

THE INCOME TAX APPELLATE TRIBUNAL
"H" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Ramlal Negi (JM)

I.T.A. No. 6519/Mum/2019 (Assessment Year 2012-13)
I.T.A. No. 6520/Mum/2019 (Assessment Year 2013-14)
I.T.A. No. 6521/Mum/2019 (Assessment Year 2014-15)

Smt. Kalpana Mukesh Ruia 1102/1103, Express Zone A Wing, Patel Vatika Off Western Express Highway, Malad-East Mumbai-400 097. PAN : ASRPR4293B (Appellant)	Vs.	DCIT, CC-2(2) Old CGO Building Annexe, 8 th Floor M.K. Road Mumbai-400 020. (Respondent)
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I.T.A. No. 6960/Mum/2019 (Assessment Year 2014-15)

Sneha Rajesh Ruia 2202 A, Lakshchandi Heights, Gokuldharm Krishna Vatika Marg Goregaon East Mumbai-400 063. PAN : BFXPR4211M (Appellant)	Vs.	DCIT, CC-2(2) Old CGO Building Annexe, 8 th Floor Pratishtha Bhavan M.K. Road Mumbai-400 020. (Respondent)
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I.T.A. No. 6957/Mum/2019 (Assessment Year 2014-15)

Late Rajesh Ruia 2202 A, Lakshchandi Heights, Gokuldharm Krishna Vatika Marg Goregaon East Mumbai-400 063. PAN : AAIPR5763P (Appellant)	Vs.	DCIT, CC-2(2) Old CGO Building Annexe, 8 th Floor Pratishtha Bhavan M.K. Road Mumbai-400 020. (Respondent)
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I.T.A. No. 6958/Mum/2019 (Assessment Year 2014-15)

Rajesh Ramniranjan Ruia 2202 A, Lakshchandi Heights, Gokuldharm Krishna Vatika Marg Goregaon East Mumbai-400 063. PAN : AGRPR4736Q (Appellant)	Vs.	DCIT, CC-2(2) Old CGO Building Annexe, 8 th Floor Pratishtha Bhavan M.K. Road Mumbai-400 020. (Respondent)
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I.T.A. No. 6959/Mum/2019 (Assessment Year 2014-15)

Rajesh Ramniranjan Ruia-HUF 2202 A, Lakshchandi Heights Gokuldharm, Krishna Vatika Marg, Goregaon East Mumbai-400 063. PAN : AABHR8904H (Appellant)	Vs.	DCIT CC-2(2) Old CGO Building Annexe, 8 th Floor Pratishtha Bhavan M.K. Road Mumbai-400 020. (Respondent)
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I.T.A. No. 6513/Mum/2019 (Assessment Year 2012-13)

I.T.A. No. 6514/Mum/2019 (Assessment Year 2013-14)

Mukesh R. Ruia (HUF) 1102/1103 Express Zone A Wing, Patel Vatika Off Western Express Highway, Malad-East Mumbai-400 097. PAN : AABHR8905G (Appellant)	Vs.	DCIT, CC-2(2) Old CGO Building Annexe, 8 th Floor Pratishtha Bhavan M.K. Road Mumbai-400 020. (Respondent)
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I.T.A. No. 6515/Mum/2019 (Assessment Year 2012-13)

I.T.A. No. 6516/Mum/2019 (Assessment Year 2013-14)

I.T.A. No. 6517/Mum/2019 (Assessment Year 2014-15)

I.T.A. No. 6518/Mum/2019 (Assessment Year 2015-16)

Mukesh Ramniranjan Ruia 1102/1103, Express Zone A Wing, Patel Vatika Off Western Express Highway, Malad-East	Vs.	DCIT, CC-2(2) Old CGO Building Annexe, 8 th Floor Pratishtha Bhavan M.K. Road
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Mumbai-400 097. PAN : AAGPR6658B (Appellant)		Mumbai-400 020. (Respondent)
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I.T.A. No. 6962/Mum/2019 (Assessment Year 2012-13)

DCIT, CC-2(2) Old CGO Building Annexe, 8 th Floor M.K. Road Mumbai-400 020. (Appellant)	Vs.	Smt. Kalpana Mukesh Ruia 2102, B Wing, Lakshachandi Heights Krishna Vatika Marg Gokuldharm, Goregaon-E Mumbai-400 063. PAN : ASRPR4293B (Respondent)
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Assessee by	Shri J.P. Bairagra
Department by	Shri Sunil Umap
Date of Hearing	11.11.2020
Date of Pronouncement	31.12.2020

ORDER

Per Shamim Yahya (AM) :-

These are appeals by the various assessees belonging to the same group and one appeal by the revenue against respective orders of learned Commissioner of Income Tax (Appeals) [in short learned CIT(A)] for the concerned assessment years.

2. There are four issues arising in assessee's appeals. They relate to challenge to the validity of assessment under section 153A, addition u/s 68 of long term capital gains as undisclosed income by treating the same as bogus, addition of commission on capital gain, addition under section 68 of loans, addition of interest on loans. The grounds raised by the assessee are similarly worded except for the amounts. For the sake of reference we are reproducing hereunder the grounds of appeal raised in the case of Kalpana Mukesh Ruia for assessment year 2013-14 where all the grounds raised are referred and emanating.

1. *The learned Commissioner of Income Tax (Appeals) erred in holding that even though the assessment for this year was not abated and no incriminating material was found during search, additions can be made in respect of long term capital gain on sale of alleged penny stock declared by the appellant in the previous year relevant to this assessment year-NIL.*
2. *The learned Commissioner of Income Tax (Appeals) further erred in not following the judgement of Hon'ble Bombay High Court in the case of CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd., 374 ITR 645, to hold that in the absence of any incriminating material found during search in unabated assessment, no addition can be made while passing order under section 153A read with section 143(3)- NIL*
3. *The learned Commissioner of Income Tax (Appeals) further erred in holding that there is no category of non-abated assessments as per the statute and thereby concluding that if the assessment is completed u/s. 143(1), the category of non-abated assessments is not applicable. - NIL*
4. *The learned Commissioner of Income Tax (Appeals) further erred in giving a new interpretation to the word 'incriminating material' and thereby rejecting the argument of the appellant that no additions can be made in absence of incriminating material found during the course of search.- NIL*
5. *The learned Commissioner of Income Tax (Appeals) erred in confirming the additions under section 68 in respect of capital gain on sale of shares of M/s Finalysis Credit and Guarantee Ltd of Rs. 1,63,76,3217- and M/s Essar India Ltd of Rs. 4,06,13,865/- totaling Rs. 5,69,90,186/- which is declared as long term capital gain exempt under section 10(38) of the Income Tax Act - Rs.1,76,66,958/-*
6. *The learned Commissioner of Income Tax (Appeals) further erred in not considering the various documents including bank statements, share application form, copy of Demat account, bills, contract notes etc., in respect of purchase and sale of shares of M/s Finalysis Credit and Guarantee Ltd and M/s Essar India Ltd and based his findings merely on the basis of general report of the Kolkata Directorate of Income Tax Department.- NIL*
7. *The learned Commissioner of Income Tax (Appeals) further erred in confirming the disallowance of appellant's claim of exemption under section 10(38) in respect of long term capital gain earned on sale of shares of M/s. Finalysis Credit and Guarantee Ltd and M/s Essar India Ltd by relying on the various information mentioned in the assessment order which are not relevant in the transactions carried out through well managed and approved stock exchange wherein the prices are driven by various economic conditions, volume of transactions and financial health of the company.- NIL*
8. *The learned Commissioner of Income Tax (Appeals) further erred in confirming the additions u/s 68 on account of long term capital gain by relying on statement of brokers viz. Anuj Agarwal, Rajesh Khetan and Shri Amit Dalmia*

which are not relevant to the facts of the case of the assessee and without providing copy of statement recorded and not allowing opportunity to cross examine the parties.- NIL

