, Cashier}, partners of M/s Mewar Transport Co. (regd.), Sh. Sunil Kumar Gupta(Prop. M/s. Sunil Metal Industries, Agra), Sh. Sushil Kumar alias Shely(Prop. M/s. Shree Ram Overseas, Delhi) and other conduits, was involved in the deliberate and planned activity of clandestine diversion and sale in cash of raw material shown to have been purchased for consumption in the manufacturing process of the appellant. This planned and deliberate exercise was consistently going on for a period of more than five years.*
>
> *ii) Sh. Pankaj Tiwari also deposed that this planned and deliberate exercise(of clandestine diversion and sale in cash of raw material shown to have been purchased for consumption in the manufacturing process), was consistently going on for a period of about five O years. This deliberate and planned exercise was for the personal benefit of Sh. Neeraj Singal, VC & MD of the appellant. The statement of Sh. Pankaj Tiwari was corroborated by the material recovered from his residence as well as statements and other evidence collected from other places by the Excise Authorities.*

iii) The Excise Authorities also found shortage of 41.367 MT in stock of zinc available at Khapoli Factory of the appellant which could never be explained by the appellant either before the AO or before the undersigned.

iv) During the search & seizure operation by the Income Tax on 13.06.2014 at premises of the appellant at Regent Chambers, Nariman Point, Mumbai a diary written by Sh. Chandrakant Mahadev Jadhav, Commercial Manager, of the appellant was found and seized. On confrontation, Sh. Jadhav deposed that he was selling the scrap generated in the Khapoli Factory of the appellant, in cash and passing on the cash to Sh. Neeraj Singal, VC & MD of the appellant. These transactions were outside the books of accounts of the appellant.

v) During the search & seizure operation by the Income Tax on 13.06.2014 at premises of the appellant at Bhikaji Cama Place, New Delhi, various vouchers evidencing payments of salary in cash, to various employees, were found and seized. These transactions were outside the books of accounts of the appellant.
vi) During the search & seizure operation by the Income Tax on 13.06.2014 at residential premises of Sh. Neeraj Singal (VC & MD of the appellant) and his family members it was found that Sh. Singal and his family members were involved in obtaining accommodation entries in form of pre-arranged and bogus transactions showing Long Term Capital Gains in penny stocks and claiming such (bogus) Long Term Capital Gains in penny stocks to be exempt from levy of Income Tax. Apparently, the unaccounted cash generated through the above stated clandestine and outside the books(of account) activities, was being laundered through accommodation entries.

vii) The act of obtaining accommodation entries by Sh. Singal and his family members was also corroborated by the evidences found/ gathered during the search & seizure operation on 13.06.2014 and post search investigation in case of Sh. R.K. Kedia (the search was conducted on the same date as in case of appellant and Sh.

Neeraj Singal). It was also evidenced that Sh. Pankaj Tiwari, Asstt Vice President of the appellant company (who sold diverted zinc ingots purchased from M/s Hindustan Zinc Ltd., Haridwar in cash and handed over the cash so received to Sh. Neeraj Singal through the cashier, Sh. D.B Gupta. handed over cash to Sh. R.K. Kedia in lieu of providing accommodation entries to Sh. Neeraj Singal and his family members.

viii) (a) The act of generation of cash through the above stated clandestine and outside the books(of account) activities, manifested in form of unaccounted transactions of loan in cash by Sh. Neeraj Singal and his family members namely Sh. B.B. Singal and Smt. Ritu Singal. Record of such transactions were found, the corresponding income surrendered and declared in the return of Income filed as a result of the search & seizure operation conducted on 03.03.2010 at residential premises of Sh. Neeraj Singal (VC & MD of the appellant) and his family members as under. Relevant portions of the statements have already been reproduced (supra)."

A) Sh. Neeraj Singal	*Rs. 69.00 crs*
B) Sh. B.B. Singal	*Rs. 31.00 crs*
C) Smt. Ritu Singal	*Rs. 16.00 crs*

55. The ld. CIT(A) also did not accept the following arguments of the assessee:

1. *Books of accounts are audited.*
2. *No discrepancies were noticed in books of accounts by the Assessing Officer while making assessment.*
3. *The discrepancy is minor.*
4. *The focus of Customs & Central Excise Settlement Commission was on legal issues.*
5. *GP/NP on M/s Tata Steel Ltd. cannot be compared because Tata Steel Ltd. is having integrated operations starting from mining."*

56. The ld. CIT(A) observed that the AO had certainly made additions, however, he certainly erred and did not correctly apply law on the facts and in the circumstances of the case which clearly suggested that the integrity of books of accounts or results reflected by the books of account could not be upheld. The ld. CIT(A) reproduced the details of sales with Excise Duty, percentage of GP/NP ratio for the various years at page nos. 267 & 268 as under:

S. No.	*AY*	*FY*	*Sales without Excise Duty (Rs. In lacs)*	*GP%*	*NP%*
1	*2009-10*	*2008-09*	*495748*	*21.02*	*11.31*
2	*2010-11*	*2009-10*	*564035*	*24.57*	*20.41*
3	*2011-12*	*2010-11*	*700046*	*28.72*	*19.65*
4	*2012-13*	*2011-12*	*994141*	*28.08*	*13.73*
5	*2013-14*	*2012-13*	*1074427*	*27.02*	*11.30*
6	*2014-15*	*2013-14*	*967583*	*22.38*	*0.99*
7	*2015-16*	*2014-15*	*1064577*	*18.05*	*-11.79*

57. The ld. CIT(A) also mentioned that the following table shows the position of addition made by the AO in respect of issue of deduction due to purchase of Zinc from M/s HZL, Haridwar and payment to M/s Mewar Transport Co.:

A.Y.	*Addition on account of purchase expenses for clandestinely diverted zinc (Rs. in crs.)*	*Addition on account of Transport Expenses for clandestinely diverted zinc (Rs. in crs.)*	*Total (Rs. in crs.)*
2009-10	*13.59*	*0.41*	*14.00*
2010-11	*61.23*	*1.29*	*62.52*
2011-12	*86.80*	*1.73*	*88.53*
2012-13	*48.74*	*0.96*	*49.70*
2013-14	*47.96*	*0.86*	*48.82*
Total			***263.57***

58. The ld. CIT(A) compared the GP rate and NP rate of M/s Tata Steel Ltd. with assessees and made the comments as under:

"GP/NP of M/s Tata Steel Ltd. cannot be compared because Tata Steel Ltd. is having integrated operations starting from mining.

Comments:

i) No doubt, as such no two cases would be identical. There is bound to be some difference. Idea is to have best available method to estimate the profit. Undisputedly, the M/s Tata Steel Ltd. is in the same business (of steel). The year wise chart of the GP/NP of M/s Tata Steel Ltd. as compared to that of appellant is tabulated as under:

AY	*M/s Tata Steel Ltd. Company's GP ratio (%)*	*M/s Tata Steel Ltd. Company's NP ratio (%)*	*Appellant's N.P.*
2009-10	*34.14*	*26.22*	*11.31*
2010-11	*33.78*	*24.09*	*20.41*
2011-12	*35.02*	*27.35*	*19.65*
2012-13	*31.83*	*23.52*	*13.73*
2013-14	*27.34*	*19.03*	*11.30*
2014-15	*28.71*	*20.61*	*0.99*
2015-16	*22.27*	*28.71*	*-11.79*

ii.) It can be seen that in the A.Y. 2010-11 the difference between the NP of the appellant and the Tata Steel Company is only 3.68%. In fact, the difference would be even lessor if we consider the effect of excess raw material purchased for the purpose of above stated clandestine diversion and the purported transportation charges paid in that connection. Since, in the A.Y. 2010-11 the said addition is of Rs. 62.52 Crs. and the turnover is Rs. 5640.35 crs, therefore, in terms of % of turnover (sales net of Excise duty), the said addition works out to be 1.11%. Hence, the actual NP of the appellant as per its books, adjusted to the factor of above stated clandestine diversion and the putported transportation charges paid in that connection, works out to be 21.52% which is only 2.57% less then the NP ratio of M/s Tata Steel Ltd. In my humble

opinion, in facts and circumstances of the case, while making estimate in best judgment, of the profit of the appellant, the NP results shown by M/s Tata Steel Ltd. would have heaviest weight. May be discount is to allowed to take care of the possible factors responsible for variation in N.P. as compared to the N.P. of M/s Tata Steel Ltd., including the ones stated by the appellant or otherwise."

59. The ld. CIT(A) also directed the AO u/s 150(1) of the Act to examine the case u/s 147/148 of the Act by observing as under:

"10.3.2 It is noted that order of the Settlement Commission is dated 27.05.2015 whereas the notice u/s 153A has been issued on 04.02.2015. As mentioned in the assessment order (reference para 4.1), the information regarding clandestine ***diversion and sale in cash of raw material shown to have been purchased for consumption in the manufacturing process, and cash generated out of payments for (bogus) transportation of this material which was consistently going on for a period of about five years as a deliberate and planned exercise,*** *was received through TEP. As also discussed above, the material contained therein is incriminating and creditworthy. This material was used in the assessment proceedings imitated under section 153A only under the genuine impression about the position of law that once proceedings under section 153A are initiated, the material gathered or received from any source would be used in the same assessment proceedings. In case, this information was received at a time when proceedings under section 153A were not there, AO was obliged to examine it from the angle of reopening the assessment under section 147/148 and in case the AO was satisfied that conditions mentioned under section 147/148 were fulfilled, a notice under section 148 would have been issued. Since, it has been held above that the proceedings under section 153A was not legal because qua this assessment year, there was no incriminating material unearthed during the search conducted on 13.06.2014 under section 132 of the I.T, Act, 1961, therefore, the A.O. is directed under section 150(1) to examine the case under section 147/148, independently and in case the conditions under relevant sections*

are found to be satisfied, the proceedings may be initiated notwithstanding anything contained in section 149 subject to provisions of section 150(2).

10.3.3 As discussed above and in subsequent paragraphs, proceeds of ***clandestine diversion and sale in cash of raw material shown to have been purchased for consumption in the manufacturing process, and cash generated out of payments for (bogus) transportation of this material which was consistently going on for a period of about five years as a deliberate and planned exercise, was going for the personal benefit of Sh. Neeraj Singal*** *and hence forms part of his income. Apparently, the same has not been disclosed. Therefore, for A.Y. 2009-10, the A.O. of Sh. Neeraj Singal (which incidentally is the same officer who is AO of M/s Bhushan Steel Ltd.) is directed under section 150(1) to examine the case under section 147/148, independently and in case the conditions under relevant sections are found to be satisfied, the proceedings may be initiated notwithstanding anything contained In section 149 subject to provisions of section 150(2).”*

60. The ld. CIT(A) observed that the assessee only filed the copy of DEMAT account but no copy of bank account statement was filed to support the mode and amount of payment for consideration of acquisition of the shares of M/s Prraneta Industries Ltd. and M/s G-Tech Ltd. and the case was a perfect example of maxim ñwitness may lie but circumstances will notò. The reliance was placed on the following case laws:

- *Sumati Dayal Vs CIT (1995) 80 Taxman 89 (SC)*
- *Hersh W. Chadha Vs DCIT, Circle-1(1), International Taxation (2011) 43 SOT 544 (Del.)*

61. The ld. CIT(A) observed that Sh. Ankur Aggarwal had not only admitted that LTCG shown by the assessee and his family members was a result of an activity of obtaining accommodation entries through Sh. Raj Kumar Kedia and

other brokers/conduits but also revealed the modus operandi of generation of (bogus and stage managed) LTCG and that the management of BSL was habitual of financial malpractices including de-facto having dummy/benami Directors and the said statement of Sh. Ankur Aggarwal was not controverted for long time. However, after a gap of period of about two and half years, a letter dated 20.12.2016 was written by Sh. Ankur Aggarwal for retracting the statement but there was no reason for the said delay in retraction. He further observed that the assessee was offered the opportunity to cross-examine Sh. Ankur Aggarwal but he declined. He also pointed out that during the course of assessment proceedings summons u/s 131 of the Act was issued to Sh. Ankur Aggarwal on 16.12.2016 to appear before the AO on 22.12.2016. However, Sh. Ankur Aggarwal filed a letter of retraction on 20.12.2016 and did not appear on the date fixed by the summons u/s 131 of the Act and the assessee did not produce Sh. Ankur Aggarwal. Therefore, the retraction made by Sh. Ankur Aggarwal was not bonafide. The reliance was placed on the following case laws:

- *Pr. CIT(C)-2, New Delhi Vs Avinash Kumar Setia (2017) 81 Taxmann.com 476 (Del.)*
- *Gurdev Agro Engineers, Bhawanigarh Vs CIT, Patiala (2016-TIOL-2689-HC-P&H-IT)*
- *CIT, Kozhikode Vs O. Abdul Razak (2012) 20 Taxmann.com 48 (Ker.)*

62. The ld. CIT(A) also observed that an irrefutable link had been established between the assessee and his family members on one hand and Sh. Raj Kumar Kedia and his activities of providing accommodation entries on the other hand and that the assessee was provided opportunity to cross-examine Sh. Raj Kumar Kedia, Sh. Manish Arora and Sh. Ankur Aggarwal, however, he declined such

opportunity. He also observed that since the statements were recorded by the officers of the Income Tax Department during the course of their duties where there was no contemplation of providing cross-examination. Therefore, those statements have to be taken on the face value and it was not the case that the assessee requested the AO to summon those persons and the AO refused. Therefore, the argument that cross-examination opportunity was not given, was having no legal force.

63. The ld. CIT(A) on the issue of Long Term Capital Gain observed as under:

"i) The averment of the appellant is factually incorrect.

ii) The statement of Sh. R. K. Kedia/ Manish Arora are corroborated by the statement of Sh. Ankur Aggarwal.

iii) The statements of Sh. R. K. Kedia/ Manish Arora are corroborated by the material seized from their premises.

iv) The statements of Sh. R. K. Kedia/ Manish Arora are corroborated by the material seized from residence of Sh. Ankur Aggarwal.

v) The statements of Sh. R. K. Kedia/ Manish Arora are corroborated by the by the statements of various other entry operators and reports of various agencies."

64. According to the ld. CIT(A), the onus was upon the assessee to prove that the transactions were genuine and that the assessee was tendering routine papers which were not enough to discharge the onus. He also observed that the AO had carried out judicial proceedings, the material which was before other agencies was provided to the assessee, the said material was used for the

purpose of assessment proceedings by following the judicious process and the AO reached at a logical conclusion after considering the defence put forward by the assessee and that finding of fact was returned, independently, that the purported transactions of acquisition and sale of share of certain companies (called ópenny stocksô) claimed to have resulted in Long Term Capital Gain which was exempt u/s 10(38) of the Act were sham. The ld. CIT(A) did not find merit in the submission of the assessee by observing in para 53.4 of the impugned order as under:

> *"53.4 I have found that there is overwhelming material to prove that the so called long term capital gain was result of series of stage managed activities to give the transactions under consideration a colour of genuineness. These evidences have been discussed exhaustively in the assessment order as well as in this order, as above. To recap, the important ones are mentioned below.*
>
> *i) The unaccounted cash generation by way of clandestine diversion and sale (in cash) of raw material shown to have been purchased for consumption in the manufacturing process, and payments for (bogus) transportation of this material, consistently for five years by/on behalf of Sh. Neeraj Singal (VC & MD of M/s Bhushan Steel Ltd.) and payment of the cash generated due to such clandestine and organized process to Sh. Neeraj Singal has been proved, especially by way of statement of Sh. Pankaj Tiwari before Excise Authorities. The order of the Settlement Commission is at Annexure-1 to this order and the statement of Sh. Pankaj Tiwari made before Excise Authorities is at Annexure-2 to this order.*
>
> *ii) Generation of cash through unaccounted sale of scrap and payment of the same as per instruction of Sh. Neeraj Singal has been proved, specially by way of statement of Sh. Chandrakant Ma hade v Jadhav.*
> *iii) Evidence of cash generation and application was found during earlier search (dated 03.03.2010) in form of incriminating*

documents leading to surrender of heavy amount as undisclosed income by the appellant and members of his family.

iv) Evidence of claim of expenses by way of payment to the companies not found at their registered address during the earlier search (dated 03.03.2010).

v) Statement of Sh. Ankur Aggarwal clearly admits fact of payment of cash, transactions being stage managed, involvement of Sh. R. K. Kedia and receiving of bogus LTCG inform of accommodation entries and corroboration of the same by way of contents of pen drive seized from residence of Sh. Ankur Aggarwal, Statement of Shri Ankur Aggarwal also shows that management of BSL/Sh. Neeraj Singal/Sh. B.B. Singal were running benami companies where Sh. Ankur Agarwal and other employees of BSL are dummy directors. The statement of Ankur Agarwal is at Annexure-3 to this order.

vi) Admission of Sh. Neeraj Singal about knowing Sh. R. K. Kedia and having meetings and discussion with him.

vii) Statements of Sh. Neeraj Singal and Sh. Brij Bhushan Singal show that they had no knowledge about affairs or financials of the (penny stock) companies, however, investment of huge amount was made and huge LTCG has been reaped by purportedly investing and selling shares of these (penny stock)companies.

viii) Subscription to the shares of various non-descript (penny stock) companies having week financials through preferential allotment without any knowledge of financials or reputation of Directors of these companies.

ix) Investing in shares of the (penny stock) companies by more than one member of the family at the same time.

x) Phenomenal rise in price of shares of every such non-descript company where investment has been made, cannot be a mere coincidence.

xi) Having gains every time and in case of every individual, cannot be a mere coincidence.

xii) Incriminating statements by Sh. R.K. Kedia and his employee Sh. Manish Arora with precise details of persons of Bhushan Steel Ltd. involved in the transaction and the recovery of corroborative material from premises of Sh. R. K. Kedia as well as residential premises of Sh. Ankur Aggarwal.

xiii) It is important to note that telephone no. of Sh. Ankur Aggarwal has been provided by Sh. Manish Arora (reference answer to question no. 34 as quoted in para no. 4.2.5 of the Assessment Order in case of Sh. Neeraj Singal for A.Y. 2010-11). This telephone no. is the same which has been disclosed by Sh. Ankur Aggarwal as per his statement dated 13.06.2004 (recorded during the search).

xiv) Incriminating statements by the Directors of these penny stock companies to the effect that they were only dummy Directors and share prices were being manipulated by the entry operators.

xv) Incriminating report of Directorates of Income Tax(Inv.) Mumbai and Kolkota recording statements of entry operators to the effect that they were controlling shares of the penny stock companies in which LTCG has been reaped.

xvi) Identical incriminating material recovered during the search at the residence of Sh. Ankur Aggarwal (employee of Bhushan Steel Ltd.) and premises of Sh. R. K. Kedia (admitted entry operator).

xvii) Incriminating statement of one of the exit (accommodation entry) provider.

xviii) Evidence of Cash Trail leading to funds in the account of accommodation (entry) providers.
xix) Investigation by SEBI implicating appellant and his family members regarding malpractices in trading of the shares of the

same non-descript companies where the appellant and his family member have reaped LTCG.

xx) Admission/disclosure by third party beneficiaries of accommodation entries from Sh. R. K. Kedia.

xxi) Evidence of application of unaccounted cash in form of payment of salary (outside the books of accounts) found during current search (dated 13.06.2014).”

65. The reliance was placed on the following case laws:

- *Sanjay Bimalchand Jain L/H of Smt. Shantidevi Bimalchand Jain Vs Pr. CIT-I, Nagpur in ITA No. 61/Nag/2013, order dated 10.04.2017*
- *CIT Vs Durga Prasad More (1971) 82 ITR 540 (SC)*
- *CIT Vs Nova Promoters & Finlease (P) Ltd. (2012) 18 Taxmann.com 217 (Del.)*
- *CIT Vs N. R. Portfolio (P.) Ltd. (2012) 42 Taxmann.com 339 (Del.)*
- *CIT Vs Navodaya Castles (P.) Ltd. (2014) 50 Taxmann.com 110 (Del.)*

66. Accordingly, the addition made on account of Long Term Capital Gain and the payment of commission for obtaining the said entries of Long Term Capital Gain were confirmed.

67. Out of the addition of Rs.33,32,905/- on account of purchase of jewellery, the ld. CIT(A) confirmed the addition of Rs.3,32,905/- by observing as under:

“55.4 During the appellant proceedings, it was argued that question of the purchase under consideration, in any case, does not prove transaction of another purchase envisaged by the AO. This argument is acceptable on facts because on record, there is nothing to support the deduction made by the AO.

55.5 During the present appellate proceedings, it was noticed that the said purchase of jewellery was made on 08.12.2009. A Xerox copy of bill of M/s Kriya Impex Pvt. Ltd. dated 08.12.2009 was produced which has description, "cut and polished Diamonds". It is observed that it is a very general type of description. It is not even specifying as to how may pieces of Diamond were sold.

55.6 During the course of present appellate proceedings the AR was asked to state as to whether the said diamonds were found during the searches dated 03.03.2010 or 13.06.2014. The AR replied in negative (vide letter dated 06.09.2017). AR also could not show that these diamonds were sold or gifted to someone or got converted into jewellery subsequent to the said purchase but before search dated 03.03.2010. The said Diamond were also not found during the current search (on 13.06.2014). Therefore, the second limb of the AO's reasoning that there was grey market purchase is negated by this fact of non-finding of these diamonds during the above said two occasions of searches. Since, it is the stand of the appellant that these items were actually purchased, therefore, without going into the controversy whether such purchase was bogus or not, AR was asked to explain as to why non-finding of the said items during the subsequent two searches should not lead to the conclusion that these were sold before the first search(on 03.03.2010) and reasonable profit must have been made due to the said out of books sale. The AR had no reply, therefore, the addition to the extent of Rs.3,32,906/- (being 10% profit) is confirmed and rest of the addition is deleted. Thus, the ground (No. 5) is partly allowed."

53.5 In view of the above, a finding of facts has been returned(independently) by this office that the transactions under consideration were stage managed and accommodation entries, obtained by payment of unaccounted cash of equal amount plus commission."

68. As regards to the enhancement of the income, the ld. CIT(A) observed as under:

" i) clandestine diversion and sale in cash of raw material shown to have been purchased for consumption in the manufacturing process and cash generated pout of payments for (bogus) transportation of this material which was consistently going on for a period of about five years as a deliberate and planned exercise, and ii) cash sale (outside the books of accounts) of the scrap generated in the Khapoli factory, Sh. Neeraj Singal would have ensured that it was recorded in the books of accounts of M/s Bhushan Steel Ltd. The fact of not recording such entries in books of accounts of BSL, clearly shows that siphoning-off of the cash under consideration was short of business for adventure in nature of trade or commerce) of Sh. Neeraj Singal in personal capacity.

ii) It is not the case of Sh. Neeraj Singal or M/s Bhushan Steel Ltd. that this cash has been accounted in books of accounts of M/s Bhushan Steel Ltd. and action including criminal complaint of embezzlement and recovery has been instituted against Sh. Neeraj Singal.

iii) The Hon'ble Customs and Excise Settlement Commission has imposed penalty on Sh. Neeraj Singal and other conduits, in personal capacity."

69. He further observed that the statement of Sh. Pankaj Tiwari was very categorical which was not challenged at any stage and was corroborated by the material seized from him, it was also backed up by admission of diversion before Settlement Commission by the assessee as well as transporters and that the subsequent event to retract the statement by Sh. Chander Kant Jadhav was only futile attempt to wriggle out of rigors of the law directed towards the assessee and that the Customs & Central Excise Settlement Commission also imposed penalty upon the assessee. The ld. CIT(A) was of the view that the assessee generated the cash and observed as under:

"that the cash generated a) out of sale of raw material (shown to have been purchased for consumption in the manufacturing process) & payment of corresponding (bogus) transportation charges and b) cash generated out of sale of scrap, goes to the pocket of Sh. Neeraj Singal which has manifested in form of extension of unaccounted loans and advances (detected as a result of search on 03.03.2010) and bogus long term capital gain through accommodation entries showing dealing in penny stocks (as a result of search on 13.06.2014) but also proves that the above said expenses of purchase of Zinc and (bogus) transportation charges are for personal benefit of Sh. Neeraj Singal. In view of the said material, the onus is upon the appellant to prove that the cash generated due to sale under consideration and corresponding (bogus) transportation charges is not income of Sh. Neeraj Singal but the appellant has miserably failed to discharge the onus."

70. The ld. CIT(A) enhanced the income and held as under:

"56.13 In view of the above discussion, it is held that income generated in form of cash due to a) clandestine diversion and ***sale of raw material (shown to have been purchased for consumption in the manufacturing process)& payment of corresponding (bogus) transportation charges and b) sale of scrap*** *is indeed the income of Sh. Neeraj Singal. The activity of such sale is likely to have some profit margin. However, there would be certain expenses, also. Therefore, it is reasonable and fair to assume that the income would be equal to the value of clandestinely diverted raw material, payments for (bogus) 'transportation[1] charges up to factory and sale of scrap as reflected by the (coded) entries in the diary of Sh. Jadhav and (as) such entries explained by Sh. Jadhav by way of recording of his statement at the time of the search. Accordingly, following amount is added (by way of enhancement) to the assessed income of Sh. Neeraj Singal.*

A.Y.	*Cash generated out of sale of clandestinely diverted zinc (Rs. in crs.)*	*Cash generated out of expenses for (bogus) transportation to factory (for clandestinely diverted zinc) (Rs. in crs.)*	*Cash; generated out of sate of scrap*	*Total (Rs. in crs.)*
2009-10	*13.59*	*0.41*	*-*	*14.00*
2010-11	*61.23*	*1.29*	*-*	*622*
2011-12	*86.80*	*1.73*	*-*	*88.53*
2012-13	*48.74*	*0.96*	*-*	*49.70*
2013-14	*47.96*	*0.86*	*-*	*48.82*
2014-15	*-*	*-*	*1.5964000*	*1.5964000*
2015-16	*-*	*-*	*1.9475000*	*1.9475000*

71. As regards to the issue relating to the assumption of jurisdiction u/s 153A of the Act in the absence of incriminating material found during the course of search agitated by the assessee qua the assessment made during the assessment years under consideration. The ld. CIT(A) held as under:

> *"57.2 There is no quarrel with the ratio laid down by Hon'ble Delhi High Court while delivering the judgment in case of Kabul Chawla (supra) and other judgments that there should be material emanating from the search qua each AY. However, Hon'ble High Court has very carefully used two words i.e. 'material' and 'emanating'. However, the appellant is (cleverly) trying to substitute these words by another two words, namely, 'document' and 'seized', Respectively. There is no doubt that the word, 'material' has much wider meaning than the word, 'document'. Similarly, the word, 'enriahating' has much wider meaning than the word, 'seized'.*
> *57.3.1 Vide para 4,4 to 4.4.6 of the assessment order in case of Sh. Neeraj Singal, the AO has discussed the material gathered during the search and post-search investigation in case of M/s* ***Prraneta Industries Ltd.***
>
> *57.3.2 Vide para 4.4.4 of the assessment order in case of Sh. Neeraj Singal, the AO has stated that during course of survey, the*

Investigation Wing detected the activity of this company were not real. It shows that ***there was a survey in case*** *of M/s* ***Prraneta Industries Ltd.***

57.3.3 Vide para 4.4.3 of the assessment order in case of Sh. Neeraj Singal, the AO has stated that Sh. R.K. Kedia, in his statement has admitted that M/s Prraneta Industries Ltd. is under control and management of Sh. Sirish Chandrakant Shah and he is in the (same) business of providing accommodation entries. Sh. R.K. Kedia further stated that booking for bogus & pre-arranged LTCG, via transactions in shares of this company, was done through Sh. R.K. Kedia.

57.3.4 Vide Question no. 41 of statement of Sh. Neeraj Singal, recorded during the search, the officer recording the statement specifically stated that he had learnt that transactions with ***M/s Prraneta Industries Ltd.*** *were managed through the help of Sh. R. K. Kedia (ref. para 52.2.1, above). Moreover, vide Question no. 32 of statement of Sh. Brij Bhushan Singal, recorded during the search, the officer recording the statement specifically asked Sh. Brij Bhushan Singal as to whether he had heard or transacted in the past six years in certain scrips mentioned therein. Name of M/s Prraneta Industries Ltd. was specifically mentioned in the said question (ref. para 52.2.2, above). The above stated two references clearly show that the search team was having information about manipulation in the shares of M/s Prraneta Industries Ltd. and the search operation was mounted to gather relevant information/evidences.*

57.3.5 In view of the above discussion, I have no hesitation in returning a finding of fact that indeed there was direct incriminating material regarding transactions in the shares of ***M/s Prraneta industries Ltd.*** *and the said incriminating material did emanate from the search. Therefore, the basis of the appellant's argument is factually incorrect.*

57.4 There is no doubt that there is over whelming material (as discussed above) which has been discovered during the search and

post-search enquiries which goes to prove that Sh. Neeraj Singal was involved in earning unaccounted income through deliberate-and planned activities which were generating unaccounted cash (at least) from F.Y. 2008-09. This unaccounted income/cash was manifesting in various forms including unaccounted cash advance and bogus long term capital gain through preplanned and stage managed transactions in penny stocks. There is no doubt that the above stated transactions are in share of non-descript companies namely G-tech Info Ltd. and Prraneta Industries Ltd. There is 1098% rise in price of M/s Prraneta Industries Ltd. and there is 536% rise in share of G-tech Info Ltd. The claimed acquisition and the payment in respect of these scrips is not supported by any document except demat a/c statement in case of M/s G-tech Info Ltd, which also has discrepancy of date, as discussed above.

57.5.1 Certainly, before AO, there were over-whelming material (as discussed above), gathered during the search and post-search enquiries which goes to prove that Sh. Neeraj Singal was involved in earning unaccounted income through deliberate and planned activities which were generating unaccounted cash (at least) from F.Y, 2008-09. Undoubtedly, M/s. G-tech Info Ltd. and M/s. Prraneta Industries Ltd. are non-descript companies. Very low price of the shares at the time of purchase shows that no one was interested to buy these shares, in normal course. The transactions under consideration show that there is phonimal rise in the price which are not backed-up by the fundamentals (ref. 4.4.4 of the assessment order in case of Sh. Neeraj Singal for AY 2010-11). As discussed above, the appellant is not able to support either the purchase date or the purchase price. ***The appellant is also not able to provide the bank statement showing payment for the same which indicate that purchase is not genuine.***

57.5.2 ***The question is whether the material gathered during the search which beyond doubt shows manipulations and coloured transactions, in general, and specifically in penny stocks has implications for the above stated scrips (M/s. G-tech Info Ltd. and M/s. Prraneta Industries Ltd.)*** *?The answer to question is in affirmative in the light of ratio of Hon'ble Delhi High Court laid*

down while delivering judgment in case of CIT Vs. ***Chetan Das Lachman Das[2012] 25 taxmann.com 227 (Delhi).*** *The Hon'ble Court ruled that transaction can be presumed for whole period on basis of seized material and seized material can also be relied upon to draw inference-that there can be similar transactions throughout period of six years covered by section."*

72. Now the assessee is in appeal. The ld. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that a search & seizure operation on M/s Bhushan Steel Ltd. (BSL) group of cases including premises of the assessee was carried out on 13.06.2014. However, no incriminating material whatsoever indicating any undisclosed income or assets of the assessee was discovered. A reference was made to page no. 58 of the assesseeôs paper book and it was submitted that the copies of panchanama of the assessee would reveal that nothing incriminating was found in the course of search. It was stated that it was apparent from the search documents that no incriminating materials in the form of books of account, documents unaccounted money, bullion, jewellery etc. indicating the factum of undisclosed income were found and seized in the course of search, justifying the quantum of additions made by the AO. It was contended that the plain reading of assessment orders passed u/s 153A of the Act in the cases of the assessees would reveal that the additions made by the AO were predominantly based on alleged entries in hard/soft data seized from the premises of third parties in the course of search actions in their cases, uncorroborated statement of employee of BSL (Sh. Ankur Agarwal) which was later on retracted by him, pen-drive seized from the residence of Sh. Ankur Agarwal which corroborated the entries pertaining to shares as recorded in regular books of account of the assessees and did not in any manner indicate that the same were bogus. It was contended that

the statements of third parties recorded u/s 132(4)/133A of the Act was not made available for cross-examination before the assessees despite categorical request, in complete denial of principles of natural justice. It was stated that the assessment orders under considerations were unabated years, therefore, the addition was limited to incriminating material found during the course of search and unless there is incriminating material qua each of the assessment years in which additions are sought to be made, the assumption of jurisdiction u/s 153A of the Act would be vitiated in law. It was stated that the complete assessment proceedings will not merge with the proceedings initiated u/s 153A of the Act and their sanctity inviolably to be respected unless violated by any incriminating material found during the course of search u/s 132 of the Act and in the instant case no incriminating material whatsoever found in the course of search action u/s 132(1) of the Act. Therefore, the assessment for unabated years were required to be reiterated by the AO and the additions made on the basis of third party statement, third party data etc which do not constitute incriminating material found in the course of search deserves to be deleted. The reliance was placed on the following case laws:

- *All Cargo Logistics Ltd. Vs DCIT (2012) 18 ITR 106 (SB)*
- *CIT(C)-III Vs Kabul Chawla (2015) 61 Taxmann.com 412 (Del.)*
- *Jai Steel (India), Jodhpur Vs ACIT (2013) 259 CTR 281 (Raj.)*
- *Pr. CIT & Ors. Vs Meeta Gutgutia Prop. Ferns 'N' Petals & Ors (2017) 395 ITR 526*
- *Pr. CIT Vs Saumya Construction Pvt. Ltd. (2016) 387 ITR 529 (Guj.)*
- *Pr. CIT-1 Vs Devangi Alias Rupa (2017-TIOL-319-HC-AHM-IT)*
- *CIT Vs IBC Knowledge Park Pvt. Ltd. (2016) 385 ITR 346 (Kar.)*
- *Pr. CIT-2 Vs Salasar Stock Broking Ltd. (2016-TIOL-2099-HC-KOL-IT)*
- *CIT Vs Gurinder Singh Bawa (2016) 386 ITR 483 (Bom.)*

- *CIT Vs Sinhgad Technical Education Society (2017) 397 ITR 344 (SC)*
- *Pr. CIT, Delhi-2 Vs Best Infrastructure (India) Pvt. Ltd. & Ors. in ITA Nos. 11/2017 to 22/2017*
- *Dharampal Satyapal Ltd. Vs DCIT in ITA Nos. 3310, 3717, 3718, 3719, 3737, 3877 to 3881/Del/2016, order dated 17.05.2018*
- *Pr. CIT Vs Dharampal Premchand Ltd. (2017) 99 CCH 202*

73. It was further submitted that the statements recorded u/s 132(4) of the Act do not by themselves constitute incriminating material for the purpose of Section 153A of the Act and cannot be used as evidences unless they have live nexus with incriminating material found in the course of search in the case of the assessee and that the adverse statements of third parties recorded behind the back of the assessee cannot be used against the assessee unless an opportunity of cross-examination of such parties has been allowed to the assessee. It was also submitted that in case no notice u/s 143(2) of the Act is issued by the AO and the time period for issuing such notice has expired on or before the search then the assessment completed u/s 143(1) of the Act for such year shall not abated and no addition in respect of any issue could be made u/s 153A of the Act in respect of such unabated years unless incriminating material relevant to that issue to such assessment year is found in the course of search. It was stated that the AO exceeded the jurisdiction conferred u/s 153A of the Act in making the impugned additions on account of alleged bogus Long Term Capital Gain, alleged unaccounted commission income in respect of unabated years de-hors any incriminating material qua each of such assessment years being found in the course of search in the cases of the assessee. It was submitted that the decision relied by the ld. CIT(A) in the case of CIT Vs Chetan Das Lachman Das (2012) 25 Taxmann.com 227 was distinguished by the Hon'ble

Jurisdictional High Court in the later case of CIT Vs Kabul Chawla 234 Taxman 300.

74. It was vehemently argued that in the case of the assessee, the factual scenario for respective scrips would show that no incriminating material relevant to unabated assessment years were found in the course of search at the premises of the assessee for the purposes of reopening of the completed assessment u/s 153A of the Act and since the same could not be done in the absence of any incriminating material, then such completed assessment could have been reiterated and only the abated assessment or reassessment can be made. It was further submitted that in the case of CIT Vs Chetan Das Lachman Das (supra), it has clearly been held that ñobviously an assessment has to be made under this Section only for the purpose of seized materialò meaning that use of the phrase ñseizedò material i.e. incriminating in nature is a mandatory requirement that cannot be done away u/s 153A/153C of the Act with respect to unabated assessment years. Therefore, the ld. CIT(A) had erroneously worked on the assumption that this pre-condition had been made for the assessees with respect to the respective scrips for which material had allegedly been found in the possession and premises of third parties (and not that of the assessees). It was submitted that the third party statements recorded i.e. Sh. Raj Kumar Kedia and his employee Sh. Manish Arora alleged entry operators/exit providers, Directors of alleged penny stock companies, Sh. Ankur Agarwal, an employee of BSL but those statements did not constitute incriminating material unless they have live nexus with books of account, documents found in the course of search but not produced in the course of original assessment for undisclosed income or property discovered in the course of search in the assesseeôs case. It

was further submitted that the pen-drive seized from Sh. Ankur Agarwal was having nothing incriminating against the assessee and his statement was subsequently retracted. It was further submitted that the revenue wrongly placed reliance on the statements of Directors of penny stock companies viz. M/s Anukaran Commercial Enterprises Ltd., M/s Rander Corporation Ltd. and M/s PSIT Infrastructure & Finance Ltd. and of the alleged entry and exit providers, recorded in the course of survey actions in their cases u/s 133A of the Act, however, apart from the fact that those statements did not directly implicate the assessees and only explain the general modus operandi with respect to the shares of the said companies being utilized to provide bogus Long Term Capital Gain to the few beneficiaries. Therefore, such statements recorded in the course of survey actions u/s 133A of the Act in the cases of the said parties did not have any evidentiary value and cannot be characterized as ñincriminating materialò for the purpose of reassessing income of the assessees for unabated assessment years u/s 153A of the Act. It was further submitted that the assessee from the very inception denied any linkage with Sh. Raj Kumar Kedia or Sh. Manish Arora. It was stated that Sh. Raj Kumar Kedia claimed that Sh. Pankaj Tiwari dealt on behalf of the BSL group, however, Sh. Pankaj Tiwari denied such allegation in statement u/s 132(4) of the Act and Sh. Raj Kumar Kedia retracted from his statements on 14.10.2014 but such retraction was again retracted by him on 26.03.2015. Therefore, no reliance could have been placed on his contradictory stand. It was also pointed out that Sh. Ankur Agarwal retracted his statement on 20.12.2016, therefore, his original statement was not reliable & conclusive. The reliance was placed on the following case laws:

- *CIT Vs Harjeev Agarwal (2016) 290 CTR 263 (Del.)*
- *Moon Beverages Ltd. & Anr. Vs ACIT & Anr. (2018) in ITA No. 7374/De/2017, order dated 07.06.2018*
- *Brahmaputra Finlease (P) Ltd. in ITA No. 3332/Del/2017, order dated 29.12.2017*

75. It was pointed out that as noted in para 4.11 of the assessment order, summons u/s 131 of the Act was issued to Sh. Raj Kumar Kedia and Sh. Manish Arora to appear before the AO on 06.12.2016 for allowing cross-examination to the assessees. However, they did not appear and the Authorized Representative of the assessee vide letter dated 19.12.2016 requested that if any adverse inference against the assessee was to be drawn on the basis of the statements of the persons, an opportunity to cross-examine the said persons may be provided. It was stated that in this regard, summons u/s 131 of the Act were issued to 15 persons but none of them responded to the summons and since the onus of ensuring the presence of the deponents for cross-examination was on the AO who failed to discharge such onus. Therefore, as per the clear dictum of the Hon'ble Jurisdictional High Court, such statements ought to be discarded and could not be relied upon for making additions u/s 153A of the Act. It was stated that for the assessment years under consideration i.e. assessment years 2010-11 to 2012-13 in the cases of all the four assessees under consideration, the assessment were not pending as on the date of search and as such there would be no abatement of any proceedings for the said years. In other words, at the time of search i.e. on 13.06.2014, the assessments for the assessment years 2010-11 to 2012-13 in the cases of the assessees were completed/not pending and therefore, the same have to be reckoned as unabated assessment in terms of second proviso to Section 153A of the Act and that the scope of assessment u/s

153A of the Act in case of unabated years would be strictly restricted to incriminating material found during the course of search in the case of the respective assessees. It was further stated that any addition/disallowance de-hors any incriminating material found during the course of search in the case of the assessee is outside the scope of assessment u/s 153A of the Act and is a clear violation of the enunciated by the various Hon'ble High Courts and the Hon'ble Supreme Court. Therefore, the AO exceeded the jurisdiction conferred u/s 153A of the Act in making the exorbitant additions. It was further submitted that the Long Term Capital Gain earned by the assessee in the respective scrips were declared in the returns of income filed for the respective years. The same were accepted as such by the department in the assessments completed u/s 143(3) of the Act for the assessment years 2010-11 & 2011-12. A reference was made to page nos. 59 to 94 of the assessee's paper book. As regards to the assessment year 2012-13, it was submitted that the said issue attained finality since the time period for issuing notice u/s 143(2) of the Act expired before the date of search, therefore, it was not open to the Department to discard such issue which had attained finality vide the original assessments in the absence of incriminating material being found in the course of search. The reliance was placed on the judgment of the Hon'ble Supreme Court in the case of CIT Vs Singhad Technical Education Society (2017) 397 ITR 344.

76. The reliance was also placed on the following case laws:

- *ACIT, Central Circle-5, New Delhi Vs M/s Gee Ispat Pvt. Ltd. in ITA Nos. 4256 to 4259/Del/2014, order dated 31.05.2018*
- *Granite Gate Properties Pvt. Ltd. Vs ACIT, Central Circle, New Delhi in ITA Nos. 7022 to 7024/Del/2017, order dated 29.05.2018*

- *M/s M. L. Singhi & Associates (P) Ltd. Vs DCIT, Central Circle-7, New Delhi in ITA No. 3335 to 3337/Del/2017, order dated 17.09.2018*
- *ACIT, Central Circle-8, New Delhi Vs Meroform India Pvt. Ltd. in ITA Nos. 4630 to 4635/Del/2014, order dated 31.07.2018*

77. As regards to the issue relating to addition made on account of alleged bogus Long Term Capital Gain and commission for the abated years, it was submitted that hard/soft data seized from the premises of Sh. Ankur Agarwal and Sh. Raj Kumar Kedia did not contain any entries/data whether incriminating or otherwise with respect to transactions in shares of the aforesaid scrips for the unabated assessment years i.e. assessment years 2010-11 to 2012-13. Accordingly, assessments for unabated years cannot be reopened on the basis of such materials. As regards to the ñNPò ledger seized from the premises of Sh. Raj Kumar Kedia relied upon by the AO, it was stated that the ledger contained entries for a period of 13 months from 01.04.2013 to 09.06.2014 which did not constitute incriminating material for the unabated assessment years i.e. assessment years 2010-11 to 2012-13. It was reiterated that the assessee had from the very inception consistently denied any relationship/linkage/dealings with Sh. Raj Kumar Kedia or Sh. Manish Arora or any of the alleged entry operators/exit providers or directors of penny stock companies. It was further submitted that the pen-drive seized from the premises of Sh. Ankur Agarwal did not contain anything incriminating against the assessees, it merely recorded the regular transactions in purchase and sale of shares of the assessees for a period of 2.5 months from 01.04.2014 to 12.06.2014 but there was no entry therein pertaining to any unaccounted receipt or payment of cash or commission against the transactions in shares carried out

by the assessee. Therefore, the entries in the said pen-drive could not have been used to draw adverse inference in respect of transactions in shares which were not even named in the said pen-drive for the unabated assessment years, a reference was made to page nos. 192 to 301 of the assesseeôs paper book. It was further submitted that since the said pen-drive was not found or seized from the possession and control of the assessees in the course of search, therefore, the presumption u/s 132(4A)/292C of the Act regarding the ownership and correctness of the contents thereof was not applicable to the assessee who was not aware of the reason as to why the names of the alleged entry operators or the notings against their names appeared in the said pen-drive which belonged to Sh. Ankur Agarwal and seized from his possession and control, in the course of search at his residential premises. It was further submitted that for making the addition u/s 68 of the Act on account of LTCG and alleged unaccounted commission, the AO had primarily relied upon the following:

> *"(i) Third party statements recorded u/s 132(4) & 133A (alleged entry/exit providers, directors of alleged penny stock companies).*
>
> *(ii) Statement of employee of BSL, Sri Ankur Aganval which was subsequently retracted.*
>
> *(iii) Third party evidence/data having no nexus with any incriminating materials seized in course of search in the Assessees' own case.*
>
> *(iv) Pen-drive seized from the residential premises of the employee of BSL (substantiating the transactions in shares carried out by the Assessees herein and having nothing incriminating against the Assessees).*

(v) Interim orders passed by S.E.B.I in respect of few scrips vis-a-vis the Assessees herein which were subsequently revoked by the S.E.B.I in the final orders.

(vi) Cash Trail in bank accounts of purchaser companies having no linkage/connection with the Assessees.

(vii) Disclosures made by third parties who were beneficiaries to bogus LTCG.
(viii) Application of principles of preponderance of probabilities under the facts and circumstances of the present case."

78. It was contended that the assessee filed the returns of income for the years under consideration and earned the Long Term Capital Gains in various scrips on which Securities Transaction Tax (STT) had been duly paid and having complied with all the requisite conditions, the LTCG was rightly claimed exempt u/s 10(38) of the Act but the AO by ignoring the specific provisions of law proceeded to tax the entire LTCG to the income of the assessees for the relevant years relying on various arguments/so-called evidences as discussed in the body of the assessment orders. However, the so-called evidences used by the AO in making the impugned additions were highly unreliable and did not conclusively prove that the LTCG earned by the assesses were not genuine or sham. It was stated that most of the shares of the companies on which LTCG had been earned were allotted to the assessees by way of preferential allotment and that one of the grounds taken by the AO in doubting the transactions carried out by the assessees and alleging personal connection between the assessees and the promoters of the said companies/entry providers was that the shares of the said companies were allotted by way of preferential allotment. It was stated that the issuance of

shares on preferential basis was in consonance with applicable SEBI regulations and listing agreement norms and that the shares of the companies were allotted to the assessees by way of preferential allotment did not signify any connection of the assessees with the companies. It was also stated that various statutory/regulatory bodies such as SEBI, the Stock Exchanges etc. were involved in the process of preferential allotment of shares as well as follow up public issues which involved a multi-stage, rigorous, coordinated and time bound process involving comprehensive due-diligence, vetting of documents, background check of promoters, compliance with well-led out guidelines and parameters etc. It was further stated that a company intending to go in for a public issue can allot shares by way of preferential allotment only after getting the approval of SEBI which 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 and that the assessee cannot be faulted for relying on the commercial proposition which was duly compliant with law, including approval of SEBI. Therefore, to disregard the activities conducted by a company as dummy when almost its entire spectrum of activities have been pre-scrutinized and approved by various agencies including capital market regulator SEBI would be disregarding the functioning of bodies operating under a law. It was emphasized that 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 and after being held for a period of more than 12 months, their sales were effective through registered brokers on the BOLT/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 and that 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 assesseeôs bank accounts. A reference was made to paper books 1A, 1B, 2A, 2B, 3A, 3B & 4. The reliance was placed on the following case laws:

- *Andaman Timber Industries Vs Commissioner of Central Excise (2015) 281 CTR 241 (SC)*
- *Kishinchand Chellaram (AIR 1980 SC 2117)*
- *State of M.P. Vs Chintaman Sadashiva Waishampayan (AIR 1961 SC 1623)*
- *Lakshman Exports Ltd. Vs Collector of Central Excise (2005) 10 SCC 634*
- *Rajiv Arora Vs Union of India and Ors. (AIR 2009 SC 1100)*
- *CIT Vs SMC Share Brokers Ltd. (2007) 288 ITR 345 (Del.)*
- *Eastern Commercial Enterprise (1994) 210 ITR 103 (Cal.)*
- *Prakash Chand Nahta Vs CIT (2008) 301 ITR 134 (MP)*
- *Bangodaya Cotton Mills Ltd. Vs CIT (2009) 21 DTR 200 (Cal.)*
- *CIT Vs Sanjeev Kumar Jain (2009) 310 ITR 178 (P&H)*
- *CIT & Anr. Vs Land Development Corporation (2009) 316 ITR 328 (Kar.)*
- *CIT Vs Rajesh Kumar (2008)_ 306 ITR 27 (Del.)*
- *Heirs & LRs of Late Laxmanbhai S. Patel Vs CIT (2009) 222 CTR 138 (Guj.)*
- *CIT Vs Pradeep Kumar Gupta (2008) 303 ITR 95 (Del.)*
- *CIT Vs Dharam Pal Prem Chand Ltd. (2007) 295 ITR 105 (Del.)*
- *CIT Vs A.N. Dyaneshwaran (2008) 297 ITR 135 (Mad.)*
- *P. S. Abdul Majeed (1994) 209 ITR 821 (Kerala)*
- *Prarthana Construction (P) Ltd. (2001) 70 TTJ 122 (Ahd. Trib.)*
- *CIT Vs S.M. Aggarwal 292 ITR 43*