9. *The learned Commissioner of Income Tax (Appeals) further erred in confirming the additions under section 68 on account of long term capital gain by relying on statement of appellant's husband Mr. Mukesh Ruia recorded u/s 132(4) and not accepting the retraction made by him and not holding that in absence of incriminating material found during search proceedings, making additions under section 68 is not justified particularly when circular of CBDT in its INSTRUCTION F. NO. 286/2/2003-IT (INV. II), DATED 10-3-2003 and LETTER [F.NO.286/98/2013-IT (INV.II)], DATED 18-12-2014 prohibits taking of confessional statements during search proceedings.- NIL*
10. *The learned Commissioner of Income Tax (Appeals) further erred in rejecting the ground of appellant for not allowing cross examination of parties on whose statements assessing officer is relying and not following the judgement of Hon'ble Supreme Court in case of Kishinchand Chellaram (125 ITR 713) and Andaman Timber Industries v. Commissioner of Central Excise (281 CTR 241) wherein it has been clearly held by Apex court that relying on statement recorded on the back of the assessee without allowing cross examination is invalid.- NIL*
11. *The learned Commissioner of Income Tax (Appeals) further erred in not examining and giving any finding on various latest case laws of ITAT and High Court relied on which are on similar facts and wherein additions on account of long term capital gain on sale of alleged penny stocks are deleted.- NIL*
12. *The learned Commissioner of Income Tax (Appeals) further erred in confirming the action of the learned Assessing Officer in making additions of long term capital gain under section 68 without bringing on record any material or evidence to prove that the long term capital gain claimed by the Appellant is an accommodation entry against which appellant paid cash.- NIL*
13. *The learned Commissioner of Income Tax (Appeals) further erred in relying of the decision of Hon'ble Supreme Court in the case of CIT v/s Durga Prasad More, 82 ITR 540 and Sumati Dayal v/s CIT, 2U ITR 801 on the general principles laid down to hold that tax authorities are entitled to look into the surrounding circumstances to find out the reality and apply the test of human probability by ignoring the direct decision of the Hon'ble jurisdictional High Court, other High Courts and Hon'ble tribunal on the similar issue of additions on account of long term capital gain under section 68.- NIL*
14. *The learned Commissioner of Income Tax (Appeals) further erred in confirming the disallowance made by assessing office under section 69C of Rs. 28,49,509/- being 5% of commission paid for alleged bogus long term capital gain - Rs. 8,83,348/-*
15. *The learned Commissioner of Income Tax (Appeals) further erred in confirming the additions of Rs.20,00,000/- under section 68 on account of loan taken from*

M/s Saraf Nivesh Pvt. Ltd. by holding that it is one of the several other companies of Kolkata which have been held as bogus by the assessing officer. - Rs. 6,20,000/-

16. *The learned Commissioner of Income Tax (Appeals) further erred in confirming the additions of Rs. 20,00,000/- under section 68 even though appellant has supplied all the documents i.e. confirmation letter, copy of bank statement of the party, copy of return of income, PAN and Balance sheet to prove the identity, creditworthiness and genuineness of loan creditors. - NIL*
17. *The learned Commissioner of Income Tax (Appeals) further erred in not accepting and giving any finding on judgement of Hon'ble Bombay High Court in the case of Pr.CIT Central-2 Vs. Skylark Build in ITA No. 616 of 2016 dated 24.10.2018, 2018-TIOL-2323-High Court-Mum-IT wherein it has been held that when the amounts borrowed by the assessee which are alleged as unexplained cash credit to make additions by invoking section 68, no addition can be made when such borrowings are repaid - NIL*
18. *The learned Commissioner of Income Tax (Appeals) further erred in confirming the disallowance under section 69C of Rs. 22,47,3217- on account of interest paid on alleged bogus loans taken in last year and loan taken from Saraf Nivesh Pvt. Ltd. during this year.- Rs. 6,96,670/-.*
19. *The Appellant craves leave to add to, alter or amend any ground before or at the time of hearing.- NIL*

3. In the revenues appeal following grounds are raised:-

1. *Whether learned CIT(A) is justified in deleting the addition amounting to Rs. 1,93,60,000/- made u/s. 69 of the I.T. Act on account of variation in purchase value of the property purchased by assessee and market value of the property. Tax effect Rs. 63,88,800/-*
2. *The appellant craves leave to add, to amend and/or alter any of the grounds of the appeal, if need be.*
3. *The appellant therefore prays that on the grounds stated above, the order of learned CIT(A)-48, Mumbai may be set aside and that of the Assessing Officer restored.*

4. At the outset it may also be gainful to refer to a chart of the issues under challenge on the various appeals as under. They are to be read along with the grounds of appeal referred hereinabove :-

Sr No.	Name	Assessment Year	Appeal No.	Issues in dispute	No incriminating material & Abated

								Assessment u/s. 153A
				Capital Gain	Commission on Capital gain	Loan	Interest on loan	
1	Kalpana Mukesh Ruia	A.Y. 2012-13	ITA6519/MUM/2019		-	Yes	Yes	Yes
2	Kalpana Mukesh Ruia	AY 2013-14	ITA6520/MUM/2019	Yes	Yes	Yes	Yes	Yes
3	Kalpana Mukesh Ruia	AY 2014-15	ITA 6521/MUM/2019	Yes	Yes	-	-	-
4	Mukesh Ramniranjan Ruia	AY 2012-13	ITA6515/MUM/2019	-		Yes	Yes	Yes
5	Mukesh Ramniranjan Ruia	AY 2013-14	ITA6516/MUM/2019	Yes	Yes	-	Yes	Yes
6	Mukesh Ramniranjan Ruia	AY 2014-15	ITA 6517/MUM/2019	Yes	Yes	-	-	-
7	Mukesh Ramniranjan Ruia	AY 2015-16	ITA 6518/MUM/2019	Yes	Yes	-	-	-
8	Mukesh Ramniranjan Ruia HUF	AY 2012-13	ITA 6513/MUM/2019		-	Yes	Yes	Yes
9	Mukesh Ramniranjan Ruia HUF	AY 2013-14	ITA 6514/MUM/2019	Yes	Yes	Yes	Yes	Yes
10	Rajesh Ramniranjan Ruia	AY 2014-15	ITA 6958/MUM/2019	Yes	Yes	Yes	-	-
11	Rajesh Ramniranjan Ruia HUF	AY 2014-15	ITA 6959/MUM/2019	Yes	Yes	-	-	-
12	Lata Ruia	AY 2014-15	ITA 6957/MUM/2019	Yes	Yes	-	-	-
13	Sneha Ruia	AY 2014-15	ITA 6960/MUM/2019	Yes	Yes	-	-	-

Since facts and adjudication by the authorities below are identical except for the figures, we are referring to the assessment order and learned CIT(A)'s order in the case of Smt. Kalpana Mukesh Ruia for A.Y. 2013-14.

5. Brief facts of the case are that there was search action u/s. 132 of the I.T. Act carried out in M/s. Shekawati group on 29.9.2015. Consequently notice u/s. 153A of the Act was issued to the assessee. The assessee filed return of income in

response thereto on 29.8.2016 declaring total income at Rs. 39,09,702/-. The Assessing Officer thereafter issue notice u/s. 143(2) of the Act. He noted that the assessee is an individual and derives income from salary and income from other sources. Thereafter, he referred that the inquiry and information gathered by the department on the issue of long term capital gain as under :-

“On the issue of Long Term Capital Gain the department has conducted certain enquiries and gathered information to arrive at the conclusion that the said transaction was bogus. The salient issues unearthed during the search and survey, post search survey and during the course of assessment proceedings are inscribed as under :-

During the course of survey at M/s. Shekhawati Poly Yarn Pvt Ltd the flagship company of the Shekhawati Group evidence has been gathered that the assessee was generating cash in manufacturing activities and scrap sale.

During the course of search proceedings, statement on oath of Shri Mukesh Ruia and Smt. Kalpana Ruia have been recorded who have admitted to have transaction in Bogus LTCG.

Survey u/s. 133A were conducted on the entry operators/share brokers who have admitted to have been involved in the process of providing accommodation entry in the form of Bogus LTCG.

During the assessment proceedings the assessee's husband has submitted a copy of retraction, letter which has not been received by the authority concerned.

The assessee has not cooperated with the Department during the course of assessment proceedings. The data of won compliance has been in corporate at Point No. 5 at Page No. 72.

The poor financial conditions of the companies wherefrom the assessee has procured bogus long term capital gain has been elaborately discussed at para No.4 A to Para 7 of this assessment order.

Further, judicial pronouncement has been discussed at 5(i) onwards including Latest decision of the jurisdictional Bombay High Court in the case of Shri SanJay Bimal Chand Jain Vs, Pr. CIT.”