79. It was reiterated that the AO placed strong reliance on statements of third parties recorded u/s 132(4)/133A of the Act in the course of search and survey action in their cases and the assessee had from the very inception consistently denied any relationship/linkage/dealings with Sh. Raj Kumar Kedia or Sh. Manish Arora or alleged entry operators or exit providers or directors of penny stock companies and even in para 4.11 of the assessment order for the assessment year 2015-16, the AO issued summons u/s 131 of the Act to Sh. Raj Kumar Kedia and Sh. Manish Arora to appear before him on 06.12.2016 for allowing cross-examination to the assessee. However, they did not appear and the assessee vide letter dated 19.12.2016 requested that if any adverse inference against the assessee was to be drawn on the basis of the statements of persons, an opportunity of cross-examine the said persons may be provided. A reference was made to page nos. 434 to 445 of the paper book. It was also stated that the summons u/s 131 of the Act were issued to 15 persons but none of them responded. Therefore, no opportunity of cross-examination was allowed to the assessee despite categorical request and the AO failed to discharge the onus of ensuring presence of the witness for cross-examination. It was pointed out that the assessee in reply to Question Nos. 34 to 36 in his statement recorded during the course of search u/s 132(4) of the Act, fervently denied having any linkage/dealings with Sh. Raj Kumar Kedia or the alleged entry operators. Therefore, no credence could be placed on the statements of Sh. Raj Kumar Kedia who was taking contradictory stands because the statements recorded on 13.06.2014 u/s 132(4) of the Act was retracted by him in the course of post search investigation proceedings on 14.10.2014 and the same was further

retracted again on 26.03.2015. Therefore, no degree of reliance could have been placed on his statement. The reliance was placed on the following case laws:

- *DCIT Vs Bhola Nath Radha Krishna in ITA No. 5149/Del/2012 (Del.)*
- *Smt. Smita P. Patil Vs ACIT (2014) 159 TTJ 182 (Pune)*
- *CIT Vs Eastern Commercial Enterprises (1994) 201 ITR 103 (Cal.)*

80. It was further submitted that the statements of the Directors of penny stock companies, alleged entry and exit providers only explained the general modus operandi with respect to the shares of the said companies being allegedly utilized for the purpose of providing accommodation entries in certain cases but no concrete evidence had been unearthed in the course of search of the assessee to conclusively establish that the assessee had booked bogus LTCG or that his own unaccounted money was routed through transactions in shares of said scrips or that he had made any compensatory payments to the buyers of the said scrips. It was further submitted that the statements of the Directors of penny stock companies recorded in the course of survey u/s 133A of the Act did not have any nexus to anything incriminating found in the course of search at the premises of the assessee. Therefore, those statements did not have any evidentiary value and could not on a standalone basis be used to draw adverse inference against the assessee in his assessments u/s 153A of the Act unless corroborated by incriminating material seized in the course of search in assesseeôs case. It was also pointed out that the AO heavily relied upon the statement of Sh. Ankur Agarwal an employee of BSL, recorded in the course of search at his premises under extreme pressure and undue stress allegedly stating that the assessee had obtained bogus LTCG by pre-arranged trading of certain

non-descript listed companies. However, the said statement was retracted by Sh. Ankur Agarwal on 20.12.2016 before the AO. Therefore, such retracted statement could not have been held as evidence/reliable material so as to fasten exorbitant liability on the assessee. The reliance was placed on the following case laws:

- *L. K. Advani Vs Central Bureau of Investigation (1997 IIIAD Delhi 53, 1997/1997 (4) Crimes 1/66 (1997) DLT/(1997) 116 PLR 1/1997 RLR 292)*
- *Straptex India (P) Ltd. Vs DCIT (2003) 84 ITD 320 (Mum.)*

81. A reference was also made to Circular No. F. No. 286/2/2003-IT (Inv.), dated 10.03.2003 issued by the CBDT wherein it has been stated that the assessment made pursuant to search operation are required to be based on incriminating material discovered as a result of search operation in the case of the assessee and not on recorded statements. Accordingly, it was submitted that evidentiary value of the documents seized from premises of third parties i.e. Sh. Ankur Agarwal and Sh. Raj Kumar Kedia etc. merely depicted the regular purchase and sale of shares carried out by the assessee and did not indicate any unaccounted exchange of cash between the assessee and the said party and that no opportunity of cross-examination of author of the data were allowed, therefore, such data did not have any referral value in so far as the cases of the assessee are concerned. The reliance was placed on the following case laws:

- *Central Bureau of Investigation VS V. C. Shukla & Ors. (1998) AIR 1406 (SC)*
- *ACIT Vs M.s Lata Mangeshkar (1974) 97 ITR 696 (Bom.)*

82. It was contended that the violation of natural justice rendered the assessment void and the department could not be given a second chance. The reliance was placed on the following case laws:

- *CIT Vs Sumita Dhadda (Order dated 28.03.2018 of Hon'ble SC)*
- *CIT VS. Dinesh Kumar Sharma, ITA No.14/2005 decided on 24.04.2017.*
- *CIT Jaipur vs. Vijendra Kumar Kankaria, ITA No. 175/2010 decided on 29.05.2017*
- *Common Cause (A Registered Society) and Ors. vs. Union of India (UOI) and Ors.*
- *Bhandari Construction Company vs. Narayan Gopal Upadhye*
- *Ayaaubkhan Noorkhan Pathan vs. The State of Maharashtra and Ors.*
- *Andaman Timber Industries vs. Commissioner of C. Ex., Kolkata-II*
- *Principal Commissioner of Income Tax Ahmedabad and Ors. vs. Kanubhai Maganlal Patel*
- *CIT v. Devendra Kumar Singhal*
- *Commissioner of Income Tax-V vs. Indrajit Singh Suri*
- *CIT vs. Supertech Diamond Tools Pvt. Ltd., 74 of 2012*
- *Commissioner of Income Tax vs. Ashwani Gupta*
- *ACIT vs. Govindbhai N. Patel*
- *CIT Kanpur vs. Shadiram & Others*
- *Commissioner of Income Tax vs. Bhanwarlal Murwatiya and Ors.*
- *CIT vs. Dhrampal Premchand Ltd*
- *CIT vs. S.M.Agganval*
- *Paramjit Singh vs. 1TO, IT Appeal No. 401 of 2009*
- *CIT-13 Vs. M/s. Ashish International (ITA No. 4299 of 2009; dated, 22.02.2011)*
- *Commissioner of Income Tax vs. Anil Khandelwal (21.04.2015 - DELHC)*
- *Commissioner vs. Motabhai Iron and Steel Industries (03.09.2014 - GUJHC)*
- *CIT vs. S.C. Sethi, D.B.I.T Appeal No. 78 of 2005, 10.03.2006*
- *Vinit Ranawat Vs ACIT (2017) 88 Taxmann.com 428 (Pune Trib.)*

- *Ganeshmull Bijay Sing Baid (HUF) & Ors. Vs DCIT & Ors. (2015) 45 CCH 306 (Kol Trib.)*
- *CIT Vs Anil Khandelwal (2015) 93 CCH 42 (Del)*
- *Straptex India (P) Ltd. Vs DCIT (2003) 84 ITD 320 (Mum)*
- *Pradeep Amrut Lal Runwal Vs Tax Recovery Officer (2014) 47 Taxmann.com 293 (Pune Trib.)*
- *ACIT Va Amit D Irshid in ITA No. 988/PN/2011, order dated 22.04.2013*
- *Prarthana Construction (P.) Ltd. Vs DCIT (2001) 118 Taxman 112 (Ahd.)*
- *Rama Traders Vs First ITO (1998) 25 ITO 599 (Pat.)*
- *ACIT Vs Kishore Lal Balwani Rai (2007) 17 SOT 380 (Chd.)*
- *ACIT Vs Prabhat Oil Mills (1995) 52 TTJ 533 (Ahd.)*
- *Sheth Akshay Pushpavadan Vs DCIT (2010) 130 TTJ 42 (Ahd.)*
- *Jai Kumar Jain Vs ACIT (2006) 99 TTJ 744 (Jai.)*
- *Amarjit Singh Bakshi (HUF) Vs ACIT (2003) 86 ITD 13 (Del.)*
- *Sri Suresh Nanda Vs ACIT, New Delhi (2012) 31 CCH 494 (Del. Trib)*
- *Anil Mahavir Gupta Vs ACIT, Central Circle-45, Mumbai (2017) 82 Taxmann.com 122 (Mum. Trib.)*
- *DCIT Vs Bhola Nath Radha Krishna in ITA No. 5149/Del/2012 (Del.)*
- *Yash Pal Narendra Kumar, New Delhi Vs Department of Income Tax in ITA Nos. 5340, 5341 & 5342/Del/2012 (Del.)*

83. The ld. Counsel for the assessee summarized the principles enunciated in the aforesaid cases as under:

- *"Mere entries in the accounts of third parties are not sufficient to prove that the assessee indulged in such transactions.*

- *Presumption available under section 132(4A)/292C can be drawn against the person from whose possession or control books of account, diary or documents are found in the course of search. Presumptions regarding correctness of contents of books of account etc. cannot be raised against a third party.*

- *The presumption u/s. 132(4A)/292C can be used only against the person from whose premises the documents are found and not against the person whose name appears in the seized papers.*

- *Based on the incriminating material found from third party search but not belonging to the assessee, this presumption will not be applicable unless corroborated by other evidence.*

- *Statement of a third party cannot be used against the assessee unless the assessee is allowed an opportunity to cross-examine him.*

- *Any addition made on the basis of statement by a Third Party without affording an opportunity for rebuttal or cross examination to the assessee is perverse.*

- *Frequent retractions of statement (i.e. retraction following by re-retraction) by the deponent undermines the credibility of its genuineness."*

84. The ld. Counsel for the assessee in his conclusion enunciated the principles to the facts of the assesseeôs case as under:

- *"Mere seizure of documents/hard soft data/ pen-drive from the premises of third party (Sri. R.K. Kedia) / personal residence of employee of BSL (Sri Ankur Agarwal) would not conclude the issue against the Assessees herein since presumption u/s 132(4A)/292C would be operable only against the persons from whose premises the said documents/pen-drive were seized and not against the Assessees.*

- *There is no independent evidence to link the seized documents found in third party premises with any incriminating material found in course of search operations at the premises of the Assessees. Hence, entries in documents seized from third party premises would not be sufficient to prove that the Assessee indulged in such transactions.*

- *Statements of third parties (R.K. Kedia, Manish Arora, alleged entry & exit providers, directors of companies etc.) recorded u/s 132(4)/133A cannot be used against the Assessees since opportunity of cross examination was not allowed to the Assessees, which makes the order so passed nullity inasmuch as it amounted to violation of principles of natural justice because of which the Assessees were adversely affected.*

- *Frequent retraction of statement by Sri R.K. Kedia (retraction followed by re-retraction) undermines the credibility of its genuineness and neutralizes his value as a witness. No reliance can be placed on the testimony of such a person indulging in double speaking and taking contradictory stands.*

- *Statement of Sri Ankur Agarwal which was subsequently retracted does not have any evidentiary/referral value insofar as the Assessees are concerned. In case the Department still intended to rely on such retracted statement, it was duty bound to allow the Assessees an opportunity of cross examining the said witness before using his original statement against the Assessees, which in the present case was clearly not done."*

85. It was further submitted that in making the additions in the hands of the assessee, the AO had also sought to seek support from the investigations carried out by SEBI in few listed companies on the basis of common trading pattern and identical developments like stock splits, preferential allotments, insignificant economic activity and high stock prices. It was also stated that the AO primarily relied upon the Ad Enterim Ex Parte Orders dated 19.12.2014 passed by the SEBI in the cases of M/s First Financial Servics Ltd. and M/s Radford Global Ltd. and restrained the assessee from trading in stock exchange stating as under;

"In order to protect the interest of the investors and the integrity of the securities market, I, in exercise of the powers conferred

upon me in terms of section 19 read with section 11(1), section 11(4) and section 11B of SEBI Act, 1992, pending inquiry/investigation and passing of final order in the matter, hereby restrain the following persons/entities from assessing the securities market and buying selling or dealing in securities, either directly or indirectly, in any manner, till further directions."

86. It was contended that the similar Ad Interim Ex-parte Orders were passed by the SEBI in respect of the scrips of M/s Mishka Finance & Trading Ltd. (formerly known as M/s Pyramid Trading and Finance Ltd.) dated 17.04.2015 and M/s Pine Animation Ltd. dated 08.05.2015. However, the said orders were only in the nature of interim orders based on the preliminary investigations carried out by the SEBI pending inquiry/investigation and passing of final orders by the SEBI. It was contended that the Hon'ble Gujarat High Court in the case of SEBI Vs Alka Synthetics (1999) 19 SCL 460 (Guj.) had opined on the nature of Ad Interim Ex-parte Orders, being merely preventive checks that are placed on certain assessees upon a mere prima facie opinion pending final decision of the SEBI. It was pointed out that the SEBI after conducting the detailed investigation into the entire scheme alleged in the cases of the aforesaid four scrips, connection amongst the debarred entities, funds used for manipulation of prices etc. came to a conclusion that no adverse findings against the entities as specified in the said orders were found and accordingly, the interim orders/confirmatory orders against the said entities were revoked.

87. It was stated that the SEBI came to a definite conclusion that the assessees were not involved in the alleged scam with respect to the impugned scrips and gave a clean chit to the assessees by passing final orders in favour of the assessees invoking the interim orders. Our attention was drawn towards

table 27 at page nos. 89 to 93 of the assesseeôs written submissions wherein findings given in the final order of the SEBI are pointed out, for the cost of repetition, the same are not reproduced herein. A reference was also made to the final orders passed by the SEBI in connection with the aforesaid four scrips (copies of which are placed at page nos. 302 to 419). It was contended that the SEBI although found that the prices of the aforesaid scrips were manipulated for providing fictitious LTCG to preferential allottees and promoter related entities in certain cases so as to convert their unaccounted income into accounted one. However, the SEBI after conducting a detailed investigation into the entire scheme employed in the respective scrips came to a conclusion that the assessees along with certain other noticees, despite being preferential allottees in the shares of the said companies, neither had any connection/nexus with the said companies or their promoters/directors or promoter related entities nor had any role in price manipulation, volume manipulation in the scrips of the said companies and categorically observed that such fraudulent schemes are conceived and executed by a set of core entries which were connected and which were bound by common objective of making wrongful gains by manipulating the market and undermining its integrity and in this process, certain entities were lured into the artifice with the promise of quick returns but their roles did not extend to price manipulation or facilitating such manipulations by means of fund transfer or any other activity of abetment. It was emphasized that after detailed investigation by the SEBI, the assessees (i.e. the Bansal Family members) were not found part of any such fraudulent schemes in the shares of the said companies and accordingly, the interim orders passed against them were subsequently revoked by the SEBI and that the said

final orders passed by the SEBI in favour of the assessees buttress/reinforce their contention with respect to the genuineness of the impugned transaction carried out by them and held immense persuasive value onto the assesseeôs case. The reliance was placed on the following case laws:

- *RM Shares Trading Vs SEBI (2014) 49 Taxmann.com 369 (SAT – Mumbai)*
- *SEBI Vs Alka Synthetics (1999) 19 SCL 460 (Guj.)*

88. As regards to the cash trail in bank accounts of purchaser companies, the ld. Counsel for the assessee submitted that the AO was not justified in drawing any adverse inference against the assessee on the basis of enquiry as to the names of buyers who ultimately bought shares sold by the assessee because the assessees were neither aware of the identity of the buyers who bought the shares sold by them through brokers nor did they had any connection with them and that the shares were of listed companies which 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 and there was no physical interaction between the parties, as such the identities of the counter party (whether buyer or seller) was not available thereby eliminating the possibility of any collusion between the parties and that the entire sales of shares were effected through web-based platforms of the relevant exchanges in which the seller would in no way sell to a particular entity/individual and vice versa and the transaction carried out by the assessee stood documented, evidenced by contract notes/bills of the relevant brokers issued in the form and manner as prescribed by the regulatory authorities. Therefore, it could not be presumed that there was any transfer of cash between

the assessees and the alleged buyers to convert the unaccounted monies of the assessees into LTCG as alleged by the AO. It was also stated that as noted by the SEBI, the assessee being innocent genuine investors, lured into the artifice with the promise of quick returns but his role did not extend to the price manipulation or facilitating such manipulations by means of fund transfers or any other activity of abetment. Therefore, in the present case, no cash trail evidencing conversion of alleged unaccounted money into bogus LTCG for the years under consideration had been prepared in the cases of the assessee and that the AO failed to establish any flow of unaccounted cash/income through this channel by brining on record conclusive evidence. The reliance was placed on the following case laws:

- *CIT Vs Lavanya Land (P) Ltd. 397 ITR 246 (Bom.)*
- *Baijnath Agarwalla Vs ACIT (2010) 40 SOT 475 (Agra)*
- *CIT VS Jamma Devi Agarwal (2010) 328 ITR 656 (Bom.)*
- *Malti Ghanshyambhai Patodia Vs ITO in ITA No. 3400/Ahd/2015*
- *Pratik Suryakant Shah Vs ITO in ITA Nos. 810 to 815 & 922 to 926/Ahd./2015, order dated 21.10.2016*
- *Podduchari Jeevan Prashant Vs ITO in ITA No. 452/Hyd/2015*
- *Anil Nand Kishore Goyal Vs ACIT in ITA No. 1256/PN/2012*

89. It was accordingly submitted that the assessee having adduced conclusive documentary evidences to show that shares were purchased and sold via legal channels in conformity with market prices and no evidences having been brought on record by the Revenue Authorities to prove that the transactions had been carried out with some kind of connivance with brokers/entry operators for introduction of unaccounted money or any unaccounted monies of the assessee had been routed by the said channel, no addition could have been made u/s 68 of the Act.

90. As regards to the disclosure by beneficiaries to bogus LTCG, it was stated that the circumstances and facts of each person/group were different by disparate factors and could not have been extrapolated, particularly when, the assessee was neither aware nor concerned with the nature of transactions carried out by the said parties or their nexus/dealings with Sh. Raj Kumar Kedia, even the department had failed to unearthed any incriminating material whatsoever to establish any link of the assessee with Sh. Raj Kumar Kedia or factum of obtaining any accommodation entries through him despite using the longest arm of the revenue against the assessees in the form of search and seizure operations u/s 132(1) of the Act at the premises of the assessee. Therefore, the assessee being an independent and having absolutely no relationship or interconnection with the beneficiaries or Sh. Raj Kumar Kedia should be considered in isolation without any reference to results of the proceedings in the latterôs case. Therefore, the presumption u/s 292C of the Act in respect of documents seized from the premises of Sh. Raj Kumar Kedia would be operable in the hands of Sh. Raj Kumar Kedia and not against the assessees.

91. As regards to the application of principles of preponderance of probabilities, it was stated that the LTCG earned by the assessee in the respective scrips were declared by the assessees in their returns of income filed for the respective years, the same were analyzed by the department and accepted as such in assessments completed u/s 143(3) of the Act for the assessment years 2010-11 and 2011-12, copies of which are placed at page nos. 59 to 94 of the assesseeôs compilation. Therefore, the alleged theory of surrounding circumstances, preponderance of probabilities, human conduct,

alleged lack of prudent investor behavior in investing in shares of penny stock companies, alleged abnormal profit on such shares etc. were, if at all, equally applicable at the time assessments were originally completed by the AO u/s 143(3) of the Act after application of mind and detailed scrutiny of accounts under identical circumstances and the LTCG offered by the assessee had been accepted as genuine. However, later on while framing assessments u/s 153A of the Act on the identical circumstances, the AO opined that investment in penny stock was against prudent behavior and profits earned thereon were abnormal, even when no incriminating material proving the LTCG offered by the assessee were bogus was found in the course of search in the case of the assessee. As such the impugned additions u/s 68 of the Act were made merely on the basis of change of opinion in the guise of search assessment. The reliance was placed on the following case laws:

- *Kelvinator of India Ltd. (2002) 256 ITR 1 (Del.) (FB)*
- *Parashuram Pottery Works Co. Ltd. Vs ITO (1977) 106 ITR 1 (SC)*
- *Manish Kumar Baid & Anr Vs ACIT (2017) TaxPub (DT) 4463 (Kol.-Tri)*
- *Krishnanand Vs The State of Madhya Pradesh (1977) 1 SCC 816 (SC)*
- *Lalchand Bhagat Ambica Ram Vs CIT (1959) 37 ITR 288 (SC)*
- *GTC Industries Ltd. Vs ACIT (2017) 164 ITD 1 (Mum. Trib.)*
- *S.A. Builders Ltd. Vs CIT (2007) 288 ITR 1 (SC)*
- *CIT Vs Dhanraj Girji Raja Narasingherji (1973) 91 ITR 544 (SC)*
- *CIT Vs Walchand and CO. (1967) 65 ITR 381 (SC)*
- *ITO Vs Aarti Mittal (2013) 37 CCH 227 (Hyd Trib.)*
- *Vishal Suryakant Shah & Ors Vs ITO & Ors (2017) 49 CCH 106 (Ahd Trib.)*
- *ITO Vs Arvind Kumar Jain HUF (2017) 51 CCH 281 (Mum Trib.)*
- *Farrah Marker Vs ITO (2016) 46 CCH 535 (Mum. Trib.)*
- *CIT Vs Orissa Corporation (P) Ltd. (1986) 159 ITR 78 (SC)*

- *CIT Vs Anirudh Narayan Agrawal (2013) 84 CCH 28 (All.)*
- *CIT Smt. Kannadevi Agarwal & Ors. (2010) 328 ITR 656 (Mum)*
- *Kamala Devi S. Doshi & Ors. Vs ITO (2017) 50 CCH 53 (Mum)*
- *ACIT Vs Kamal Kumar S. Agarwal (Indl.) & Ors. (2010) 113 TTJ 818 (Nag. Trib.)*
- *Dolarrai Hemani Vs ITO (2016) 48 CCH 286 (Kol. Trib.)*
- *CIT Shreevashi Ganguli in ITA NO. 196 of 2012 (Cal. HC)*
- *CIT Bhagwati Prasad Agarwal in ITA No. 22 of 2009, order dated 29.04.2009 (Cal HC)*
- *CIT Vs Lakshmangarh Estate & Trading Co. Ltd. in ITA No. 270 of 1999, order dated 07.10.2013*
- *Union of India Vs Azadi Bachao Andolan (2003) 263 ITR 0706 (SC)*
- *Mc. Dowell and Co. Ltd. Vs Commercial Tax Officer (1985) 154 ITR 148*

92. As regards to the enhancement of income by the ld. CIT(A), it was submitted that the ld. CIT(A) enhanced the income on account of alleged income generated from (a) alleged clandestine diversion and sale of raw materials (zinc) shown to have been purchased for consumption in the manufacturing process of M/s Bhushan Steel Ltd. (BSL), (b) alleged claim of corresponding bogus transportation charges and (c) alleged unaccounted sale of scrap generated in the Khapoli Factory of BSL, mainly relying on the order dated 27.05.2015 of the Customs & Central Excise Settlement Commission and statements of several persons recorded by the Excise Authorities in the course of search by the DGCEI on 20.02.2013 in the case of BSL group as per the following details:

Assessment Year	***Cash generated out of sale of clandestinely diverted Zinc (Rs. in crores)***	***Cash generated out of expenses for (bogus) transportation to factory (for clandestinely diverted zinc (Rs. in crores)***	***Cash generated out of sale of scrap (Rs. in crores)***	***Total (Rs. in crores)***
2010-11	*61.23*	*1.29*	*-*	*62.5200*
2011-12	*86.80*	*1.73*	*-*	*88.5300*

2012-13	*48.74*	*0.96*	*-*	*49.7000*
2013-14	*47.96*	*0.86*	*-*	*48.8200*
2014-15	*-*	*-*	*1.5964*	*1.5964*
2015-16	*-*	*-*	*1 .9475*	*1.9475*

93. It was further submitted that the aforesaid amounts enhanced by the ld. CIT(A) were telescoped against the additions already made by the AO on account of alleged bogus LTCG, alleged unaccounted payment of commission etc. as per the following details:

A.Y	**Total enhancement in income (Rs. in Crores)**	**Additions made on account of LTCG in penny stocks and commission for obtaining such accommodation (Rs. in crores)**	**Income surrendered due to cash advance (surrendered during earlier search on 03.03.2010) (Rs. in crores)**	**Total (Rs. in Crores) (C1)+(C2)**	**Effect of enhanced income (B)-(C3) (Rs. in crores)**
(A)	(B)	(Cl)	(C2)	(C3)	(D)
2010-11	62.5200	0.2125900	69.00	69.2125900	Nil
2011-12	88.5300	39.0761585	-	39.0761585	49.4538415
2012-13	49.7000	18.7473666	-	18.7473666	30.9526334
2013-14	48.8200	15.7886180	-	15.7886180	33.0313820
2014-15	1.5964	98.6345526	-	98.6345526	Nil
2015-16	1.9475	34.4751867	-	34.4751867	Nil

94. It was contended that the taxability of the aforesaid alleged incomes had not been considered at all by the AO in the assessment orders u/s 153A/143(3) of the Act dated 30.12.2016 for the assessment years 2010-11 to 2015-16 and the said alleged incomes did not constitute the subject matter of the assessment i.e. the same had neither been offered by the assessee in his return of income nor was their any whisper regarding taxability or otherwise of alleged source of income in the assessment orders passed by the AO u/s 153A of the Act for the years under consideration. Therefore, the ld. CIT(A) had no power to enhance the assessment by assessing new sources of income outside the subject matter of assessment appealed. The reliance was placed on the following case laws:

- *CIT Vs Shapoorji Pallonji (1962) 44 ITR 891 (SC)*
- *CIT Vs Rai Bahadur Hardutroy Motilal Chamaria (1967) 66 ITR 443 (SC)*
- *CIT Vs Union Tyres (1999) 240 ITR 556 (Del.)*
- *CIT Vs National Company Ltd. (1993) 199 ITR 445 (Cal)*
- *CIT Vs Associated Garment Makers (1992) 197 ITR 350 (Raj.)*
- *Sterling Vs ITO (1975) 99 ITR 236 (Kar.)*

95. It was further stated that in making the impugned enhancement, the ld. CIT(A) had primarily relied upon the order dated 27.05.2015 of the Customs & Central Excise Settlement Commission and the statements of the persons recorded by the Excise Authorities in the course of search conducted by the DGCEI on 20.02.2013 in the case of BSL group. It was submitted that the said order dated 27.05.2015 and the statements of the persons recorded by DGCEI in the course of search conducted by the Excise Department on 20.02.2013 in the case of BSL could not, by any stretch of imagination be categorized as ñ incriminating materialsò unearthed as a result of search u/s 132(1) of the Act in the case of the assessee on 13.06.2014. The ld. Counsel for the assessee submitted that the identical additions made by the AO in the case of BSL on account of i) alleged bogus purchase expenses for clandestinely diverted zinc ii) transport expenses for alleged clandestinely diverted zinc for the assessment years 2009-10 & 2010-11 were deleted by the ld. CIT(A) placing reliance on the judgments of the Hon'ble Jurisdictional High Court in the case of CIT Vs Kabul Chawla (supra) and Pr. CIT Vs Meeta Gutgutia (supra). It was contended that in those cases, the ld. CIT(A) opined that no incriminating material in respect of the aforesaid issues were found in the course of Income-tax search in the BSL group on 13.06.2014 and accordingly the AO was not within the jurisdiction bestowed on him by law to make the impugned addition in respect

of the unabated assessment years 2009-10 & 2010-11. A reference was made to paras 10.3.1 & 10.3.2 at page nos. 279 & 280 which are the copies of the aforesaid order passed by the ld. CIT(A).

96. It was contended that as per the own findings of the ld. CIT(A) in the case of BSL, the additions on account of enhancement were based on the order of the Settlement Commission dated 27.05.2015 received after the date of issuance of notice u/s 153A of the Act issued to the assessee on 08.09.2014 i.e. much before the order of the Settlement Commission and that as per the ld. CIT(A)ös own observations, the information in respect of the aforesaid issues were received through TEP after issuance of notice u/s 153A of the Act which did not constitute incriminating material unearthed during the Income-tax search conducted on 13.06.2014 for the purpose of making assessment u/s 153A of the Act. Therefore, the same logic should have been applied in assesseeös case and the ld. CIT(A) was not justified in enhancing the income of the assessee on the identical issue which was considered by him in the case of M/s Bhushan Steel Ltd. It was further submitted that the ld. CIT(A) also enhanced the income of the assessee on account of alleged unaccounted sale of scrap generated in the manufacturing process of BSL for the assessment years 2014-15 & 2015-16, despite the fact that identical additions on the said counts for the said years were already made by the AO in the hands of M/s Bhushan Steel Ltd., thereby resulting double addition of the same income in the hands of two different assessees. It was further submitted that even if for the argumentös sake, it was to be assumed without conceding that scrap generated in the manufacturing process of BSL was sold outside the books, the proceeds arising therefrom would be the property of M/s Bhushan Steel Ltd. and not that of the

assessee. Therefore, the enhancement made by the ld. CIT(A) on account of scrap generated was not justified.

97. As regards to the proposed enhancement on the basis of alleged sale of zinc purchased from M/s Hindustan Zinc in cash and the order of the Settlement Commission (Customs & Central Excise), it was stated that the said issue was subject matter of the appellate proceedings in the case of M/s Bhushan Steel Ltd. and was challenged separately therein, therefore, the said issues pertained to M/s Bhushan Steel Ltd. only and had no relevance in the personal assessment of the assessee. Particularly when, there was no evidence, whether direct, indirect, circumstantial or even suggestive to arrive at a conclusion that the amounts, if at all generated from the aforesaid alleged activities went into the personal coffers of the assessee. It was pointed out that the said enhancement had been made on the basis of statement of Sh. Chanderkant Mahadev Jadhav, on employee of BSL recorded u/s 131 of the Act on 13.06.2014 and hand written noting in his personal diary seized in the course of survey action. However, the said statement was retracted by Mr. Jadhav on 30.11.2016. Therefore, the ld. CIT(A) was not justified in making the enhancement on this count.

98. As regards to the confirmation of addition to the extent of 10% of cost of jewellery purchased by the assessee, it was stated that the AO made the addition of Rs.33,32,905/- for the assessment years 2010-11 in the hands of the assessee on account of alleged bogus purchases of diamonds from M/s Kriya Impex Pvt. Ltd. (a company belonging to Jain Brothers) relying on the alleged statement of Sh. Rajener Jain recorded in the course of search in the case of Sh. Rajender Jain group on 03.10.2013allegedly admitting to providing accommodation

entries to various beneficiaries and the AO assumed that the assessee himself have purchased equal quantity of diamonds from the grey market from unaccounted source of income and obtained bills from M/s Kriya Impex Pvt. Ltd. and received back equal amount of cash and that the AO made the impugned addition assuming availability of unaccounted cash with the assessee for the said alleged grey market purchase. It was contended that the diamonds were purchased through regular banking channels and duly disclosed in the respective wealth tax returns for the assessment year 2010-11 and onwards which had been accepted as such in the Wealth Tax Assessments of the assessee. It was further submitted that the diamonds amounting to Rs.33,32,906/- were purchased by the assessee vide Bill No. KYPL/PD/DEC/12/2009-10 dated 08.12.2009 for which payment was made vide cheque no. 688566 drawn on the assesseeôs bank account maintained with Punjab National Bank, Tropical Building, New Delhi. A reference was made to page nos. 420 to 433 of the assesseeôs paper book which are the copies of aforesaid bill, bank statement, Wealth Tax Return along with computation, assessment order passed u/s 16(3) of the Wealth Tax Act. It was submitted that since the purchase of impugned diamonds was duly supported by documentary evidences on record and the AO had failed to bring on record any concrete evidence in support of the alleged receipt back of cash from the parties from whom diamonds had been purchased by the assessee or alleged grey market purchases of the impugned diamonds by the assessee as alleged by the AO. Therefore, no addition could have been made merely on the basis of surmises and conjectures and uncorroborated statement of third party. It was contended that the ld. CIT(A) went a step ahead of the AO and passed a rather whimsical

order holding that since the impugned diamonds were not found in the course of the Income-tax searches at the assesseeôs premises on two occasions on 03.03.2010 and 13.06.2014, the AOôs reasoning that there was a grey market purchase was negated and accordingly, the said diamonds must have been sold before the first search on 03.03.2010 and reasonable profit to the extent of 10% must have been earned on the alleged sale. Accordingly, the ld. CIT(A) confirmed the addition to the extent of 10% on account of alleged profits earned from alleged óout of booksô sale of diamonds and the department had not filed any appeal in respect of balance 90% of the addition. It was submitted that the said addition had been upheld by the ld. CIT(A) merely on the basis of surmises, conjectures, assumptions and presumptions relating to the alleged óout of books salesô of the impugned diamonds before the first search without any evidence whatsoever proving the actual sale by the assessee óout of booksô.