6. After giving the above said brief case the Assessing Officer reproduced the notice u/s. 143(2). In his notice he referred to the Investigation in Kolkata and Mumbai conducted by Investigation Wing of the Income Tax Department on the issue of long term capital gain. Thereafter he theoretically discussed

modus operandi in the case of long term capital gain adopted by various assesseees. Thereafter he observed that the Securities and Exchange Board of India (SEBI) has in the recent past, passed some orders on the issue of manipulation of share market for providing accommodation entry of bogus LTCG, SEBI considering the inputs from Income Tax Department as well as from its own surveillance system and that of the stock exchanges has taken appropriate action in case of the suspect scrips. These actions include passing Interim direction, suspending the trade, reducing the price band etc. Thereafter Assessing Officer referred to the discussion corroborating false long term capital gains. In this connection he referred to the companies, whose shares were subject matter of long term capital gains. After extensively dealing with the same he was of the opinion that they did not command huge increase in the valuation. Thereafter he referred to the discussion on price rigging based upon the analysis of increase in share values. He also referred to the statement of Shri Amit Dalmia and Shri Alok Harlalka (Director of Unno Industries Limited). He also referred to 'Exit Providers' and their statements. He also referred to the statement of Shri Bipin Divecha, Director of Finalysis Credit & Guarantee Limited. After making the general discussion about the modus operandi of long term capital gains generation, he referred to the role of share brokers. He referred to the statement of Shri Anuj Agarwal, Director of Korp Securities Limited. Thereafter he referred to the survey action in the case of M/s. S.M. Khetan by the Investigation wing. He noted that M/s. S.M.Khetan is a broker company through which bogus exit providers have traded in share market. He noted that in the statement of Shri Rajesh Khetan, son of Shri S.M. Khetan had admitted that he traded in the shares of Unno Industries on behalf of the Shri Mukesh Ruia. Referring to the above, the Assessing Officer referred that Shri Mukesh Ramaniranjan Ruia (assessee's husband) has agreed to the modus operandi and that bogus long term gains were generated. He again went on to the modus operandi of bogus share operation. Thereafter the Assessing Officer noted that the assessee has not offered long term capital gains which were accepted by the husband of the assessee. Thereafter he referred to the

assessee's husband statement. After detailing the above the Assessing Officer referred to the reply to the show-cause notice given to the assessee. He noted that the assessee has submitted that her husband had retracted to the disclosure made during the course of search while giving statement u/s. 132(4) of the Act. The Assessing Officer was of the opinion that the said retraction was only an afterthought. The Assessing Officer further noted that the assessee has demanded cross examination of each and every person whose statement the department was relying upon. He noted that the statements of different persons were only supporting the evidences gathered by the department that the assessee was benefitted by bogus long term capital gains from those scrips. He noted that the assessee has demanded cross verification at this juncture is nothing but an evasive tactic. That the assessee has failed to comment upon the modus operandi enumerated in the show-cause notice. The Assessing Officer further observed that despite communication of the above facts the assessee has not explained the real transaction behind these entries availed in the books. The entry providers in both the cases/groups have categorically stated that, the cheques and bills/documents were issued and corresponding cash has been received from the beneficiaries. He stated that there are no book entries to the real transactions either in the books of the assessee or in the books of these entry providers. Therefore the statements on oath, solemn affirmation and the admission of the parties when confronted with the evidences found in the course of search are sufficient evidences under taxation provisions to conclude that, both the parties entered into such arrangements with connivance with each other.

7. Thereafter the Assessing Officer proceeded to examine the scope of section 68 of the I.T. Act. He referred to the case law from ITAT Delhi in the case of M/s. Kushara Real Estate Pvt. Limited (ITA No. 4247/Del/2009) and decision of Hon'ble Hon'ble Jurisdictional High Court in the case of Major Metals Vs. UOI (19 taxmann.com 176) for addition u/s. 68 of the I.T. Act. Thereafter the Assessing Officer further gave theoretical analysis of section 68

extensively and referred to the bogus sham transaction and Hon'ble Supreme Court decision in this regard. Thereafter the Assessing Officer referred to Special Investigation wing report on black money. Thereafter he referred to the ITAT Delhi Bench decision in the case of Harsh Win Chadha Vs. DCIT (ITA Nos. 3088 to 3098 & 3107/Del/2005). He also mentioned the following case laws :

- Sumati Dayal Vs. CIT (214 ITR 801)
- Durga Prasad More (82 ITR 540)
- Mc.Dowell & Co. Limited (154 ITR 148)
- ACIT Vs. Som Nath Mani (100 TTJ 917)
- Govinda Rajulu Mudaliar Vs. CIT (34 ITR 807)
- Sreelekha Banerjee & Others Vs. CIT (49 ITR 112)
- Kalekhan Mohameed Hanif Vs. CIT (50 ITR 1)
- CIT Vs. Biju Patnaik (160 ITR 674)
- CIT Vs. P. Mohanakala & Others (291 ITR 278)

8. Thereafter he referred to Hon'ble Bombay High Court decision in the case of Sanjay Bimalchand Jai Vs. Pr. CIT. Finally he held that long term capital gain claimed by the assessee is non genuine and held that the same was unexplained cash credit u/s. 68 of the Act. Thereafter the Assessing Officer noted that from the statement of various share brokers and entry operators, it was clear that the assessee has paid commission @ 5% for obtaining said gains. Hence, he added 5% for commission resulting in addition of Rs. 28,49,509/-.

9. Thereafter the Assessing Officer noted that the assessee had taken nine loans in financial year 2011-12 amounting to Rs. 3.62 crores and one loan amounting to Rs. 20 lakhs in financial year 2012-13. He noted that the assessee was issued show-cause notice to establish creditworthiness, genuineness and identity of above persons for advancing loans. He referred to the investigation wing Kolkata report that some of the entry operators are providing bogus loans at Kolkata. Though he noted that the assessee has given confirmation, he found fault in same by noting that they were only xerox copy and they were dated 1.4.2012, first date of next financial year. He observed that completion of paper work by filing confirmation, ITRs, Bank Statement does not itself establish the identity, creditworthiness and genuineness of the

creditors. After observing above the Assessing Officer the Assessing Officer held that the assessee has failed to prove that identity, creditworthiness and genuineness of the bogus transaction. Thereafter he again referred to catena of case laws for provisions of section 68 of the Act. Finally he further observed on the addition proposed by him as under :-

“Therefore by applying the ratios laid down in above cases, the facts and findings in the case and considering the assessee's submissions in the matter, the amount brought in by assessee in its books as loans from the party stated above amounting to Rs.20,00,000/- for the year under consideration is treated as unexplained credit within the meaning of section 68 of the Act and taxed as assessee's income for the year under consideration. Penalty proceedings u/s. 271(l)(c) of the Act are separately initiated for furnishing inaccurate particulars of income.

Further, during the year under consideration, the assessee has debited an amount of Rs.22,47,321/- on the said bogus loans. On the basis of the findings that the loan is treated as bogus and the expenditure claimed thereon is treated as unexplained expenditure u/s.69C and accordingly, the amount of Rs.22,47,321/- Is added back to the total income of the assessee. Penalty proceedings u/s. 271(1)(c) of the Act are separately initiated for furnishing inaccurate particulars of income.”

10. Against the above order the assessee appealed before learned CIT(A).
11. At the outset assessee challenged the validity of additions made under assessment framed under section 153 A without reference to any incriminating material seized in the course of search.
12. The learned CIT(A) observed that the grounds relating to the validity can be taken up together as they are related to the issue of jurisdiction of the assessing officer in making addition without the incriminating documents. In this regard learned CIT(A) noted that assessee has challenged that since no incriminating documents were found assessing officer could not have made addition on account of bogus long-term capital gains LTCG. In this regard learned CIT(A) noted that assessee has relied upon following case laws.
 - CIT Vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. (374 ITR 645)
 - CIT(C), Nagpur Vs. Nurli Agro Products Ltd. (49 Taxmann.com 172)

- CIT Vs. Deepak Kumar Agarwal (298 ITR 586)
- All Cargo Global Logistics Ltd. Vs. DCIT (137 ITD 287)

13. The learned CIT(A) observed that in this regard he would analyse in depth the provisions of section 153A and the case laws. He referred to the honourable Delhi High Court decision in the case of Kabul Chawla (61 Taxman.com 412) and observed that the said decision has discussed the honourable Bombay High Court decision in the case of continental warehousing. Thereafter referring extensively from the above said decision of Kabul Chawla (supra), the learned CIT(A) opined that in case of non-abated assessment in absence of any incriminating material the assessment can still be what he called 'interfered with'. She noted that honourable High Court has said that incriminating material need not to be a specific document. He observed that honourable Bombay High Court has also so held. Thereafter he referred to honourable Supreme Court decision in the case of ACIT Vs. Rajesh Jhaveri Stock Brokers (P) Ltd. (161 Taxman 316). Thereafter he observed that there should be harmonious construction of honourable Bombay High Court decision in the case of Continental Warehousing Corporation & (Nhava Sheva) Ltd. (supra). She observed that Assessing Officer had powers when assessment earlier was not done under section 143(3) of the Act. In this regards she referred to the admission made by Mukesh Ruia under section 132(4) of the Act. She also referred the statement of Kalpana Ruia. Hence, she held that assessee's appeal in this regard was liable to be dismissed.

14. As regards merits of the addition of long-term capital gain she reiterated the order of the assessing officer. She noted the statement of various persons referred by the assessing officer. She noted that Mr. Rajesh Khaitan has admitted that she was taking instructions from Shri Prakash Modi on behalf of the Mukesh Ruia and his family. Thereafter she reiterated the various aspects of modus operandi referred by the assessing officer. She also rejected the retraction by the assessee. She also rejected the request of cross examination of the persons on the basis of the statement addition was done. Thereafter he

distinguished the case laws referred by the assessee. She even distinguished the case laws from ITAT Mumbai in the case of Kalpna Ruia (the assessee herself) for assessment year 2007-08 and 2008-09 where addition was made for bogus capital gain on account of accommodation entries from Shri Mukesh Choksi. In this regard she observed that the facts are different in this case as in the present case elaborate investigation by the revenue has been done. Thereafter she referred to various case laws and finally she upheld the addition on account of long term capital gain done by the assessing officer.

15. The learned CIT(A) similarly confirmed the addition of 5% commission paid for bogus long-term capital gain. Thereafter she referred to the addition of unsecured loan. In this regard she referred to his CIT(A)'s order for the assessee for assessment year 2012-13. She quoted therefrom. The quotation included that the bogus entry providers had not disclosed much income. That entire TDS is claimed as refund. That same IP address in filing of return of income and common postal address. Thereafter she referred to the distinction of case laws.

16. Thereafter she considered provisions of section 68 of the Act and finally dismissed the assessee's appeal in this regard. Thereafter she noted that ground relating to disallowance under section 69C of the Act of ₹ 22,47,321/- being interest on loans taken. In view of previous discussion she dismissed this ground also.

17. Against the above order assessee is in appeal before us.

18. We have heard both the counsel and perused the records. As regards the issue of incriminating material, learned Counsel of the assessee submits that search and seizure action u/s 132 took place on 29-09-2015. Assessment for this year is non-abated as no notice u/s 143(2) was issued till the time limit prescribed which expired before the date of search.

19. That further, during the course of search no incriminating material was found hence no addition can be made while passing order under section 153A read with section 143(3). That reliance is placed on the decision of Hon'ble Bombay High Court in the case of CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd., 374 ITR 645 and other Judgements of Hon. Bombay High Court and Hon. Delhi and Bombay ITAT.

20. As regards addition u/s. 68 of the Act for long term capital gain learned Counsel of the assessee submits that the Assessing Officer has incorporated the general thesis on the penny stock and observation in the Kolkata Investigation Report starting from para 3 (page no. 4) of the assessment order wherein it is stated that the shares in penny stock companies are acquired by the LTCG beneficiaries at very low prices through private placement. During the period of one year from the purchase date the prices of the stocks are rigged and are raised to a high level through circular trading. Later on after one year, when the prices are high the sale activity of the shares take place leading to long term capital gains. The Assessing Officer has given his findings in relying on the information received from Kolkata Investigation report and general thesis and statements recorded of various entry providers wherein none of the person has given any statement against the assessee in respect of long term capital gain earned. Learned Counsel of the assessee further submitted that the assessee has given detailed submission before learned CIT(A). But he pointed out that learned CIT(A) has dismissed grounds of appeal in this regard in view of referring to general thesis and information from Investigating Wing, Kolkata Investigation Report which was also relied on by the Assessing Officer. Further learned counsel has summarised as under :-

“The assessee has provided all the contract notes of the brokers in relation to sales and purchase of the shares which are system generated and prescribed by the Stock Exchange, copies of share certificates, copy of the D-MAT account statement of the assessee, copies of bank statements of the assessee highlighting the payments for purchase of shares and receipts against the sale of shares.

Pursuant to sale of shares the broker issued contract notes for sale of impugned shares vide various bills. There was no privity of contract between the assessee and the buyer of the shares as the assessee does not know to whom the shares have been sold and hence the long term capital gain on sale of shares cannot be treated as non-genuine.

The assessee has received entire sales proceeds through regular banking channels from the stock broker registered with SEBI which establishes the identity of the payer, sources of funds on sale of the same shares and the genuineness of the transaction.

The AO has not pointed out any deficiency in the documents or inherent weakness in the explanation or doubted genuineness of the transactions for want of any evidence.

The AO & Ld. CIT(A) have relied on the statement u/s 132(4) recorded of the appellant and her husband Mr. Mukesh Ruia to hold that capital gain earned by appellant is bogus. In this regard, we submit that the statements were recorded under threat, coercion and undue influence. Therefore the contents of the same cannot be relied and therefore, Mukesh Ruia has filed his retraction before conducting officer and the same was also submitted before Ld. Assessing Officer. We rely on the decision of Hon. Supreme Court in the case of Mehta Parikh & Co. vs. CIT (30 ITR 181), wherein it has been held that retraction statements made by deponents in their affidavits are final unless AO has examined the deponents after the retraction. It is not uncommon that such statements are recorded under inducement, promise, and persuasion under exceptional circumstances and in an atmosphere of high pressure liable to cause nervousness amounts to involuntary statements divorced from the actual facts on record.

Thus statement given by the assessee cannot bind him on the face of other evidences supporting his case. In this regard, the appellant relies on the decision in the case of Deepchand and Co. Vs. ACIT (1995) 51 TTJ (Bom) 421, wherein it was held that a statement recorded during search proceeding which continued for an unduly long period cannot be considered to be free, fearless and voluntary. Thus, an element of compulsion is discernible in the case of the assessee on the facts and circumstances of case justifying retraction.”

21. Furthermore, learned Counsel of the assessee submits that in the following case laws it has been held that the statement recorded u/s. 132(4) does not have evidentiary value when retracted if there is no any corroborative material :-

- CIT Vs. Sunil Agarwal (379 ITR 367)
- CIT Vs. Naresh Kumar Agarwal (369 ITR 171)
- DCIT Vs. Narendra Garg & Ashok Garg (AOP) (ITA No. 1531 & 1532 of 2007 dated 28.7.2016)
- DCIT Vs. Marathon Fiscal Pvt. Ltd. (ITA no. 5783 & 5784/Mum/2017 dated 28.8.2019)

- Tribhuvandas Bhimji Zaveri (ITA no. 2250 & 2251/Mum/2013 dated 4.11.2015)

22. Furthermore, learned counsel referred to CBDT Instruction F.No. 286/2/2003-IT(INV.II), dated 10.3.2003, wherein the Assessing Officer has been advised to avoid obtaining admission of undisclosed income under coercion/undue influence. Learned counsel further submits that the CBDT has again issued Circular No. F.No. 286/98/2013-IT(INV.II), dated 18.12.2014 for the following paragraph of the said Circular :-

"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 afo esaid 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 shall be viewed by the Board adversely."

23. Learned counsel further submits that the AO & CIT(A) relied on the statements of following persons to conclude that long term capital gain earned by the appellant is bogus -

- a. Statements of Shri Pankaj Dave, Sagar Kadam and Dharmendra H Bhojak who are referred as exit providers,
- b. Statements of Shri Anuj Agarwal share broker,
- c. Statement of Shri Arun Kumar Gupta who is director of 5 companies who are alleged to be exit providers.

24. It was submitted that these persons have not mentioned assessee's name in their statement which proves that their statements are general in nature and cannot be used against assessee. They have never stated that they have provided alleged bogus Long term capital gain entries to the assessee or her family. That these persons are not known to the assessee and appellant had no dealing with them. Ld. CIT(A) on page no. 43 of the order has incorporated the statement of Shri Rajesh Kaitan of M/s S M Khaitan, share broker through

whom family members of the appellant has carried out transaction in shares to hold that LTCG is bogus. With reference to statement of Rajesh Khetan it is submitted as under:

- a) There is nothing adverse in his statement which goes against appellant in this case.
- b) In his statement he has clearly stated that appellant's and his family member's account was KYC compliant and trading was done by Shri Prakash Modi as he was authorized by appellant to instruct S.M. Khetan brokers.
- c) In response to question no. Q 69 in his statement he specifically mentioned that he never doubted his clients i.e. Ruia Family because the trades happened over the period of 12-13 months when the price range was Rs. 26/- to Rs. 33/- per share and on exchange there was huge volumes of the shares.
- d) Further he stated that Ruia family has good financial background and social standing and he did work on the basis of faith and goodwill and earned only brokerage income which is his business.
- e) In the entire statement of Shri Rajesh Khetan, he has never said that alleged exit providers traded in share market through their broking company and he has never give any statement where it was admitted that shares of FCGL, Esaar India Ltd., Unno Industries Ltd or Tilak Finance Ltd were used to provide accommodation entries. Therefore, from this statement no negative inference can be drawn against appellant in this case.

25. That further during the course of assessment proceedings assessee requested the Ld AO to provide him the opportunity to cross examine these persons but request was denied by the Ld. AO. That therefore their statement is not binding on assessee and cannot be used against him. That the assessee had asked vide letter dated 19.12.2017 to AO to allow cross examination of these parties but was not allowed by AO as the assessment was getting time barred. That Assessing Officer incorporated this fact in para 5.1 at page no. 73 of his order.

26. That it is well settled law that any information collected at the back of assessee cannot be used against him for any proceedings without providing opportunity of cross-examination as held in the following decisions:-

- Kishinchand Chellaram (125 ITR 713)
- Andaman Timber Industries Vs. CCE (62 taxmann.com 3)
- H.R. Mehta Vs. ACIT (387 ITR 561)
- ITO Vs. M. Pirai Choodi (334 ITR 262)

27. Learned Counsel of the assessee further submits that the assessee has discharged the burden to prove the genuineness of the long term capital gains earned during the year under consideration by providing all necessary evidences and hence long term capital gain on sale of shares cannot be treated as bogus. In this regard learned Counsel of the assessee has relied upon following case laws :-

- Shri Vijayrattan Balkrishan Mittal Vs. DCIT (ITA no. 3427 to 3429/Mum/2019 dated 1.10.2019)
- CIT Vs. Shyam R. Pawar (229 Taxman 256)
- Farrah Marker Vs. ITO (ITA No. 3801/Mum/2011 dated 27.4.2018)
- GTC Industries Ltd. Vs. ACIT (164 ITD 1)
- Shri Brij Bhushan Singal Vs. ACIT (ITA No. 1415 to 1417/Del/2018 dated 7.12.2018)

28. Learned Counsel of the assessee further referred to catena of Hon'ble High Court and ITAT decisions referred in the above decision of Delhi ITAT. He further submits that following decisions relied upon by the Department have been distinguished in the above decision as under:-

- Sanjay Bimalchand Jain Vs. PCIT (89 Taxman.com 196)
- Shri Abhimanyu Soin vs. ACIT (2018-TIOL-733-ITAT-CHD dated 18.4.2018)
- Chandan Gupta Vs. CIT (229 Taxman 173)
- Balbir Chand Maini Vs. CIT (340 ITR 161)

29. Learned Counsel of the assessee further submits that the Assessing Officer has made addition which has been confirmed by learned CIT(A) merely on the surmises, suspicion and conjectures. In this regard learned Counsel of the assessee submits following decisions as under :-

“a. Hon'ble Supreme Court in the case of Omar Salay Mohamed Salt v. CIT [1959] 37 ITR 151 (SC) had held that no addition can be made on the basis of surmises, suspicion and conjectures.

b. The Hon'ble Supreme Court in the case of Umacharan Shaw & Bros. v. CIT (1959) [1959] 37 ITR 271 (SC) held that suspicion however strong, cannot take the place of evidence.

c. *The Hon'ble Supreme Court in the case of Lalchand Bhagat Ambica Ram v. CIT [1959] 37 ITR 288 (SC) held that assessment could not be based on background of suspicion and in absence of any evidence to support the same.*

d. *Hon. Kolkata High Court in the case of CIT v. Lakshmanagarh Estate & Trading Co Ltd.(220 Taxman122) held that on the basis of a suspicion howsoever strong it is not possible to record any finding of fact, As a matter of fact suspicion can never take the place of proof. It was further held that in absence of any evidence of record, it is difficult to hold that the transactions of buying or selling of shares were colorable transactions or were resorted to with ulterior motive."*

30. Learned Counsel of the assessee further submits that recent decision of the ITAT, Mumbai in the case of Smt. Geeta Khare Vs. ACIT (ITA No. 4267/Mum/2018 dated 29.5.2019) has decided identical issue in favour of the assessee :-

While doing so Hon. ITAT has distinguished the decision of Hon. Bombay High Court in the case of Sanjay Bimalchand Jain (89 taxmann.com 196) which was relied on by AO on the following grounds:

- (i) *In that case, the broker company through which shares were sold did not respond to AO's letter.*
- (ii) *At the time of acquisition of shares, payments were made in cash.*
- (iii) *Address of both the penny stock company were same.*
- (iv) *Authorised signat ry of both the companies were same.*
- (v) *Address of broker and penny stock companies were same.*

31. As regards addition u/s. 68 of the Act of Rs. 20 lakhs loan taken learned Counsel of the assessee submits that during the course of assessment proceedings u/s 153A r.w.s 143(3), the assessee has submitted detailed explanation and documentary evidences in respect of the loan taken from M/s. Saraf Nivesh Pvt Ltd vide her letter dated 27.12.2017 wherein the assessee has submitted the following details :-

- a) Identity of loan parties :
 - (i) Name and complete address of the parties
 - (ii) PAN of the parties
 - (iii)Details of directors of the lender companies
- b) Genuineness of transactions:
 - (i) Loan confirmations
 - (ii) Details of repayment of loans

(iii) Copy of bank statements reflecting entry of loan taken and repaid

c) Creditworthiness of parties:

- (i) Copy of return of income of lender parties for AY 2012-13
- (ii) Balance sheet of the lender parties
- (iii) Bank statement of lender parties reflecting entry of loan taken and repaid

32. That the above details are also enclosed. That original Loan Confirmation is again enclosed. That the assessee has discharged her onus to prove identity of the lender parties by supplying PAN, Address and details of directors of lender companies, genuineness of transaction since loan is received and repaid through banking channel only and creditworthiness of the parties by filing their Financials, IT Return copies, etc. Thereafter, onus is shifted to the AO to examine further the documents submitted by the assessee and give his findings on the same. That further, the loan taken from M/s Saraf Nivesh Pvt Ltd has already been repaid in the same year i.e. AY 2013-14, therefore additions u/s 68 are not sustainable. That the assessee has submitted the copy of bank statement of the lender parties evidencing the repayment of loans. In this regard, he relied on the decision of Hon. Bombay High Court in the case of Pr CIT, Central -2 Vs Skylark Build in ITA No. 616 of 2016 dated 24-10-2018, 2018-TIOL-2323-HC-Mum-IT, wherein it has been held that when the amounts borrowed by assessee which are alleged as unexplained cash credit to make additions by invoking section 68, no addition can be made when such borrowings are repaid. He further relied on the submission and judgements relied on in submission for AY 2012-13.

33. As regards interest on loan taken disallowed u/s. 69 of the Act, learned Counsel of the assessee submits that in Ground no. 18, the assessee has challenged the disallowance u/s 69C of interest of Rs.22,47,321/- paid on loan taken from 9 parties in AY 2012-13 and loan taken from Saraf Nivesh Pvt Ltd during AY 2013-14. That it is also challenged that provisions of section 69C of the Act are not applicable in respect of disallowance of interest paid on loan borrowed as provisions of section 69C are applicable only if the assessee has

incurred any expenditure and offers no explanation regarding source of expenses while in this case interest on loan paid is recorded in books of accounts. That as submitted above, since additions u/s 68 on account of loan taken is liable to be deleted, the addition of interest paid on the said loans should also be deleted. We rely on the submission and judgements relied on in our submission for AY 2012-13.

34. Lastly learned Counsel of the assessee refers to the ITAT decision in the case of Vijayrattan Balkrishan Mittal (ITA No. 3429, 3428, 3427/Mum/2019 dated 01.10.2019). Learned Counsel of the assessee submits that this case is very analogical to the one dealt with by the Revenue authorities in the present case. Learned Counsel of the assessee has extensively quoted from the same.

35. Per Contra learned departmental representative relied upon the orders of the authorities below. He extensively quoted from the order of assessing officer and the order of learned CIT appeals. As regards the issue of jurisdiction of assessment under section 153(A) without incriminating material he submitted that the statement was very much obtained under section 132 (4) wherein there is clear admission of undisclosed income. He further submitted that learned CIT(A) has fully dealt with this issue in his appellate order. Furthermore the learned departmental representative submitted that honourable jurisdictional High Court in the case of continental warehousing (supra) has held that only in case of assessments which have been finalized that addition without incriminating material cannot be done. He pointed out that in these cases earlier assessment was not done under section 143(3). Hence he submitted that assessee cannot be said to be covered by honourable jurisdictional High Court decision as above. Furthermore he referred to honourable Supreme Court decision in the case of Rajhesh Jhaveri (supra) for the proposition that intimation under section 143(1) cannot be deemed to be assessment order. Furthermore in this regard learned departmental representative relied upon the case laws from honourable Delhi High Court in

the case of Kabul Chawla (supra) and another case laws referred by learned CIT appeals.

36. As regards the merits of the case is concerned he submitted that the order of assessing officer and learned CIT appeals are quite elaborate. As regards the bogus long-term capital gain he submitted that the same has clearly been accepted by the assessee in the statement recorded during search. Furthermore he submitted that the share scrips in question have abnormal increase which is totally unjustified. In this regard he referred to the modus operandi of the bogus capital gain and the statement of bogus exit providers and the brokers. He further placed reliance upon case laws referred by the learned CIT appeals.

37. As regards the addition of loans learned Departmental Representative relied upon the orders of authorities below. He reiterated the position that the date of confirmation was not proper and only xerox copy of confirmation was submitted. Overall learned departmental representative relied upon the orders of authorities below.

38. On a query from the bench as to whether the learned departmental representative is in a position to bring incriminating material on record from the search, learned departmental representative submitted that he is relying upon the materials that are referred in the orders of the authorities below and is not in a position to bring any further material on record.

39. We have carefully considered the submissions and perused the records. Firstly issue in appeal is that in assessment framed under section 153(A) in case of the unabated assessment addition without reference to incriminating material is not sustainable. This issue has been clearly spelt out and affirmed by honourable jurisdictional High Court in the Catena of case laws including that of continental warehousing (supra).

40. The learned departmental representative and the learned CIT appeals have tried to distinguish this decision from Hon'ble Bombay High Court by referring to Hon'ble Delhi High Court decision in the case of Kabul Chawla (supra).

41. In this regard we are of the considered opinion that the decision from honourable jurisdictional High Court in Continental Warehousing (supra) is clear and unambiguous. It was clearly held in that case that assessments which are not pending and which have attained finality, addition under section 153(A) cannot be done without reference to incriminating seized material. We may gainfully refer to the relevant order of the honourable High Court as under:

"On a plain reading of section 153A, it becomes clear that on initiation of the proceedings under section 153A, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under section 132 or making requisition under I section 132/4 stand abated and not the assessments/reassessments already finalised for those assessment years covered under section 153A. By a Circular No. 8 of 2003, dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment/reassessment shall not abate. It is only because, the finalised assessments/reassessments do not abate, the appeal revision or rectification pending against finalised assessment/ reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under section 153A, the assessments/reassessments finalised for the assessment years covered under section 153A stand abated cannot be accepted. Similarly on annulment of assessment made under section 153A(1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1)."

"Once it is held that the assessment has attained finality, then the Assessing Officer while passing the independent assessment order under section 153A read with section 143(3) could not have disturbed the assessment/reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under section 153A establish that the reliefs granted under the finalised assessment/reassessment were contrary to the facts unearthed during the course of 153A proceedings. If there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings, the Assessing Officer while passing order under section 153A read with section 143(3) cannot disturb the assessment order."

42. A reading of the above makes it clear that it was expounded that in case of assessments which have attained finality no addition under section 153(A) can be done without seized incrementing material. In this regard, the learned departmental representative and learned CIT appeals have tried to make out a case that in the present cases before us the earlier assessments were not under section 143 (3). Hence the ratio from honourable jurisdictional High Court decision will not apply here. The learned departmental representative has mentioned that honourable High Court has referred about assessments which have been finalized.

43. In our considered opinion, the honourable jurisdictional High Court has never mentioned that it is only assessment which has been completed under section 143(3) that addition under section 153(A) cannot be done without reference to incriminating seized material. Honourable jurisdictional High Court has clearly mentioned that it is those assessments which are unabated, that is not pending, to which the above said ratio will apply. Assessments which are not pending are not only those which have been completed under section 143(3) but also those for which the time for issuing notice under section 143(2) have a ready elapsed. In other words the references is to those assessments in whose case assessment under section 143 (3) cannot now be done. It is not at all the case of the revenue that in the appeals which have been claimed as unabated here there was time for assessment under section 143(3). In this view of the matter, in our considered opinion, the submission of the learned counsel of the assessee succeeds that addition in the case of unabated assessment without reference to incriminating seized material for assessment u/s.153(A) is not sustainable on the touchstone of above said honourable jurisdictional High Court decision. Therefore, the learned CIT appeals and the learned departmental representative plea in trying to distinguish the same by reference to Hon'ble Delhi High Court decision and honourable Supreme Court decision in the case of Rajesh Jhaveri (supra) doesn't succeed.

44. It may not be out of place here to mention that it is specifically provided in section 153A *“that assessment or reassessment if any relating to any relevant assessment year or years referred to in this subsection pending on the date of initiation of search under section 132 or making of requisition under section 132 a as the case may be shall abate.”* This makes it further abundantly clear that only those assessments which are pending abate. Hence sanguine provisions of the act read with honourable jurisdictional High Court decision as above make it abundantly clear that the assessments which do not abate and assessment and addition under section 153 A without reference to incriminating seized material is not sustainable.

45. The jurisprudence regarding jurisdictional defect in assessment under section 153A /153C without reference to incriminating seized material has also been expounded by honourable Supreme Court in the case of Commissioner of Income Tax vs. Singhad technical education Society in civil appeal No. 11080 of 2017 and others. In this regard the honourable Supreme Court in paragraph 18 of the said order observed that :-

In this behalf it was noted by the ITAT that as per provisions of section 153C of the act,, incriminating material which was seized had to pertain to assessment years in question and it is an undisputed fact that the documents which were seized did not establish any correlation, document -wise, with these for assessment years since this requirement under section 153C of the act is essential for assessment under the provision it becomes a jurisdictional defect. We find this reasoning to be logical and valid having regard to the provisions of section 153C of the Act.”

46. We also note that the co-ordinate bench of ITAT in the case of Shri Vijayrattan Balkrishan Mittal (supra) in similar situation held that, dehorse incriminating Material assessment u/s.153A is not sustainable in the case of unabated assessment. We may gainfully refer to the said decision as under:

44. After hearing both the parties and perusing the facts on record, we observed that undisputably the assessment in the instant year has not abated on the date of search. We further find that the evidences were gathered after issuing notice under section 133(6) that assessee has carried out synchronized trades for obtaining bogus LTCG. In our opinion, the said information/data is

collected after the date of search and does not constitute incriminating material found and seized during the course of search. Keeping in view the said facts and circumstances, we are of the considered view that addition to the income of the assessee can only be made on the basis of incriminating record found during the course of search. In the present case, there is no such incriminating material and therefore, the AO has no jurisdiction to make addition in the unabated assessment. The case of the assessee is squarely covered by the decision of Hon'ble Bombay High Court decision in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra), wherein the Hon'ble Bombay High Court held as under: -

“a) Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) was justified in deleting the addition of ₹ 3,91,55,000/- under section 68 of the Act in respect of share application money and addition of ₹ 11,24,964/- under section 14A made by the Assessing Officer, as it was not based on incriminating material found during the course of search.

d) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of ₹ 3,91,55,000/- under section 68 of the Act in respect of share application money and addition of ₹ 11,24,964/- under section 14A made by the assessing officer without appreciating the fact that the decision of continental warehousing corporation & the decision in the case of All Cargo Global Logistics have not been accepted by the department and an SLP has been filed in the Supreme Court in both the cases decided by the High court i.e. Continental Warehousing Corporation as well as all Cargo Global Logistics vide appeal civil 8546 of 2015 and SLP civil 5254-5265 of 2016 respectively.”

45. Since, there is no incriminating material found during the course of search, we therefore respectfully following the ratio laid down by the Hon'ble Bombay High Court in the above decision, set aside the order of the CIT(A) and direct the AO to delete the addition. Resultantly, the appeal of the assessee on jurisdictional issue is allowed.

47. As regards the issue of seized material it is clear that in the appeals which have remained unabated the addition is without reference to any seized material. The materials referred are only the statement obtained of the assessee under section 132 (4). These have been duly retracted. Hence without corroborative material addition only based upon the retracted statement is not sustainable. For this proposition following case laws are germane:

- CIT Vs. Sunil Agarwal (379 ITR 367)
- CIT Vs. Naresh Kumar Agarwal (369 ITR 171)
- DCIT Vs. Narendra Garg & Ashok Garg (AOP) (ITA No. 1531 & 1532 of 2007 dated 28.7.2016)
- DCIT Vs. Marathon Fiscal Pvt. Ltd. (ITA no. 5783 & 5784/Mum/2017 dated 28.8.2019)

- Tribhuvandas Bhimji Zaveri (ITA 2250 & 2251/Mum/2013 dt. 4.11.2015)

48. It may also be pertinent to note here that no seized material said to be incriminating was produced before us. In light of above said case laws the observation of learned CIT(A) that incriminating material need not be specific has no legs to stand. This very observation by the learned CIT(A) itself is an admission that no specific incriminating material has been seized and referred in the assessment order. Hence, in all cases of unabated assessment the assessment fails on jurisdictional defect. Thus, ITA No. 6519/MUM/2019, 6520/MUM/2019, 6515/MUM/2019, 6516/MUM/2019, 6513/MUM/2019 & 6514/Mum/2019 are dismissed on account of jurisdictional defect.

49. As regards the issue of additions on merits for the bogus long-term capital gain, we note that the same is based upon the modus operandi of earning bogus long-term capital gain in general mentioned by the assessing officer. It is further more based upon the statements obtained upon survey. Furthermore it is based upon Assessing Officer's analysis of the impugned companies financials wherein the assessing officer is of the opinion that the increase in value is unjustified. Furthermore assessing officer has referred to general SEBI action in case of bogus long-term entry operators. However none of the brokers or the persons or the companies dealt in these appeals have been referred in the above said SEBI enquiry noted by the AO in his order. As regards the merits of additions based upon the statement obtained from Survey from 3rd parties the same is not at all sustainable without any corroborative material. This position was expounded by the honourable Supreme Court in the case of S. Kader Khan (supra). That there is no material incrementing available in this regard is clearly evident from the observation of the assessing officer in the order itself. The assessing officer mentions that what is real was not recorded in the books of accounts at any place. He mentions in the assessment order that no book entries to the real transactions either in the books of assessee or in the books of this entry operators are there. This clearly signifies that assessing officer is not referring to any incriminating material seized. As regards the observation of the assessing officer that the share broker

has accepted that he was acting on the advice of Shri Prakash Modi on behalf of the assessee, again there is no incriminating seized record in this regard. The same remains solely statement upon survey which is not a conclusive evidence of addition of undisclosed income without corroborative material.

50. It is noted that assessee's claim that all necessary documentary evidences are in place have remained undisputed. The assessee has provided all the contract notes of the brokers in relation to sales and purchase of the shares which are system generated and prescribed by the Stock Exchange, copies of share certificates, copy of the Demat account statement of the assessee, copies of bank statements of the assessee highlighting the payments for purchase of shares and receipts against the sale of shares. Pursuant to sale of shares the broker issued contract notes for sale of impugned shares vide various bills. There is no evidence of any privy of contract between the assessee and the buyer of the shares as the assessee does not know to whom the shares have been sold and hence the long term capital gain on sale of shares cannot be treated as non-genuine. The assessee has received entire sales proceeds through regular banking channels from the stock broker registered with SEBI which establishes the identity of the payer, sources of funds on sale of the same shares and the genuineness of the transaction. The AO has not pointed out any deficiency in the documents or inherent weakness in the explanation or doubted genuineness of the transactions for want of any evidence.

51. From the above, it is evident that all the documentary evidence in support of the income has been maintained and furnished. No defect in the same has been referred by the Revenue.

52. Further, it is undisputed that the assessee has asked for cross examination doing assessment proceeding itself. However, the same remained unresponded by the A.O. as well as Id. CIT(A). These information collected on the back of the assessee without opportunity to cross examine, cannot be a basis for addition. They have been held to be vitiating the assessment itself and

rendering it a nullify. Here, the Hon'ble Supreme Court's decision in the case Andaman Timber Industries (supra) is germane and supports this proposition.

53. In this regard we also place reliance upon the co-ordinate bench decision in the case of Shri Vijayrattan Balkrishan Mittal (supra), wherein similar addition was deleted by following adjudication:

28. *We also noted that as per provisions of section 68 of the Act, where any sum is found credited in the books in any previous year and assessee offers no explanation about the nature and source thereof or the explanation offered is not satisfactory to the AO, the sum credited may be charged to tax under Sec. 68 of the Act. The assessee is required to prove: (i) the identity of the creditor (ii) Source of the credit and (iii) genuineness of the transaction to the satisfaction of the AO. To prove the identity of the creditor, the nature of transactions, source of payments and the genuineness of the transactions of sale of shares of PAL, the assessee has submitted following documents/evidences: -*

a) To prove the identity of creditor and nature of transaction the assessee submitted copy of Contract note on sale by Geojit on BSE platform. The contract notes shows the quantity, rate, time stamp, value, taxes and charges viz. STT, brokerage, SEBI and exchange turnover charges, service tax and stamp duty incurred on all the transactions done on BSE platform, a stock exchange recognized by the market regulator SEBI. The documents have been accepted by the AO.

b) Bank statement showing sale proceeds credited by the broker Geojit. Demat account of the assessee showing sold shares debited/transferred to broker.

c) The sale consideration is received by assessee from Geojit, a registered broker of SEBI/BSE, with who has been dealing with Geojit for more than 10 years as per contract note directly in the bank account after shares are delivered from demat account and received by the assessee. Copy of demat account and bank statements where sale proceeds are received are submitted as discussed above. Geojit has also been examined and interrogated by the Investigation Department during search proceedings. Geojit's source is BSE settlement system. This explains identity of the creditor and source of money paid by assessee for genuine transaction of sale of shares.

d) Sale is done at prevailing price quoted on the BSE. (BSE published quotations daily and rate list of the relevant dates can be produced if required)

e) The shares are sold by assessee's broker on BSE platform and not off market to any buyer hence source is BSE's clearing system and broker. The transactions on the BSE platform and settlement system who are responsible

for the transactions of the demat account and prevailing price on public domain prove the genuineness of the transactions.

f) SEBI's final order dt. 19.09.2017 relating to PAL is enclosed. SEBI after detailed investigation into the transactions in the shares of these companies held that the parties to the investigation including assessee and alleged exit providers are having no nexus or connection with the company, their directors, promoters etc. and there is no price or volume manipulation in these scripts. This also explains the genuineness of the transactions and discards the theory of manipulation or accommodation to take tax advantage illegally.

29. We have also noted the facts further that the assessee has received total amount of Rs. 14,16,80,449/- on account of sale of shares of PAL during the year, in the account with Axis Bank from Geojit, registered broker of BSE with whom the assessee is dealing from last more than 10 years. The assessee has been regular investor in shares & securities and his portfolio comprises of various shares and the aggregate value of investments for 5 years have been as under: -

AY (as on date)	Total investment in shares – Amount (in Rs.)
31.03.2011	3,77 21,394
31.03.2012	3,33,40,018
31.03.2013	2 66 87,649
31.03.2014	2,91,24,876
31.03.2015	2,58,84,431

Copies of Balance Sheet of the assessee for the above mentioned years showing the investments made in shares were submitted to the AO vide submission dated 15.03.17 as well as before CIT(A) and even now before us. This adds to the bonafide of the assessee's transactions. In view of the above facts and circumstances of the case, we have to go through the expression of "nature and source" and has to understand the requirement of identification of the source and its genuineness. Sec. 68 of the Act places the burden of proof on the tax payer, to explain the nature of source of any credit but not the source of the source. Hence when an assessee gives evidences of identity of the payer, source of the credit, evidences of the transactions to prove the genuineness, the assessee is said to have discharged his initial burden. In view of the above, we are of the view that the assessee has explained and submitted evidences to prove identity, nature and source of the cash credit on account of sale proceeds credited/received in the bank account of the assessee and also furnished all evidences comprising contract notes, brokers, banking details in support of the genuineness of the transactions. The AO has not pointed out any deficiency in the documents or inherent weakness in the explanation or doubted genuineness of the transactions for want of any evidence. The AO did not produce any evidence whatsoever to prove the allegation that unaccounted money changed hands between the assessee and the broker or any other person including the alleged exit provider nor proved that the assessee has taken any type of accommodation from any person or so called exit providers to introduce unaccounted money into books by way of

LTCG. With the purchase and sale transactions of shares of PAL are proved genuine by third party evidences - bank, broker; DP-demat account, and in the absence of any material to prove cash changing hands in the transaction, the addition made by the AO under section 68 of the Act, by treating the sale consideration as unexplained, sham, non-genuine is baseless. The addition under section 68 of the Act made merely on the basis of suspicion, presumptions and probability of preponderance without any direct evidence to prove the transactions as non-genuine or sham or demonstrating appellant's involvement in any kind of manipulation is illegal and cannot sustain. The findings of investigation & modus operandi in other cases narrated by the AO and also CIT(A) nowhere prove any connection with the assessee nor the assessee's involvement or connection or collusion with the brokers, exit providers, accommodation providers or companies or directions etc. For making the addition, it is necessary to bring on record evidence to establish ingenuity in transactions or any connection of the assessee or its transaction with any of the alleged parties. The assessee has discharged his onus by establishing the identity of the payer, source of the credit and genuineness of the transactions.

30. We noted that the learned CIT Departmental Representative also relied on the decision of the Hon'ble Bombay High Court, Nagpur Bench in the case of *Sanjay Bimalchand Jain vs. Pr. CIT (2018) 89 taxmann.com 196 (Bom)*, wherein the decision on the impugned issue was discussed. Hon'ble High Court has considered the facts of *Sanjay Bimalchand Jain supra* from where we find that (i) in that case, the broker company through which the shares were sold did not respond to AO's letter regarding the names and address and bank account of the person who purchased the shares sold by the assessee (ii) Moreover, at the time of acquisition of shares of both the companies by the assessee, the payments were made in cash (iii) The address of both the companies were interestingly the same (iv) The authorized signatory at both the companies were also the same person (v) The purchase of shares of both the companies was done by that assessee through broker, GSSL and the address of the said broker was incidentally the address of the two companies. Based on these crucial facts, the Hon'ble Bombay High Court rendered the decision in favour of the revenue. None of these factors were present in the facts of the assessee before us. Hence it could be safely concluded that the decision of Hon'ble Bombay High Court (*supra*) is factually distinguishable."

54. In the background of aforesaid discussion and precedents it is clear that the addition of long term capital gain as bogus is not sustainable. The case laws relied by the revenue is duly dealt with in the order of the tribunal referred above. Accordingly we set aside the orders of authorities below and delete the addition on merits in this regard. It may not be out of place to mention here that the ITAT in assessee's own case for A.Y. 2007-08 & 2008-09 has decided the issue of treatment as bogus of the long term capital gain of

shares in favour of the assessee. The same has not been reversed yet. Despite that learned CIT(A) erroneously distinguished the same.

55. We have already held that the long-term capital gain cannot be treated as undisclosed income under section 68 the addition of commission on capital gain done in these cases is consequently not sustainable. Hence we delete the same also.

56. As regards the addition of unsecured loan is concerned, we note that assessing officer has accepted that assessee has submitted the confirmation, ITR, bank statement of the parties. However he rejected by simply observing that investigation wing at Kolkata has reported that some of the entry operators are providing bogus loans at Kolkata. The assessing officer did not make any enquiry of his own the only referred to the date of confirmation of the unsecured loan and drew adverse inference. The learned CIT appeals also has confirmed the assessing officer's action by simply making general observations that the loan creditors are bogus in as much as they don't have much income, that the entire TDS have been claimed as refund by them, that they have same IP address of filing return and same corresponding address.

57. We find that by simply referring to General findings of investigations wing at Kolkata entry operators providing bogus loans the revenue authorities cannot fasten liability of undisclosed income upon the assessee, unless the assessing officer makes enquiry of his own and rebuts the documentary evidences submitted by the assessee. The assessee has duly discharged its onus by submitting the loan confirmation, income tax details and bank statements and financial statement of the loan creditors. Without making enquiry of his own the Assessing Officer has rejected them which is totally unsustainable. In this regard we note that honourable Bombay High Court in the case of CIT Vs. Orchid industries p ltd in ITA No 1433 of 2014 vide order dt. 5/7/2017 has similarly held as under :-

"1] *The Revenue has filed the appeal on following questions;*

6.3 Whether on the facts and in the circumstances of the case and in law, orders of the Tribunal was perverse in deleting the addition of Rs.95,00,000/- made u/s. 68 of the Act, relying only on the documentary evidence produced by the Respondent Company while ignoring the key factor that these entities were not traceable at their given addresses.

6.4 Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in not appreciating the observations made by the Delhi High Court in Nova Promoters and Finlease Pvt. Ltd. 18 Taxman.com 217 wherein the Court has observed that cases of this type cannot be decided only on the basis of documentary evidences above and there is need to take into account the surrounding circumstances. 6.5 The Tribunal ought to have taken note of the fact that the assessee was not able to produce even a single party before the AO despite agreeing before the CIT(A) that it will produce all parties before the AO during remand proceedings."

2] Mr.Pinto, the learned counsel for the Assessee submits that the Assessing Officer upon considering all the facts had added Rs.95 lakhs as income under Section 68 of the Income Tax Act. It needs to be considered that the Assessee had not discharged its onus to establish that the amount was received by the Assessee from the share holders as share application money. The Assessee could not prove the identity of the creditors, their credit worthiness and the genuineness of the transactions. The party from whom the Assessee had received the share amount never responded to the summons issued by the Assessing Officer. The Assessing Officer has considered the said aspect and thereafter has added the amount under Section 68 of the Income Tax Act. According to the learned counsel, the Tribunal only on the basis that documents are available has accepted the case of the Assessee. The Tribunal has failed to consider the circumstances and the facts which are relevant.

3] The learned counsel for the Assessee supports the order and submits that the Assessee had discharged its onus. The Assessee had produced the PAN of all the creditors along with the confirmation, Bank Statement showing payment of share application money and relevant record is produced with regard to the allotment of shares to those parties. The share application form, allotment letter, share certificate are also produced. Even the balance-sheet, profit and loss account, the books of account of these creditors were produced on record showing that they had sufficient funds for investing in the shares of the Assessee. The learned counsel relies on the judgment of the Division Bench of this Court in case of Commissioner of Income Tax vs. Gagandeep Infrastructure (P.) Ltd., reported in [2017] 80 Taxmann 272 (Bombay) and the order of the Apex Court in case of Commissioner of Income Tax vs. Lovely Exports (P.) Ltd., reported in [2008] 216 CTR 195 (SC).

4] We have considered the submissions.

5] The Assessing Officer added Rs.95 lakhs as income under Section 68 of the Income Tax Act only on the ground that the parties to whom the share certificates

were issued and who had paid the share money had not appeared before the Assessing Officer and the summons could not be served on the addresses given as they were not traced and in respect of some of the parties who had appeared, it was observed that just before issuance of cheques, the amount was deposited in their account.

6] The Tribunal has considered that the Assessee has produced on record the documents to establish the genuineness of the party such as PAN of all the creditors along with the confirmation, their bank statements showing payment of share application money. It was also observed by the Tribunal that the Assessee has also produced the entire record regarding issuance of shares i.e. allotment of shares to these parties, their share application forms, allotment letters and share certificates, so also the books of account. The balance sheet and profit and loss account of these persons discloses that these persons had sufficient funds in their accounts for investing in the shares of the Assessee. In view of these voluminous documentary evidences, only because those persons had not appeared before the Assessing Officer would not negate the case of the Assessee. The judgment in case of Gagandeep Infrastructure (P.) Ltd, (supra) would be applicable in the facts and circumstances of the present case.

7] Considering the above, no substantial question of law arises. The appeal stands dismissed. However, there is no order as to costs.”

58. It is further noted that in the present case assessee has also refunded the loan amount to the loan creditor. This aspect further supports the assessee's plea that these loans cannot be treated as undisclosed income of the assessee. Authorities below have totally ignored this aspect. In this regard case law from Hon'ble Bombay High Court referred by learned counsel of the assessee above supports the proposition that when loan amount is duly repaid the same cannot be treated as undisclosed income under section 68.

59. Accordingly in the background of aforesaid discussion and precedents in our considered opinion the addition of unsecured loans as undisclosed income of the assessee is not sustainable. Hence, we set aside the orders of authorities below and delete the addition.

60. Since we have already deleted the addition of unsecured loan as undisclosed income the addition of interest thereon is consequently also not sustainable. Hence, the same is also deleted.

61. Our above adjudication on various grounds applies mutatis mutandis to all the assessee's appeals in adjudication here.

Revenues Appeal in ITA 6962/Mum/2019 for assessment year 2012-13 in case of Kalpana Mukesh Ruia

62. In this appeal the ground raised is that learned CIT appeals erred in deleting the addition amounting to rupees 1,93,60,000/- made under section 69 of the IT act on account of variation in the purchase price of the property purchased by the assessee and the market value of the property. On this issue the assessing officer observed that it was found that assessee has purchased 2 plots at Ambey Valley. That in order to ascertain the fair market value notice under section 133(6) was issued to the assistant sub-registrar Lonavala, to furnish the copies of sale deeds executed within the range of 3 months post and pre-of the registration made by the assessee. The assessing officer made some computation of his own and thereafter show caused the assessee as to why 90.28% more should not be added to the value already shown. In absence of any response from the assessee proceeded to add difference amount of Rs.1,93,60,000/- u/s. 69 of the IT Act .

63. Upon assessee's appeal learned CIT(A) observed that this addition by the assessing officer is without any basis and the assessing officer has erred both in law and fact .That addition is simply based on some comparables collected from the office of the Asst Sub-Registrar and has been applied on presumption that assessee would have paid the same market value. The addition of undisclosed investment under section 69 cannot be made purely on possibility of higher payment on the basis of comparables of higher market value. That hence the addition is without any basis. The learned CIT(A) has further noted that provisions of section 56 would have been applicable as purchase value is lower than stamp duty value. However since provisions of section 56 have come to the statute with effect from 01.04.2014. The substantive law would not be applicable for assessment year 2012-13.

64. Against this order revenue is in appeal before us. As we already observed the additions for assessment year in this case is without reference to any incriminating material found during search. Since the assessment has been done under section 153 A in case of an unabated assessment as we have already held hereinabove the addition is not sustainable dehorse any incriminating material. Hence this addition is not at all sustainable.

65. Furthermore the order of learned CIT(A) is reasonable and on that count also the same deserves to be sustained.

66. In the result appeals by the assesseees are allowed and the appeal by the revenue is dismissed.

Order pronounced under Rule 34(4) of the ITAT Rules by placing the result on notice board on 31.12.2020.

Sd/-

(RAMLAL NEGI)
JUDICIAL MEMBER

Sd/-

(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 31/12/2020

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

PS