99. The said allegation of óout of booksô sale was completely baseless and there was no basis for the arbitrary profit of 10% assumed by the ld. CIT(A) at his whims and fancies. The reliance was placed on the following case laws:

- *Dhakeswari Cotton Mills Vs CIT (1954) 26 ITR 775 (SC)*
- *Lalchand Bhagat Ambica Ram Vs CIT 37 ITR 288 (SC)*
- *Omar Salay Mohamed Sait Vs CIT (1959) 37 ITR 159 (SC)*
- *Umacharan Shaw & Bros. Vs CIT (1959) 37 ITR 271 (SC)*

100. Accordingly, it was submitted that the addition to the extent of 10% upheld by the ld. CIT(A) on account of alleged óout of booksô sale of diamonds had no legs to stand on and hence deserves to be deleted.

101. In his rival submissions, the ld. CIT DR reiterated the observations made by the authorities below and strongly supported the impugned order. It was

further submitted that the statements recorded on oath u/s 132(4) of the Act during the course of search constituted incriminating material. The ld. CIT DR referred to page no. 9 of the assessment order and submitted that during the course of search, statement of Sh. Manish Arora was recorded who is an employee of Sh. Raj Kumar Kedia and in his statement he admitted that seized document so found pertained to the records of cash receipt from various beneficiaries to whom bogus Long Term Capital Gain was arranged by Sh. Raj Kumar Kedia and in his statement Sh. Manish Arora also accepted that Sh. Raj Kumar Kedia was an accommodation entry provider, took cash from various persons in order to provide accommodation entry of bogus LTCG. He referred to question no. 13 asked to Sh. Manish Arora to provide details of some persons who used to provide cash on behalf of major beneficiaries who used to collect cash from him. It was pointed out that in his answer Sh. Manish Arora said that Sh. Pankaj Tiwari an employee of M/s Bhushan Steel Ltd. provided cash and some other persons who generally collected cash from Sh. Shivam for Jagdish Purohit and that other transfers of cash were generally through angadiya. He further stated that vide answer to question no. 3, it was stated that LT entries, OT entries, unsecured loan entries, ST entries etc. given to various beneficiaries were arranged from various entry operators for different beneficiaries after charging fixed percentage of commission and that he helped BSL group company and their promoters. It was further submitted that the statement of the assessee was also recorded on oath on 13.06.2014 u/s 132(4) of the Act wherein in reply to question no. 15, it was stated that on directions of promoters of M/s Bhushan Steel Ltd. and discussion with Sh. Pankaj Agarwal, one time investment was made in the shares of some non-descript listed company and

once higher market share price was attained through artificial rigging, the shares of are sold to book huge Long Term Capital Gain which was also exempt from Income-tax u/s 10(38) of the Act and substantial portion of such money was utilized for purchasing shares of group companies at higher premium. He further submitted that the statement of Directors of the penny stock companies during the course of search on Sh. Raj Kumar Kedia group of cases were recorded, in the said statements also, it was stated that share prices of the companies were manipulated to convert black money of the persons into white by availing Long Term Capital Gains and that certain percentage of commission was received in lieu of that. He also referred to page no. 33 of the assessment order and stated that the incriminating materials were found from the premises of Sh. Raj Kumar Kedia related to BSL group and from premises of Sh. Ankur Agarwal, an employee of BSL group. The material found and seized from the premises of Sh. Raj Kumar Kedia contained ledgers of one NP (acronym for ónehru Placeô, referring to Bhushan Steel Group since earlier, the corporate office of Bhushan Steel group was at Nehru Place). Therefore, it could not be said that no incriminating material was found during the course of search. It was further submitted that during the course of assessment proceedings, summons u/s 131 of the Act was issued to Sh. Ankur Agarwal on 16.12.2016 to appear on 22.12.2016. However, he filed his retraction on 20.12.2016 from his statement recorded during the course of search and did not appear on the date given u/s 131 of the Act. It was further submitted that during the course of survey, the Investigation Wing detected that the activities of the companies who provided LTCG entries were not real and it was found that there were no substantial business transactions taken place in the companies

who traded in shares and manipulated for providing profitable exist to various beneficiaries by availing bogus LTCG. A reference was made to page nos. 43 & 44 of the assessment order. It was also submitted that many of the entities, provided profitable exist to initial preferential allottees in the scrips, which were under the control of some accommodation entry providers who admit to have been controlling those companies. A reference was made to para 4.5.2 of the assessment order. It was further stated that the notices were issued to check the identity and creditworthiness of the purchaser who purchased the shares of the assessee at a very high price and provided profitable exist, on test check basis on the addresses provided by BSL. However, most of those notices either returned back or incomplete reply was received and even the investigation carried out by SEBI in few of listed companies on the basis of common trading pattern and identical developments like stock splits, preferential allotments, insignificant economic activity and exorbitantly high stock price clearly established that the assessee manipulated the trading in the scrips and had taken undue benefit out of the same by reaping Long Term Capital Gain by manipulative trading in shares of those scrips. He further submitted that incriminating material seized from Sh. Raj Kumar Kedia and Sh. Ankur Agarwal who were connecting persons, clearly established that the material so seized from those person was related to the assessee as such it was an incriminating material. The reliance was placed on the following case laws:

- *Sanjay Bimalchand Jain L/H Shantidevi Bimalchand Jain Vs PCIT-1, Nagpur (2018) 89 Taxmann.com 196 (Bom.)*
- *Abhimanyu Soin Vs ACIT (2018-TIOL-733-ITAT-CHD)*
- *Chandan Gupta Vs CIT (2015) 54 Taxmann.com 10 (P&H)*
- *Balbir Chand Maini Vs CIT (2012) 340 ITR 161 (P&H)*
- *Usha Chandresh Shah Vs ITO (2014-TIOL-1459-ITAT-Mum)*

- *Ratnakar M Pujari Vs ITO (2016-TIOL-1746-ITAT-Mum)*
- *Arvind M Kariya Vs ACIT in ITA No. 7024/Mum/2010*
- *ITO Vs Shamim M Bharwani (2016) 69 Taxmann.com 65 (Mum)*
- *CIT Vs Mukundray K. Shah (2007) 290 ITR 433 (SC)*
- *CIT Vs S. Ajit Kumar (2018) 93 taxmann.com 294 (SC)*
- *Vinod Kumar Gupta Vs DCIT in ITA No. 1003 of 2017, order dated 12.03.2018 (Del. HC)*
- *Kishore Kumar Vs CIT 62 Taxmann.com 215 (SC)*
- *Bhagirath Aggarwal Vs CIT 351 ITR 143 (Del.)*
- *CIT Vs M. S. Aggarwal (2018) 93 taxmann.com 247 (Del.)*
- *Smt. Dayawanti Vs CIT (2017) 390 ITR 496 (Del.)*
- *M/s Pebble Investment and Finance Ltd. Vs ITO (2017-TIOL-238-SC-IT)*
- *Greenview Restaurant Vs ACIT (2003) 263 ITR 169 (Gau.)*
- *Raj Hans Towers (P.) Ltd. Vs CIT 373 ITR 9 (Del.)*
- *PCIT Vs Avinash Kumar Setia (2017) 81 taxmann.com 476 (Del.)*
- *M/s Punjab Sind Dairy Products Pvt. Ltd. Vs DCIT (2017-TIOL-83-SC-IT)*
- *CIT Sonal Construction (2012-TIOL-851-HC-DEL-IT)*
- *CIT Vs Naresh Kumar Aggarwala (2011) 331 ITR 510 (Del.)*
- *Mahabir Prasad Rungta Vs CIT (2014) 43 Taxmann.com 328 (Jharkhand)*
- *Bhagheeratha Engineering Ltd. Vs ACIT (2015) 379 ITR 244 (Ker.)*
- *Ashok Kumar Vs CIT (2016) 386 ITR 342 (Patna)*
- *Baldev Raj Vs CIT (2010) Taxmann.com 335 (P&H)*
- *CIT Vs MAF Academy (P.) Ltd. 361 ITR 258 (Del.)*
- *CIT Vs Navodaya Castle Pvt. Ltd. (2014) 367 ITR 306 (Del.)*
- *Konark Structural Engineering (P.) Ltd. Vs DCIT (2018) 90 Taxmann.com 56 (Bom.)*
- *CIT Vs Nipun Builders & Developers (P.) Ltd. 350 ITR 407 (Del.)*
- *CIT Vs Nova Promoters & Finlease (P) Ltd. 342 ITR 169 (Del.)*
- *CIT Vs Ultra Modern Exports (P.) Ltd. 40 Taxmann.com 458 (Del.)*
- *CIT Vs Frostair (P.) Ltd. 26 Taxmann.com 11 (Del.)*

- *CIT N R Portfolio Pvt. Ltd. (2013) 29 Taxmann.com 291 (Del.)*
- *PCIT Vs Bikram Singh in ITA No. 55/2017 (Del.)*

102. The ld. CIT DR reiterated the observations made by the ld. CIT(A) in para 5.6.1 & 5.7.1 at page nos. 164 to 166 and stated that the material seized during the course of search at the premises of Sh. Raj Kumar Kedia and Sh. Ankur Agarwal constitute the incriminating material as the same was related to the assessee. It was further submitted that the ld. CIT(A) rightly made the enhancement on the basis of material which was already available on record. Therefore, the enhancement was rightly made by the ld. CIT(A). It was further submitted that the proceedings initiated u/s 153A of the Act were valid as the same were on the basis of incriminating material found during the course of search.

103. The ld. Counsel for the assessee in his rejoinder distinguished the judgment of the Hon'ble Supreme Court strongly relied by the ld. CIT DR in the case of CIT Vs S. Ajit Kumar (supra) and submitted that the said judgment was rendered on a completely disparate and incongruent set of facts vis-à-vis the case at hand in the context of the erstwhile scheme under Chapter XIVB of the Act which had been non-operative qua search and requisition after 31.05.2003. Accordingly, the said judgment was inapplicable to the search assessment made in the case of the assessee here in Section 153A of the Act pursuant to the search and seizure operation conducted in his case on 13.06.2014 u/s 132(1) of the Act. It was further submitted that the assessment pursuant to search operation u/s 132(1) of the Act in the case of the assessee are thus, governed by the provisions of Sections 153A, 153B and 153C of the Act which were inserted in the Income-tax Act, 1961 by the Finance Act, 2003

w.e.f. 01.06.2003 and have replaced the post search assessment scheme in respect of any search or requisition made after 31.05. 2003. It was further submitted that in the said case, relied by the ld. CIT DR, the search u/s 132(1) of the Act was conducted in the premises of the assessee and evidences regarding unaccounted cash payment seized from the premises of builder who admittedly was connected person having transactions/dealings with the assessee. Therefore, the AO after having regard to the extent of the case completed the block assessment and inter alia held that the said amount was liable to tax as undisclosed income of the block period. However, in the present case, alleged data was seized from the premises of Sh. Raj Kumar Kedia, the person having no transaction/dealings/linkage with the assessee. Therefore, unlike the case Sh. S. Ajit Kumar wherein direct evidence pertaining to unaccounted cash payment over and above the cash ecorded in the regular books of account therein was found from the premises of connected person with whom the assessee admittedly had dealing. However, in the instant case, the material relied upon by the revenue authorities were found from the premises of unconnected persons having no dealings/nexus with the assessee. It was submitted that in the case of S. Ajit Kumar direct incriminating evidence pertaining to unaccounted cash payment made to M/s ECIL in respect of block period was found. However, in the instant case, no incriminating material conclusively establishing any irregular availment of bogus LTCG by the assessee have either been found in the course of search at the premises of the assessee or even for that matter from the premises of unconnected third party. Therefore, the said judgment of the Hon'ble Supreme Court was distinguishable from the facts of the assessee's case. The ld. Counsel for the assessee submitted

that similar was the position with regard to other case laws relied by the ld. CIT DR, those cases are also distinguishable on facts from the assesseeôs case.

104. We have considered the submissions of both the parties and perused the material available on the record. In the present case, the assessee had raised the legal issue in the additional ground as well as the main ground no. 1 by challenging the jurisdiction of the AO and the ld. CIT(A) in making the additions/enhancement u/s 153A of the Act in the absence of incriminating material pertaining to the years under consideration found during the course of search.

105. In the instant case, it is an admitted fact that the search and seizure operation u/s 132(1) of the Act was conducted at the premises of the assessee on 13.06.2014 and thereafter notice u/s 153A of the Act dated 08.09.2014 was issued to the assessee for furnishing the return of income. In response to the said notice, the assessee filed its return of income on 12.07.2016 declaring the same income which was furnished in the original return of income filed on 31.07.2010. The provision contained in Section 153A of the Act read as under:

> *"153A—Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—*
>
> *(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as*

may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made :

***Provided** that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:*
***Provided further** that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this section pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate.*

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

(2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the [Principal Commissioner or] Commissioner:

***Provided** that such revival shall cease to have effect, if such order of annulment is set aside.*

Explanation.—For the removal of doubts, it is hereby declared that,—
(i) save as otherwise provided in this section, section 153B and section 153C, all other provisions of this Act shall apply to the assessment made under this section;

(ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year."

106. From the second proviso to the aforesaid Section, it is clear that the assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years and for the relevant assessment year or years referred to in Sub-Section (1) of Section 153A of the Act, is pending on the date of initiation of search u/s 132 of the Act or making of requisition u/s 132A of the Act as the case may be shall abate. In other words, the only assessment which are pending shall abate but those assessments which had already been completed before the search proceedings cannot be reassessed under this Section. In the present case, the search took place on 13.06.2014 and the assessment for the assessment years 2010-11 and 2011-12 were completed prior to the said date i.e. 13.06.2014 u/s 143(3) of the Act, therefore, those were not abated. The assessee filed the return of income for the assessment years 2010-11, 2011-12 and 2012-13 on 31.07.2010, 30.07.2011 and 31.07.2012 respectively while the search took place on 13.06.2014 and the assessments u/s 143(3) of the Act were framed on 27.02.2011 and 14.02.2014 for the assessment years 2010-11 and 2011-12 respectively (copies of which are place at page nos. 66 to 92 of the assesseeôs compilation). The return of income for the assessment year 2012-13 was filed by the assessee on 31.07.2012 and the time to issue the notice u/s 143(2) of the Act had already expired before the

date of search. Therefore, the scope of assessment u/s 153A of the Act in respect of the assessment years under consideration i.e. assessment years 2010-11 to 2012-13 is limited to the incriminating material found during the course of search. As regards to the issue relating to the original return of income processed u/s 143(1) of the Act and for which time to issue notice u/s 143(2) of the Act had already expired before the search took place. The ITAT Delhi Bench ó I-1ô, New Delhi in the case of Granite Gate Properties Pvt. Ltd. Vs ACIT, CC-6, New Delhi in ITA Nos. 7022 to 7024/Del/2017 for the assessment years 2009-10 to 2011-12 vide order dated 29.05.2018 (where in one of us i.e. Accountant Member is the author) held in paras 18 to 20 as under:

> *"18. We have considered the submissions of both the parties and perused the material available on the record. In the present case, it is an admitted fact that the assessee filed the original return of income for the year under consideration on 30.09.2009 which was processed u/s 143(1) of the Act on 05.09.2010 and the time period to issue the notice u/s 143(2) of the Act had already expired before the search took place on 29.10.2013. During the course of search, no incriminating material was found relating to the FCCDs which were already shown by the assessee in its regular books of accounts. The AO/TPO made the addition on account of differential interest on FCCDs undertaken with the AE, in our opinion, no such adjustment could have been made to the income which was already assessed prior to the date of search.*
>
> *19. On a similar issue, the Hon'ble Karnataka High Court in the case of CIT & Anr. Vs IBC Knowledge Park P. Ltd. (2016) 385 ITR 346 (supra) held as under:*
>
> > *"A search was conducted on Y, Z and IBC on June 17, 2008. One of the offices of the assessee was in the same*

premises where the search took place. Certain documents belonging to the assessee were seized and the Assessing Officer of the persons in whose cases search was conducted transferred the documents to the Assessing Officer of the assessee under section 153C of the Act. Assessment orders under section 143(3) read with section 153C were passed for the assessment years 2004-05 to 2008-09. In respect of the assessment year 2004-05, *the Tribunal noted that as on the date the search was conducted i.e., on June 17, 2008, no assessment proceeding was pending and as no undisclosed income was detected, the assessment made under section 153A read with section 153C of the Act the Tribunal quashed the assessment. For the assessment year 2005-06, though no order under section 143(3) had been passed, an intimation under section 143(1) had been issued. The Tribunal held that for the purpose of section 153A read with section 153C of the Act, an intimation under section 143(1) was also an order of assessment. It upheld the validity of the assessment for the assessment year* 2005-06.ò

It has further been held as under:

"That one of the conditions precedent for invoking a block assessment pursuant to a search in respect of a third party under section 158BD of the Act, i.e., recording satisfaction that undisclosed income belongs to the third party, which was detected pursuant to a search had not been complied with. Though documents belonging to the assessee were seized at the time of search operation, there was no incriminating material found leading to undisclosed income. Therefore, assessment of income of the assessee was unwarranted."

20. In the present case also, although the assessment was not framed u/s 143(3) of the Act but an intimation

was issued u/s 143(1) of the Act, however, the time to issue the notice u/s 143(2) of the Act has already expired before the search. Therefore, for the purposes of Section 153A r.w.s. 153C of the Act, an intimation u/s 143(1) of the Act was also an order of assessment. In the present case, since no incriminating material was found during the course of search. The addition made by the AO u/s 153A of the Act on account of interest on FCCDs was not justified."

107. We, therefore, by respectfully following the aforesaid referred to order of the Co-ordinate 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 assesseeôs 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 assesseeôs 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 assesseeôs 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 assesseeôs compilation. Similar was the position with regard to the statement of Sh. 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.

108. On a similar issue, the Hon'ble Jurisdictional High Court in the case of Pr. CIT Vs Best Infrastructure (India) Pvt. Ltd. in ITA No. 11/2017 and Others (supra) vide order dated 01.08.2017 (copy of which is placed at page nos. 151 to 171 of the assesseeôs compilation) held in paras 35 to 39 as under:

> *"35. As noted in Principal Commissioner of Income Tax Central-2, New Delhi v. Meeta Gutgutia (supra), several other High Courts*

have also come to a similar conclusion either by following Commissioner of Income Tax (Central-Ill) v. Kabul Chawla (supra) or otherwise. This includes the decisions of the Gujarat High Court in Principal Commissioner of Income Tax v. Saumya Construction Pvt. Ltd. (2016) 387 ITR 529 (Guj); Principal Commissioner of Income Tax-i v. Devangi alias Rupa 2017-TIOL-319- HC-AHM-IT; the Karnataka High Court in CIT v. IBC Knowledge Park Pvt. Ltd. (2016) 385 ITR 346 (Kar); the Kolkata High Court in Pr. CIT-2 v. Salasar Stock Broking Ltd. 2016-TIOL-2O99-HC-KOL-IT and the Bombay High Court in CIT v. Gurinder Singh Bawa (2016) 386 ITR 483 (Bom). Inr Principal Commissioner of Income Tax Central-2, New Delhi v. Meeta Gutgutia (supra) the entire gamut of the case law had been analysed and the legal position was reiterated that unless there is incriminating material qua each of the AYs in which additions are sought to be made, pursuant to search and seizure operation, the assumption of jurisdiction under Section 153A of the Act would be vitiated in law. This is one more occasion for the Court to reiterate that legal position.

36. Turning to the facts of the present case, it requires to be noted that the statements of Mr. Ami Aggarwal, portions of which have been extracted hereinbefore, make it plain that the surrender of the sum of Rs. 8 crores was only for the AY in question and not for each of the six AYs preceding the year of search. Secondly, when Mr. Anu Aggarwal was confronted with A-1, A-4 and A-n he explained that these documents did not pertain to any undisclosed income and had, in fact been accounted for. Even these, therefore, could not be said to be incriminating material qua each of the preceding AYs,

37. Fourthly, a copy of the statement of Mr. Tarun Goyal, recorded under Section 132 (4) of the Act, was not provided to the Assessees. Mr. Tarun Goyal was also not offered for the cross-examination. The remand report of the AO before the CIT(A) unmistakably showed that the attempts by the AO, in ensuring the presence of Mr. Tarun Goyal for cross-examination by the Assessees, did not succeed. The onus of ensuring the presence of Mr. Tarun Goyal, whom the Assessees clearly stated that they did not know, could not have been shifted to the Assessees. The onus was on the Revenue to ensure his presence. Apart from the fact that Mr. Tarun Goyal has

retracted his statement, the fact that he was not produced for cross-examination is sufficient to discard his statement.

38. Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in Commissioner of Income Tax v. Harjeev Aggarwal (supra). Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts in Smt. Dayawanti Gupta v. CIT (supra) where the admission by the Assessees themselves on critical aspects, of failure to maintain accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases, is non-existent in the present case. In the said case, there was a factual finding to the effect that the Assessees were habitual offenders, indulging in clandestine operations whereas there is nothing in the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any such admission.

39. For all the aforementioned reasons, the Court is of the view that the ITAT was fully justified in concluding that the assumption of jurisdiction under Section 153A of the Act qua the assessees herein was not justified in law."

109. Similarly, the Hon'ble Apex Court in the case of Andaman Timber Industries Vs Commissioner of Central Excise (2015) 281 CTR 241 (supra) held as under:

"6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity 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.

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

8. 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."

110. A similar view has been taken by the Hon'ble Apex Court in the case of Kishinchand Chellaram Vs CIT 1980 AIR 2117 (supra) wherein it has been held as under:

> *"(2) It is true that the proceedings under the Income Tax law are not governed by the strict rules of evidence and therefore it might be said that even without calling the Manager of the Bank in evidence to prove this letter, it could be taken into account as evidence. But before the Income-Tax Authorities could rely upon it, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to cross-examine the Manager of the Bank with reference to the statements made by him. Moreover, this letter was said to have been addressed by the Manager of the Bank to the Income Tax Officer on 18th February, 1955 in relation to a remittance alleged to have been sent on 16th October, 1946 and it is impossible to believe in the absence of any evidence to that effect, that the Manager who wrote this letter on 18th February, 1955 must have been incharge of the Madras Office on 16th October, 1946 so as to have personal knowledge as to who remitted the amount of Rs. 1,07,350, The Revenue authorities ought to have called upon the Manager of the Bank to produce the documents and papers on the basis of which he made the statements contained in his letter and confronted the assessee with those documents and papers but instead of doing so, the Revenue authorities chose to rely merely on the statements contained in the letter and that too, without showing the Letter to the assessee."*

111. A similar view has been expressed by the Hon'ble Jurisdictional High Court in the case of CIT Vs SMC Share Brokers Ltd. (supra) wherein it has been held as under:

> *"6. We are of the opinion that the Tribunal was right in its view that in the absence of Manoj Aggarwal being made available for cross-examination, despite repeated requests by the assessee, his statement could not be relied upon to his detriment."*

112. Similarly, the ITAT Mumbai ó Bô Bench in the case of Straptex (India) (P) Ltd. Vs DCIT 84 ITD 320 (supra) held as under:

> *"Presumption under Section 132(4A) is not limited only to the proceedings under Section 132(5); presumption under Section 132(4A) is applicable only against the person from whose possession books of account or other documents were found and not against any other person."*

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.

114. On a similar issue, the Hon'ble Calcutta High Court in the case of CIT Vs Eastern Commercial Enterprises (1994) 210 ITR 103 (supra) held as under:

> *"4. We have considered the contesting contentions of the parties. It is true that Shri Sukla has proved to be a shifty person as to witness. At the earlier stages, he claimed all his sales to be genuine but before the Assessing Officer in the case of the assessee, he disowned the sales specifically made to the assessee. This statement can at the worst show that Shri Sukla is not a trustworthy witness and little value can be attached to what he stated either in his*

affidavits or in his examination by the Assessing Officer. His conduct neutralizes his value as to witness. A man indulging in double-speaking cannot be said by any means a truthful man at any stage and no Court can decided on which occasion he was truthful."

115. On a similar issue the CBDT also issued the Circular No. 286/2/2003-IT(Inv.), dated 10.03.2003 stating therein as under:

"Instances have come to the notice of the Board where assessees have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assessees while filing returns of income. In these circumstances, such confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads information on what has not been disclosed or is not likely to be disclosed before the Income-tax Department. Similarly, while recording statement during the course of search & seizure and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely. Further, in respect of pending assessment proceedings also, Assessing Officers should rely upon the evidences/materials gathered during the course, of search/survey operations or thereafter while framing the relevant assessment orders."

116. The aforesaid directions were once again reiterated by the CBDT vide Circular No. 286/98/2013-IT dated 18.12.2014 which read as under:

"Instances/complaints of undue influence/coercion have come to notice of the CBDT that some assessees were coerced to admit undisclosed income during Searches/Surveys conducted by the Department. It is also seen that many such admissions are retracted in the subsequent proceedings since the same are not backed by credible evidence. Such actions defeat the very purpose of

Search/Survey operations as they fail to bring the undisclosed income to tax in a sustainable manner leave alone levy of penalty or launching of prosecution. Further, such actions show the Department as a whole and officers concerned in poor light.

2. I am further directed to invite your attention to the Instructions/Guidelines issued by CBDT from time to time, as referred above, through which the Board has emphasized upon the ***need to focus on gathering evidences during Search/Survey and to strictly avoid obtaining admission of undisclosed income under coercion/undue influence.***

3. In view of the above, while reiterating the aforesaid guidelines of the Board, I am directed to convey that any instance of undue influence/coercion in the recording of the statement during Search/Survey/Other proceeding under the I.T. Act, 1961 and/or recording a disclosure of undisclosed income under undue pressure/ coercion ."

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. In our opinion, it cannot be said that those statements on the basis of which impugned additions were made by the AO, were incriminating material found during the course of search. As we have already noted that no incriminating material was found during the course of search and the additions were made by the AO while framing the assessments u/s 153A of the Act, the said additions need to be restricted or limited only to incriminating material found during the course of search. However, in the present case, no such

incriminating material was found during the course of search from the possession of the assessee.

118. A similar issue has been adjudicated by the ITAT Delhi Bench ó I-1ô, New Delhi in the case of Granite Gate Properties Pvt. Ltd. Vs ACIT, Central Circle-6, New Delhi in ITA Nos. 7022 to 7024/Del/2017 for the assessment years 2009-10 to 2011-12 vide order dated 29.05.2018 (supra) wherein one of us (Accountant Member) is the author and it has been held vide paras 23 to 26 as under:

> *"23. On an identical issue, the Hon'ble Jurisdictional High Court in the case of CIT Vs Kabul Chawla (2016) 380 ITR 573 (supra) held as under:*
>
> > *"The legal position that emerges on a perusal of section 153A and section **132** of the Income-tax Act, 1961, is as under : (i) Once a search takes place under section 132 of the Act, notice under section 153A will have to be mandatorily issued to the person in respect of whom search was conducted requiring him to file returns for six assessment years immediately preceding the previous year relevant to the assessment year in which the search takes place. (ii) Assessments and reassessments pending on the date of the search shall abate. The total income for such assessment years will have to be computed by the Assessing Officers as a fresh exercise, (iii) The Assessing Officer will exercise normal assessment powers in respect of the six years previous to the relevant assessment year in which the search takes place. The Assessing Officer has the power to assess and reassess the "total income" of the six years in separate assessment orders for each of the six years. In other words, there will be only one assessment order in respect of each of the six assessment years in which both the disclosed and the*

undisclosed income would be brought to tax. (iv) Although section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the Assessing Officer which can be related to the evidence found, it does not mean that the assessment can be arbitrary or made without any relevance or nexus with the seized material. Obviously, an assessment has to be made under this section only on the basis of the seized material, (v) In the absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word "assess" in section 153A is relatable to abated proceedings (i.e., those pending on the date of search) and the word "reassess" to completed assessment proceedings, (vi) In so far as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under section 153A merges into one. Only one assessment shall be made separately for each assessment year on the basis of the findings of the search and any other material existing or brought on the record of the Assessing Officer, (vii) Completed assessments can be interfered with by the Assessing Officer while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

24. A similar view has been taken by the Hon'ble Jurisdictional High Court in the case of Pr. CIT Vs Meeta Gutgutia Prop. M/s Ferns "N" Petals (2017) 395 ITR 526 (supra) wherein it has been held as under:

"Any and every document cannot be and is not an incriminating document. No addition can be made for a particular assessment year without there being an incriminating material qua that assessment year which would justify such an addition."

25. Similarly, their Lordships of the Hon'ble Jurisdictional High Court in the case of Pr. CIT Vs Ram Avtar Verma (2017) 395 ITR 252 (supra) observed as under:

"The Commissioner of Income-tax (Appeals), after considering the record, was of the opinion that the additions could not be justified, and accordingly granted relief, holding that no incriminating material was recovered during the search. The Revenue's appeal was rejected.

The Income-tax Appellate Tribunal held as follows:

"10. As per the paper book filed by the learned authorized representative showing the Panchnama from where learned Departmental representative could not point out any material found during the course of search which could give even remote possibilities of altering the income of the assessee based on any incriminating documents. Admittedly both the assessment years in these appeals are completed assessments in case of the assessee. The reliance placed upon by the learned authorized representative on the decision of the Hon'ble Delhi High Court in the case of C/T v. Kabul Chawla [2016] 380 ITR 573 (Delhi) where original assessment have been made under section 143(1) of the Act is apt and squarely covers issue in favour of the assessee. The Hon'ble High Court in paragraph No. 37 of that decision has held that no addition can be made in the hands of the assessee in the absence of any incriminating material unearthed during the

course of search or requisition of documents. On reading of the order of the Assessing Officer we could not find that there is any incriminating material referred to by the Assessing Officer which is found during the course of search for making these additions. Therefore, respectfully following the decision of the Hon'ble Delhi High Court in the case of CIT v. Kabul Chawla (supra) we confirm the order of the learned Commissioner of Income-tax (Appeals) and dismiss the appeal of the Revenue."

The Revenue urges that the non obstante clause in section 153A together with section 158BD removes the barrier vis-a-vis restriction upon search assessments being confined to "undisclosed income". In other words, it is stated that none of the provisions confine the enquiry of the Assessing Officer to evaluating incriminating materials. This aspect, in the opinion of the court, was extensively dealt with in CIT v. Kabul Chawla [2016] 380 ITR 573 (Delhi) which has, by now, been followed consistently in several appeals. The non obstante clause, in the opinion of the court, was necessary, given that there is a departure from the pre-existing provisions, which applied for the previous years and had a different structure where two sets of assessment orders were made by the Assessing Officer during block periods. With the unification of assessment years for the block period, i.e. only one assessment order for each year in the block period, it was necessary for an overriding provision of the kind actually adopted in section 153A. But for such a non obstante clause, the Revenue could possibly have faced hurdles in regard to unadopted/current assessment years as well as reassessment proceedings pending at the time of the search in respect of which proceedings were to be completed under section 153A/ 153C. Having regard to the above directions, we are of the opinion that the Income-tax Appellate Tribunal's

decision does not call for interference. Both the appeals are accordingly dismissed."

26. We, therefore, by keeping in view the ratio laid down in the aforesaid referred to judicial pronouncements, are of the confirmed view that the impugned addition made by the AO u/s 153A of the Act in the absence of any incriminating material found during the course of search was not justified."

119. A similar view has also been taken by the ITAT Delhi Bench ñCò, New Delhi in ITA Nos. 4256 to 4259/Del/2014 in the case of ACIT, Central Circle-5, New Delhi Vs M/s Gee Ispat Pvt. Ltd. (supra) (wherein one of us i.e. Accountant Member is the Author) vide order dated 31.05.2018 wherein the relevant findings have been given in paras 23 to 27 as under:

"23. On a similar issue, the Hon'ble Gujarat High Court in the case of Pr. CIT Vs Dipak Jashvantlal Panchal (2017) 397 ITR 153 (supra) held as under:

"Section 153A of the Income-tax Act, 1961, bears the heading "assessment in case of search or requisition". The heading of the section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of the section, the intention of the Legislature is clear, viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment in case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition. In other words, the assessment should be connected with something found during the search or requisition, viz., incriminating material which reveals undisclosed

income. Thus, while in view of the mandate of sub-section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition or disallowance can be made only on the basis of material collected during the search or requisition."

24. In the present case, since no incriminating material was found, therefore, the addition made by the AO u/s 153A of the Act was not justified.

25. On an identical issue, the Hon'ble Jurisdictional High Court in the case of CIT Vs Kabul Chawla (2016) 380 ITR 573 (supra) held as under:

*"The legal position that emerges on a perusal of section 153A and section **132** of the Income-tax Act, 1961, is as under : (i) Once a search takes place under section 132 of the Act, notice under section 153A(ll will have to be mandatorily issued to the person in respect of whom search was conducted requiring him to file returns for six assessment years immediately preceding the previous year relevant to the assessment year in which the search takes place. (ii) Assessments and reassessments pending on the date of the search shall abate. The total income for such assessment years will have to be computed by the Assessing Officers as a fresh exercise, (iii) The Assessing Officer will exercise normal assessment powers in respect of the six years previous to the relevant assessment year in which the search takes place. The Assessing Officer has the power to assess and reassess the "total income" of the six years in separate assessment orders for each of the six years. In other words, there will be only one assessment order in respect of each of the six*

assessment years in which both the disclosed and the undisclosed income would be brought to tax. (iv) Although section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the Assessing Officer which can be related to the evidence found, it does not mean that the assessment can be arbitrary or made without any relevance or nexus with the seized material. Obviously, an assessment has to be made under this section only on the basis of the seized material, (v) In the absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word "assess" in section 153A is relatable to abated proceedings (i.e., those pending on the date of search) and the word "reassess" to completed assessment proceedings, (vi) In so far as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under section 153A merges into one. Only one assessment shall be made separately for each assessment year on the basis of the findings of the search and any other material existing or brought on the record of the Assessing Officer, (vii) Completed assessments can be interfered with by the Assessing Officer while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

26. A similar view has been taken by the Hon'ble Jurisdictional High Court in the case of Pr. CIT Vs Meeta Gutgutia Prop. M/s Ferns "N" Petals (2017) 395 ITR 526 (supra) wherein it has been held as under:

"Any and every document cannot be and is not an incriminating document. No addition can be made for a particular assessment year without there being an incriminating material qua that assessment year which would justify such an addition."

27. Similarly, their Lordships of the Hon'ble Jurisdictional High Court in the case of Pr. CIT Vs Ram Avtar Verma (2017) 395 ITR 252 (supra) observed as under:

"The Commissioner of Income-tax (Appeals), after considering the record, was of the opinion that the additions could not be justified, and accordingly granted relief, holding that no incriminating material was recovered during the search. The Revenue's appeal was rejected.

The Income-tax Appellate Tribunal held as follows:
"10. As per the paper book filed by the learned authorized representative showing the Panchnama from where learned Departmental representative could not point out any material found during the course of search which could give even remote possibilities of altering the income of the assessee based on any incriminating documents. Admittedly both the assessment years in these appeals are completed assessments in case of the assessee. The reliance placed upon by the learned authorized representative on the decision of the Hon'ble Delhi High Court in the case of C/T v. Kabul Chawla [2016] 380 ITR 573 (Delhi) where original assessment have been made under section 143(1) of the Act is apt and squarely covers issue in favour of the assessee. The Hon'ble High Court in paragraph No. 37 of that decision has held that no addition can be made in the hands of the assessee in the absence of any incriminating material unearthed during the course of search or requisition of

documents. On reading of the order of the Assessing Officer we could not find that there is any incriminating material referred to by the Assessing Officer which is found during the course of search for making these additions. Therefore, respectfully following the decision of the Hon'ble Delhi High Court in the case of CIT v. Kabul Chawla (supra) we confirm the order of the learned Commissioner of Income-tax (Appeals) and dismiss the appeal of the Revenue."

The Revenue urges that the non obstante clause in section 153A together with section 158BD removes the barrier vis-a-vis restriction upon search assessments being confined to "undisclosed income". In other words, it is stated that none of the provisions confine the enquiry of the Assessing Officer to evaluating incriminating materials. This aspect, in the opinion of the court, was extensively dealt with in CIT v. Kabul Chawla [2016] 380 ITR 573 (Delhi) which has, by now, been followed consistently in several appeals. The non obstante clause, in the opinion of the court, was necessary, given that there is a departure from the pre-existing provisions, which applied for the previous years and had a different structure where two sets of assessment orders were made by the Assessing Officer during block periods. With the unification of assessment years for the block period, i.e. only one assessment order for each year in the block period, it was necessary for an overriding provision of the kind actually adopted in section 153A. But for such a non obstante clause, the Revenue could possibly have faced hurdles in regard to unadopted/current assessment years as well as reassessment proceedings pending at the time of the search in respect of which proceedings were to be completed under section 153A/ 153C. Having regard to the above directions, we are of the opinion that the Income-tax Appellate Tribunal's decision does not call for interference. Both the appeals are accordingly dismissed."

120. Similarly, the ITAT Delhi Bench ôEô, New Delhi in the case of ACIT, Central Circle-8, New Delhi Vs Meroform India Pvt. Ltd. in ITA Nos. 4630 to

4635/Del/2014 for the assessment years 2006-07 to 2011-12 (supra) vide order dated 31.07.2018 held in paras 14 & 15 as under:

"14. We have heard the rival submissions and also perused the relevant material referred to before us and the decisions relied upon by the parties. As discussed above, it is an undisputed fact that for the assessment years 2006-07, 2007-08 and 2008-09 the return of income was filed u/s 139(1) and order u/s 143(3) was passed much before the date of search, except for the assessment year 2007-08, wherein no notice u/s 143(2) was issued within the stipulated time period. Accordingly, on the date of search, i.e., 19.10.2010 the assessments for these assessment years have attained finality and hence has to be reckoned as unabated assessment in terms of second proviso to section 153A. Now under the jurisdiction of Hon'ble Delhi High Court it is a well settled principle that in the case of assessments which have attained finality and are non-abated assessment, then no additions can be made over and above the original assessed income unless some incriminating material has been found during the course of search qua that assessment year. This proposition has been well discussed in the judgment of CIT vs. Kabul Chawla, wherein their Lordships have also discussed the judgment of Shri Anil Kumar Bhatia (supra). After considering the various judgments the Hon'ble High Court have summarised the decisions in the following manner: -

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

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

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

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

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

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

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of

search which were not produced or not already disclosed or made known in the course of original assessment."

15. The ratio laid down in the aforesaid judgment has been further reiterated on the Hon'ble Delhi High Court in the case of Pr.CIT vs. (supra) vs Meeta Gutgutia and catena of other cases as referred above. In so far as judgments relied upon by the Ld. CIT DR, same may not have binding precedence for the reason that; firstly, most of the judgments are distinguishable; secondly, majority of the High Court judgments are in favour; and lastly, jurisdictional High Court in series of judgment has reiterated the same principle. Thus, in view of the settled proposition laid down by the Hon'ble Jurisdictional High Court which is applicable on the facts of the present case also, we hold that all the additions made by the AO in the assessment years 2006-07, 2007-08 and 2008-09 are beyond the scope of assessment u/s 153A, because assessments for these assessment years had attained finality before the date of search and no incriminating material or seized documents were found qua these additions. Accordingly, additions made by the AO are quashed on this ground."

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

125. As regards to the enhancement of income by the ld. CIT(A) is concerned. It is noticed that the ld. CIT(A) considered new sources of the income which were outside the subject matter of assessment framed by the AO, therefore, the ld. CIT(A) acted beyond jurisdiction u/s 251 of the Act. It is also noticed that the ld. CIT(A) relied upon the order dated 27.05.2015 of Settlement Commission and the statements of the persons recorded by DGCEI in search on 20.02.2013 in the case of BSL group. However, the same cannot be categorized

as incriminating material found in the course of search at the premises of the assessee for unabated assessment years 2010-11 to 2012-13. It is also relevant to point out that the then ld. CIT(A) deleted the additions on account of diversion of raw material and alleged transport expenses in the hands of the BSL for unabated assessment years 2009-10 and 2010-11, on the ground that no incriminating material was found in respect thereto in the course of Income-tax search on 13.06.2014. In the present case, as the enhancement was based on the order of the Settlement Commission dated 27.05.2015 received much after issuance of notice u/s 153A of the Act after the search dated 13.06.2014. The same could not be categorized as incriminating material found during the course of search. Therefore, the ld. CIT(A) had taken a contrary stand in the case of the assessee i.e. Sh. Neeraj Singal vis-à-vis the BSL by enhancing the income on the same count, in the absence of incriminating material. It is also relevant to point out that the enhancement on account of alleged sale of scrap in the hands of the assessee was made by the ld. CIT(A) on the basis of statement of one Sh. Chandrakant Mahadev Jadhav, employee of BSL recorded u/s 131 of the Act on 13.06.2014 and hand written nothing in his personal diary. However, the said person retracted from his original statement on 30.11.2016. Therefore, the ld. CIT(A) was not justified in enhancing the income on the basis of the said statement.

126. On a similar issue, the Hon'ble Apex Court in the case of CIT, Bombay Vs Shapoorji Pallonji Mistry (1962) 44 ITR 891 held as under:

> *"In an appeal filed by the assessee the Appellate Assistant Commissioner has no power to enhance the assessment by discovering new sources of income not mentioned in the return of*

the assessee or considered by the Income-tax Officer in the order appealed against."

127. A similar view has been taken by the Hon'ble Supreme Court in the case of CIT(Central), Calcutta Vs Rai Bahadur Hardutroy Motilal Chamaria (1967) 66 ITR 443 wherein it has been held as under:

"The Appellate Assistant Commissioner has no jurisdiction under section 31(3) of the Indian Income-tax Act, 1922, to assess a source of income which is not disclosed either in the returns filed by the assessee or in the assessment order. It is not therefore open to the Appellate Assistant Commissioner to travel outside the record, i.e. the return made by the assessee or the assessment order of the Income-tax Officer, with a view to finding out new sources of income and the power of enhancement under section 31(3) is restricted to the sources of income which have been the subject-matter of consideration by the Income-tax Officer from the point of view of taxability. In this context "consideration" does not mean "incidental" or "collateral" examination of any matter by the Income-tax Officer in the process of assessment. There must be something in the assessment order to show that the Income-tax Officer applied his mind to the particular subject-matter or the particular source of income with a view to its taxability or to its non-taxability and not to any incidental connection."

128. Similarly, the Hon'ble Jurisdictional High Court in the case of CIT Vs Union Tyres (1999) 240 ITR 556 (supra) held as under:

"The first appellate authority is invested with very wide powers under section 251(1)(a) of the Income-tax Act, 1961, and once an assessment order is brought before the authority, his competence is not restricted to examining only those aspects of the assessment about which the assessee makes a grievance but ranges over the whole assessment to correct the Assessing Officer not only with regard to a matter raised by the assessee in appeal but also with regard to any other matter which has been considered by the Assessing Officer and determined in the course of assessment. However, there is a solitary but significant limitation to the power of revision, viz., that it is not open to the Appellate Assistant Commissioner to introduce in the assessment a new source of income

and assessment has to be confined to those items of income which were the subject-matter of original assessment."

129. A similar view has been taken by the Hon'ble Calcutta High Court in the case of CIT Vs National Company Ltd. (1993) 199 ITR 445 wherein it has been held as under:

"Before the Supreme Court, the question was whether, in an appeal filed by an assessee, the Appellate Assistant Commissioner can find a new source of income not considered by the Income-tax Officer and assess it under his powers granted by section 31 of the Indian Income-tax Act, 1922.

There the Supreme Court, after considering several decisions, held that, in enhancing the assessment for any year, the Appellate Assistant Commissioner cannot travel outside the record, that is to say, the return made by the assessee and the assessment order passed by the Income-tax Officer with a view to finding out new sources of income not disclosed in either. The Supreme Court also observed that there are other provisions like sections 34 and 33B which enable escaped income from new sources to be brought to tax after following the special procedure. The powers of the Appellate Assistant Commissioner extends to matters considered by the Income-tax Officer, and if a new source is to be considered, then the power of remand should be exercised. By the exercise of the power to assess fresh sources of income, the assessee is deprived of the finding by two Tribunals and one right of appeal. Accordingly, the Supreme Court dismissed the appeal of the Revenue in that case.

In our view, the principles laid down in the aforesaid decision by the Supreme Court would apply to the facts of this case. The Appellate Assistant Commissioner was not competent to enhance the assessment taking an income which income was not considered by the Income-tax Officer at all."

130. Since, in the present case also, the ld. CIT(A) enhanced the income in the absence of any incriminating material found during the course of search and considered a new source of income which was outside the subject matter of the assessment framed by the AO or the grounds agitated by the assessee in its

appeal before the ld. CIT(A). Therefore, the enhancement made u/s 153A r.w.s. 251 of the Act was not justified and accordingly the same is deleted.

131. Facts for the another assessment years 2011-12 and 2012-13 are similar to the facts involved in the year under consideration i.e. 2010-11, therefore, our findings given in the former part of this order shall apply *mutatis mutandis*.

132. Before parting, it is also relevant to point out that the case laws relied by the ld. CIT DR are distinguishable on facts, since in the case of M/s Chetan Das and Lakshman Das (supra), certain documents were found in the premises of the assessee therein, which as per the AO had shown gross under valuation of sales and suppression of production/yield/hinge but in the present case no incriminating material was found during the course of search. In the case of CIT Vs S. Ajit Kumar also direct relationship and nexus was established between the two parties and the assessee and the amount of Rs.95.16 lacs paid to M/s ECIL in cash was not accounted for. However, in the present case, there is no such nexus and no incriminating material was found during the course of search which could establish that there was any undisclosed income earned by the assessee. In other cases also certain undisclosed income was detected either during the course of survey or search or there was voluntarily surrender but in the present case such facts are not there, therefore, the case relied by the ld. CIT DR is distinguishable on facts. The ld. CIT DR also relied on the decision of the Hon'ble Jurisdictional High Court in the case of Smt. Dayawanti Vs CIT wherein it has been held by the Hon'ble High Court that the statements recorded during search operation could be relied upon to make addition to the assessee's income u/s 153A of the Act proceedings. However, the said case is

also not applicable to the assesseeôs case since the stay had been granted by the Honôble Supreme Court in (C) Appeal No. 20559/2017 against the said decision of the Honôble Delhi High Court. The ld. Counsel for the assessee distinguished the decisions relied by the ld. CIT DR, in his rejoinder through written submissions furnished on 02.08.2018 running into page nos. 1 to 31 which are placed on record.

133. The facts of the cases of other assessees are similar to the facts involved in the case of the present assessee i.e. Sh. Neeraj Singal, therefore, our findings given in respect of the appeals in ITA Nos. 1485 to 1487/Del/2018 shall apply to the other appeals of different assessees with the same force. Since, we have decided the legal issues in favour of the assessees, therefore, no findings are given on the other issues raised by the assessees on merit.

134. In the result, the appeals of the assessees are allowed.

(Order Pronounced in the Court on 31/10/2018)

Sd/-	Sd/-
(K. N. Chary)	**(N. K. Saini)**
JUDICIAL MEMBER	**VICE PRESIDENT**

Dated: 31/10/2018
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR