

**IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI**

BEFORE SHRI PRASHANT MAHARISHI, AM  
AND  
SHRI PAVAN KUMAR GADALE, JM

Sr No	ITA/ CO. No.	Appellant/ Cross Objector		Respondent
1	ITA No. 2092/Mum/2019 (A.Y. 2010-11)	Jt. Commissioner of Income (OSD) Tax,  Central Circle 5(1), Room No. 1926, 19 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai-400 021	Vs.	Nitin Kumar Dindayal Didwania  172, Kshitij Building, 47, Napean Sea Road, Mumbai-400 036
2	ITA No. 2093/Mum/2019 (A.Y. 2011-12)			
3	ITA No. 2094/Mum/2019 (A.Y. 2012-13)			
4	ITA No. 2095/Mum/2019 (A.Y. 2014-15)			
5	ITA No. 2096/Mum/2019 (A.Y. 2015-16)			
<b>PAN No.AACPD7055J</b>				
6	CO No. 29/Mum/2021 (Arising out of ITA No.2092/Mum/2019 for A.Y. 2010-11)	Nitin Kumar Dindayal Didwania  172, Kshitij Building, 47, Napean Sea Road, Mumbai-400 036	Vs.	Jt. Commissioner of Income (OSD) Tax,  Central Circle 5(1), Room No. 1926, 19 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai-400 021
7	CO No. 30/Mum/2021 (Arising out of ITA No.2093/Mum/2019 for A.Y. 2011-12)			
8	CO No. 32/Mum/2021 (Arising out of ITA No.2094/Mum/2019 for A.Y. 2012-13)			
9	CO No. 34/Mum/2021 (Arising out of ITA No.2095/Mum/2019 for A.Y. 2014-15)			
10	CO No. 38/Mum/2021 (Arising out of ITA No.2096/Mum/2019 for A.Y. 2015-16)			
	<b>ITA/ CO. No.</b>	<b>Appellant/ Cross Objector</b>		<b>Respondent</b>
11	ITA No. 2062/Mum/2019 (A.Y. 2010-11)	Jt. Commissioner of Income (OSD) Tax,  Central Circle 5(1), Room No. 1926, 19 <sup>th</sup> Floor, Air India Building, Nariman Point,	Vs.	Niti NitinKumar Didwania 172, Kshitij Building 47, Napean Sea Road, Mumbai-400 036
12	ITA No. 2063/Mum/2019 (A.Y. 2011-12)			
13	ITA No. 2065/Mum/2019			



	(A.Y. 2014-15)	Mumbai-400 021		
14	ITA No. 2066/Mum/2019 (A.Y. 2015-16)			
<b>PAN No.AAAPA8012E</b>				
15	CO No. 28/Mum/2021 (Arising out of ITA No.2062/Mum/2019 for A.Y. 2010-11)	Niti Nitin Kumar Didwania 172, Kshitij Building, 47, Napean Sea Road, Mumbai-400 036	Vs.	Jt. Commissioner of Income (OSD) Tax,  Central Circle 5(1), Room No. 1926, 19 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai-400 021
16	CO No. 31/Mum/2021 (Arising out of ITA No.2063/Mum/2019 for A.Y. 2011-12)			
17	CO No. 35/Mum/2021 (Arising out of ITA No.2065/Mum/2019 for A.Y. 2014-15)			
18	CO No. 36/Mum/2021 (Arising out of ITA No.2066/Mum/2019 for A.Y. 2015-16)			

	ITA/ CO. No.	Appellant/ Cross Objector		Respondent
19	ITA No. 1899/Mum/2019 (A.Y. 2010-11)	M/s Hazel Mercantile Ltd. 181, 2nd Floor, Ashoka Shopping Centre, G.T. Hospital Complex, L.T. Road, Mumbai 400 001	Vs.	Dy. Commissioner of Income (OSD) Tax,  Central Circle 5(1), Room No. 1928, 19 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai-400 021
20	ITA No. 1900/Mum/2019 (A.Y. 2011-12)			
21	ITA No. 1901/Mum/2019 (A.Y. 2012-13)			
22	ITA No. 1902/Mum/2019 (A.Y. 2013-14)			
23	ITA No. 1903/Mum/2019 (A.Y. 2014-15)			
24	ITA No. 1904/Mum/2019 (A.Y. 2015-16)			
<b>PAN No.AAACH2671K</b>				
25	ITA No. 2085/Mum/2019 (A.Y. 2010-11)	Jt. Commissioner of Income (OSD) Tax,	Vs.	M/s Hazel Mercantile Ltd. 181, 2nd Floor, Ashoka Shopping Centre, G.T. Hospital Complex, L.T. Road, Mumbai 400 001
26	ITA No. 2086/Mum/2019 (A.Y. 2011-12)	Central Circle 5(1), Room No. 1926, 19 <sup>th</sup> Floor, Air India Building,		
27	ITA No. 2087/Mum/2019 (A.Y. 2012-13)	Nariman Point, Mumbai-400 021		



28	ITA No. 2088/Mum/2019 (A.Y. 2013-14)			
29	ITA No. 2089/Mum/2019 (A.Y. 2014-15)			
30	ITA No. 2090/Mum/2019 (A.Y. 2015-16)			

Assessee by : None  
Revenue by : Dr. Mahesh Akhade, CIT DR

Date of hearing:

Date of pronouncement : 14.12.2022  
23.01.2023

### ORDER

#### PER BENCH:

01. This is the bunch of 15 appeals in case of Three Assessee, namely (1) Shri Nitin Kumar Didwania , (2) Ms Niti Nitin Didwania and (3) Hazel Mercantile Limited filed by the ld AO and 15 cross objections in those appeals filed by those assessee for AY 2010-11 to 2015-16 in case of assessee at serial no 1 and (3) and for all those years except AY 2013-14 in case of assessee no (2) where All the three assessee have claimed long term capital gain u/s 10 (38) of The Act and assessee at sr no. (3) is also assessed on profit earned on unaccounted sales also.
02. Facts in case of Assessee no (1) and (2) are identical where long term capital gains u/s 10 (38) is claimed and found bogus by revenue. We state the facts in case of Assessee no (1) those are identical to assessee no (2) being spouse of Assessee no (1).
03. In this case, Joint Commissioner of Income Tax (OSD), Central Circle-5(1), Mumbai, has filed the appeal for A.Ys. 2010-11 to 2016-17 against the order passed by the Commissioner of Income tax (Appeals)-53, Mumbai [the learned



CIT (A)] dated 25 January 2019. The assessee has filed cross objection in all these appeals. Therefore, these are six appeals of the learned Assessing Officer and six cross objection of the assessee against the same order of the learned CIT (A).

04. The grounds of appeal raised by the learned Assessing Officer in ITA No.2092/Mum/2019 for A.Y. 2010-11 are as under:-

*"1. Whether on the facts and in the circumstances of the case and in law, the Id. CIT (A) re of deleting the addition of Rs. 7,01,34,500/-, being accommodation entry obtained in the nature of bogus long term capital gains by the assessee which fact was also concurred in the appellate order by the Id. CIT (A) that the assessee Indulged in accommodation entries?"*

*2. Whether on the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in deleting the addition of Rs. 35,06,745/-, being unaccounted commission paid for arranging accommodation entry which is in the nature of bogus long term capital gains in patent violation of the infringement of the provisions of the Act?"*

*3. "Whether on the facts and in the circumstances of the case and in law, the Id. Commissioner of Income Tax (Appeals) erred in deleting the addition made in the assessment order, by merely relying on the submissions of the assessee that the funds generated through accommodation entry were directly indirectly routed to Ms. Hazel Mercantile Ltd., without providing any opportunity of being heard or for verifying the submissions made by the assessee in the course of appellate proceedings, which is arbitrary and against the interests of the principles of natural Justice?"*

*4. Whether on the facts and in the circumstances of the case and in law, the Id. Commissioner of Income Tax (Appeals) erred in sustaining the protective addition of only 5% of GP on alleged unaccounted sales in the case of the assessee company-"Hazel*



*Mercantile Ltd white on the other hand according relief of entire addition of Rs. 7,01,34,900/- which is arbitrary and against the interests of the principles of natural justice?"*

*5. "Whether on the facts and in the circumstances of the case and in law, the Id. Commissioner of Income Tax (Appeals) erred in not appreciating that the accommodation entries undertaken by the assessee represented the final income earned by the assessee company, and no further estimation of 5% profit thereon was called for.?"*

*6. "Whether on the facts and in the circumstances of the case and in law and without prejudice, the Id. CIT(A) erred in facts and in law in not appreciating that the assessee, being a shareholder of the company had enjoyed dividend in the form of utilizing the proceeds of unaccounted cash sales made by the company?"*

*The appellant prays that the order of Commissioner of Income Tax (Appeal) on the above ground be set aside and that the DC be restored. The appellant craves, leave to amend or alter any grounds or add a new ground, which may be necessary. Last date for filing second appeal is 05.04.2019. However, the appeal should be filed immediately."*

05. The grounds of appeal raised by the assessee in Cross Objection no. 29/Mum/2021 for A.Y. 2010-11 are as under:-

*"1. On the facts and circumstances of the case as well as in Law, the Learned CIT (A) has erred in confirming the action of Learned Assessing in making additions in the Assessment Order passed u/s. 153A/C r. w. s. 143(3) of the Act on issues not based on any incriminating material found during the course of search.*

*2. On the facts and circumstances of the case as well as in Law, the Learned CIT (A) has erred in confirming the action of Learned Assessing in disallowing the claim for exempt Long Term Capital Gains made by the Appellant in the return of income*

*amounting to Rs. 7,01,34,900/-without appreciating the facts and circumstances of the case and position of law.*

*3. On the facts and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of Learned Assessing in treating the exempt LTCG are allegedly non genuine and adding the same u/s.68 of the Act without appreciating the facts and circumstances of the case and position of law.*

*4. On the facts and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of Learned Assessing in considering the facts and circumstances of the case by not providing an opportunity for cross examinations of third parties whose statements were relied upon.*

*5. the respondent craves leave to add, amend, alters or deletes the said ground of appeal.”*

06. The grounds of appeal of the Revenue and grounds of cross objection of the assessee for all other five years are similar except change in amounts involved.
07. The brief facts of the case shows that
- i. for A.Y. 2010-11 the assessee filed return of income on 7<sup>th</sup> October, 2010 at a total income of ₹9,85,980/-.
  - ii. Search and seizure operation under Section 132(1) of the Income-tax Act, 1961 (the Act) conducted on Veritas Group and Shri Nitin Kumar Dindayal Didwania, promoter of the group along with the family members on 10<sup>th</sup> September, 2015.
  - iii. Assessee and his family engaged in the business of trading and distribution of chemicals. The assessee is deriving income from salary business and profession and capital gains and income from other sources.



- iv. Because of the search, the notice under Section 153A of the Act was issued and assessee filed his return of income on 9<sup>th</sup> December, 2016 declaring total income of ₹19,48,426/-.
- v. During search, it was found that there is claim of bogus long-term capital gain earned by the assessee, his family members and a company in which assessee is interested.
- vi. Statement on oath under Section 132(4) was recorded on 10 September 2015 where in assessee confessed to have shown bogus long-term capital gain in several companies in his name as well as his family members and companies.
- vii. Assessee retracted the above statement on 23 October 2015.
- viii. Learned Assessing Officer during the course of assessment proceedings found that assessee has entered into the bogus long-term capital gain on share transaction with ten companies and claimed long-term capital gain exempt under Section 10(38) of the Act.
- ix. Based on the details available, show cause notice was issued on 16<sup>th</sup> November, 2017 that why the above long term capital gain was not considered as income under Section 68 of the Act. The learned Assessing Officer on verification of trading data of VERITAS Group cases, analyzed all the ten companies pointed out the details such as exit providers with respect to each of the company, statement recorded of the exit providers, financial conditions of the companies in which assessee earned long-term capital gain.
- x. The learned Assessing Officer also noted that assessee himself has accepted that for obtaining such bogus long term capital gain commission at the rate of 5% in cash was paid to the operators namely Mr. Natwar & Mr. Girish zaveri.
- xi. Accordingly, the learned Assessing Officer noted that assessee has earned Long Term Capital Gain of ₹7,01,34,900/- for A.Y.



2010-11 should not be treated as unaccounted income of the assessee along with that by cash commission at the rate of 5% should also not be added as unexplained income.

- xii. Assessee submitted his reply on 16 November 2017. The main claim of the assessee is that all the details of purchase and sales in the form of contract notes etc. have been provided to the learned Assessing Officer. Further, the shares were purchased and sold through the regular banking channel, evidenced by Demat Account and transacted through recognized stock exchange. It was also contended that those shares were held in Demat Account for more than one year. Assessee also stated that the reliance on the statement of Mr. Nitin Didwania that the capital gain earned was not genuine, as it has already been retracted.
- xiii. Assessee has been examined once again under Section 131 of the Act, wherein he has reiterated that statement given by him under Section 132(4) of the Act is incorrect and all the capital gains are genuine.
- xiv. Assessee relied upon several judicial precedents wherein the Long Term Capital Gain has been accepted as genuine. Assessee also submitted a note on the Long Term Capital Gain earned by him. Assessee also asked from the learned Assessing Officer several information.
- xv. Learned Assessing Officer rejected the explanation of the assessee. The learned Assessing Officer for the following reasons made the addition:-
- a) Mr. Raj kumar Kedia an accommodation entry provider has confirmed in his statement recorded under Section 132(4) of the Act, wherein the companies in which the assessee has traded was stated to be an accommodation entry. The statement on oath of Mr. Manish Arora,





employee of Mr. Raj Kumar Kedia also confirmed the modus operandi.

- b) The survey conducted on M/s Dhanleela Investments & Trading Company in which the members of Veritas Group are one of the beneficiaries was also explained.
- c) Mere payment of purchase and sales through banking channel and through recognized exchanges cannot be enough to prove the genuineness of the transaction.
- d) Investment in nondescript company by way of preferential allotment and the financials of the company did not justify the investment and large-scale price fluctuation confirmed by the accommodation entry providers proves that the Long Term Capital Gain earned by the assessee is bogus.
- e) The statement of Shri Nitin Kumar Dindayal Didwania under Section 132(4) of the Act wherein he was completely unaware about the financial of the companies where he had made investments, complete unawareness about the activities of these companies as well as the address and names of the directors through whom preferential allotments were obtained. Shri Nitin Kumar Dindayal Didwania also confirmed that all share transactions in the group member and his family members are having the same character.
- f) The preferential allotment was obtained through one Mr. Natwar & Mr. Girish zaveri and marketed the investment of this long-term capital gain are merely entry providers.
- g) In view of the statement of the assessee u/s 132 (4) corroborated by the statement of several other participant entities in earning of bogus long term capital gain by assessee, retraction was not accepted.



- h) It is not necessary to establish the cash trail of these accommodation entries.
- i) The learned Assessing Officer then relied on several judgments and held that the assessee has utilized his unaccounted cash to obtain the above bogus long term capital gain.
08. Accordingly, the addition of ₹7,34,900/- was made in the hands of the assessee as unexplained credit under Section 68 of the Act. 5% of commission amounting to ₹35,06,745/- which is paid to accommodation entry provider, Mr. Natwar & Mr. Girish zaveri, were added under Section 69 of the Act.
09. Accordingly, the return of income of ₹47,84,142/- was assessed at ₹7,84,25,790/- by assessment order passed under Section 143(3) read with section 153A of the Act vide order dated 29<sup>th</sup> December, 2017.
010. Assessee aggrieved with the order of the learned Assessing Officer preferred the appeal before the learned CIT (A). The learned CIT (A) passed a consolidated order for A.Y. 2010-11 to 2016-17 on 25 January 2019. The learned CIT (A) has held that
- i. The retraction made by the assessee is not admissible as it is an afterthought.
  - ii. There is enough evidence and investigation made in question with respect to the companies to show that those are used to generate non-genuine long-term capital gain.
  - iii. The assessee and his family members did not have any other significant capital gain except of this penny stock cases and nothing to support genuineness of dream windfall earned which was never replicated after research proves that genuineness of the claim is false.
  - iv. Therefore, he confirmed the order of the learned CIT (A) to that extent.



- v. However, the learned CIT (A) noted that in the other family members such as assessee, his wife and Mrs. Sushma Dindayal Didwania [ Mother of Assessee ] in whose cases, the long term capital gain have been shown do not have source of income from which such huge funds could have been generated.
- vi. Main source of income is of the assessee is salary from Hazel Mercantile Ltd.
- vii. Assessee [Mr. Nitin Didwania] has earned the long-term capital gain of about Rs. 74 crores have been found as bogus.
- viii. On verification of the details about the subsequent use of the funds received as long term capital gain, it was found that this money has been ploughed back largely into one company Hazel Mercantile Ltd.
- ix. In terms of turnover and volumes, Hazel Mercantile Ltd is the flagship company of group and therefore, he accepted the explanation of ld AR that the funds were sourced from Hazel Mercantile Ltd.
- x. He asked the assessee to file a statement of closing stock as per the books of account and closing stock after accounting for out of book sale in case of Hazel Mercantile Ltd for A.Y. 2010-11 to 2016-17.
- xi. He noted that closing stock as per book was Rs. 445 crores in case of Hazel Mercantile Ltd as on 31<sup>st</sup> March, 2016 and the sale out of book in cash of ₹120 crores is possible.
- xii. He therefore held that it is reasonable to tax the same in the hands of entity that is the source of the money used for obtaining long-term capital gain.
- xiii. He therefore, referred to his appellate order of the even date in case of Hazel Mercantile Ltd [those appeals of assessee as well as LD AO in the case are also decided by this order] wherein the protective addition made in that particular case was made on substantive basis in hands of that company.



- xiv. His finding was that addition made in the hands of Hazel mercantile Limited is enough to cover the addition made in the hands of this assessee and therefore when addition is confirmed in the hands of Hazel mercantile Limited, addition though confirmed on merits in the hands of Mr. Nitin Didwania and Mrs. Nitti Didwania, should not be taxed in their hands, as it will be double addition.
- xv. Therefore, as a consequent of this, he deleted the addition of long term capital gain of ₹7,01,34,900/- and commission expense of ₹35,06,745/- for AY 2010-11 in the hands of Mr. Nitin Didwania.
011. Therefore, he allowed the appeal of the assessee for A.Y. 2010-11 partly.
012. On the similar facts, by this common appellate order, for
- a. A.Y. 2011-12, he deleted the addition of ₹5,77,49,901/- on account of bogus long term capital gain as well as commission expense of ₹28,87,495/-
  - b. A.Y. 2012-13, he deleted the addition of ₹23,86,97,745/- and commission expense of ₹ 1,19,34,887/-
  - c. A.Y. 2014-15, the learned CIT (A) deleted the addition of bogus long term capital gain of ₹21,48,94,044/- and commission expense of ₹1,07,44,702/-
  - d. A.Y. 2015-16, he deleted the addition of bogus long term capital gain of ₹16,80,27,919/- and commission expense of ₹84,01,396/-.
  - e. A.Y. 2016-17, the long term capital gain of ₹35,36,720/- and commission expenditure of ₹1,76,836/- was deleted.
013. This order of the learned CIT (A) is challenged before us by the Revenue.
014. In the cross objections, the assessee has challenged the order of the learned CIT (A) on the issue that



- i. There is no incriminating material found during the course of search. The learned CIT (A) in absence of that should not have confirmed the addition.
  - ii. On the merits of the addition challenge was made on the addition of long term capital gain along with commission expenditure and
  - iii. Further absence of an opportunity to cross-examine third parties whose statements were relied upon.
015. Despite several opportunities granted to the assessee, none appeared on behalf of the assessee. On earlier occasions, there was a letter from the authorized representative of the assessee who submitted that they have withdrawn the letter of authority to represent the above cases. In view of this, we do not find any other option but to decide the issue on the merits of the case as per information available on record. Counsel of Assessee has filed a paper book that is also considered by us.
016. The learned Departmental Representative was heard. He submitted that
  - i. Assessee has earned bogus long-term capital gain from several companies that were not genuine.
  - ii. Assessee has failed to prove the genuineness of the transactions of long-term capital gain. The brokers are identified namely Mr. Natwar & Mr. Girish Zaveri who have provided the accommodation entries in the form of Long Term Capital Gain to the assessee.
  - iii. Statement made by the assessee is admissible evidence for making addition as it is backed by proper material even during the course of search on the assessee.
  - iv. Learned CIT (A) is correct in holding that the bogus long-term capital gain earned by the assessee is correctly to be taxed.
  - v. There is enough incriminating material found during the course of search which was corroborated by statement of assessee u/s 132 (4) of



the Act in his case as well as in case of Veritas Limited. Two statements of assessee u/s 132 (4), where retraction is not backed by any evidence, statement of Assessee u/s 132 (4) should be accepted.

- vi. When during search assessee accepts all the evidences on the basis of which search is carried out and assessee at first instances confirms the evidence available with the revenue by making statement u/s 132 (4), once again statement u/s 132 (4) in case of VERITAS confirming the same, there cannot be any fault with revenue to search for evidence during search. He submits that it is not necessary that revenue should find some pieces of papers to make the addition when overwhelming evidences based on which search is carried out is immediately confirmed by the assessee as truth.
- vii. He also referred to provision of section 153A of The Act and submitted that ,
- a. there is books of accounts,
  - b. evidences in the form of statements,
  - c. financials of the companies,
  - d. statement of entry operators, statement of exit providers,
  - e. statement of the persons who arranged bogus long term capital gains for assessee Mr. Natwar and Girish,
  - f. Absence of any knowledge with assessee of anything about the investment and sales of shares
  - g. Unusual, windfall gains earned by the assessee
  - h. confirmed by assessee in his statement u/s 132 (4) in his search



- i. once again confirmed in case of VERITAS in 132 (4) statement

All the conditions are satisfied for making addition. A ground of assessee in his cross objection of 'no incriminating Material' is not sustainable.

- viii. He further stated that the learned CIT (A) is incorrect in holding that the addition is confirmed by him in the hands of Hazel Mercantile Ltd, the addition is deleted in the hands of the assessee. He further referred to the provisions of section 68 of the Act and submitted that assessee has failed to prove the correct 'nature and sources' of the sum credited in the books of account in the form of bogus long term capital gain and therefore, the addition is required to be made in the hands of this assessee irrespective of the addition made in the hands of Hazel Mercantile Ltd.
- ix. He submitted that when Assessing Officer has not made addition on protective basis vs. substantive basis, the learned CIT (A) has fallen into an error in deleting the addition in the hands of the assessee holding that it deserves to be telescoped with the addition made in the hands of Hazel Mercantile Ltd.
- x. He submitted that even otherwise telescoping of the income in the hands of one assessee could not be granted for the income of another assessee. Therefore, to that extent the order of the learned CIT (A) is sustainable.
- xi. He extensively read the grounds of appeal and stated the learned CIT (A) has held so merely relying on the submission of the assessee that the funds generated through the accommodation entries were directly or indirectly routed through M/s Hazel Mercantile Ltd.
- xii. He submitted that there is no material available to hold so. He further stated that the learned CIT (A) has upheld the protective addition of gross profit of only 5% of unaccounted sales in the case of Hazel



Mercantile Ltd whereas the entire relief of 7.1 crores was granted to the assessee.

017. In view of this, according to him, the order of the learned CIT (A) is not sustainable.
018. We have carefully considered the contentions of the learned CIT Departmental Representative and the orders of the lower authorities. In this case, the family of the assessee and the group concerns have earned long term capital gain of ₹115,02,93,092/-. This long term capital gain has been earned from A.Ys. 2010-11 to A.Y. 2015-16 in the name of 4 companies and 3 individuals. The total allegedly bogus long term capital gain in the hands of Mr. Nitin Kumar Didwania for all these assessment years is to the tune of ₹74,95,04,809/-, in the name of Mrs. Niti Nitin Kumar Didwania (wife of the assessee) of ₹12,42,47,438/- and Smt. Sushmadeviji Dindayal Didwania (mother of the assessee) of ₹1,48,86,406/-. In the hands of the four companies, the Long Term Capital Gain earned in M/s Hazel Mercantile Ltd. is of ₹16,04,32,675/-, M/s Aspen International Pvt. Ltd. of Rs.4,26,92,856/- M/s Sanman Trade Impex Pvt. Ltd. and M/s Veritas (I) Limited of ₹2,00,76,725/-.
019. The investigation wing on the basis of the above information that assessee along with companies are the beneficiaries of bogus accommodation entries of Long Term Capital Gain based on searches and survey conducted. The information was also contained in copies of statement of alleged exit providers and other persons acting as part of money laundering scheme and tax evasion. The information was also received from DIT, Delhi about the beneficiaries and promoters of various companies. The other regulator securities and exchange board of India also passed several interim orders where the trading was restricted in the companies whose shares are dealt with by these assesseees. The assessee was found to have earned Long Term Capital Gain from ten companies. During the course of search, the statement of assessee was recorded and he was questioned about the Long Term Capital Gain and its genuineness. The assessee admitted that these are all bogus transaction. Further, in his statement, he expressed his ignorance about





those companies, their business, their whereabouts, their financials, etc. Thus, he did not know anything about these companies. He also did not attend any of the meetings of those companies and never received any dividend. All the statements of entry operators and other intermediaries were confronted to the assessee but he expressed his ignorance. The assessee was also shown the various statements of the companies and their directors and in question no.38; he simply stated that he was acting on the advice of Mr. Girish Zaveri, who was an employee of the group. He also confessed that Mr. Girish Zaveri, introduced a person named Mr. Natwar and the whole unaccounted income was converted into capital gain through these persons. He, in the end, admitted that the Long Term Capital Gain earned by him, his family members is not genuine and is out of manipulation of the transactions carried out with the help of operators and its bogus Long Term Capital Gain shown in pre arranged manner. Further, in the proceedings of search in the case of VERITAS India Ltd, the statement of the assessee was recorded under Section 132(4) of the Act on 14 October 2015, wherein once again he confirmed the bogus Long Term Capital Gain earned by his family members and various companies. He also confirmed that 4 to 5% was the commission paid to Mr. Girish Zaveri for obtaining of these accommodation entries of long-term capital gain. Based on this, assessee was confronted by the learned Assessing Officer and reply of the assessee was considered but in the end, addition was made in the hands of the assessee of long-term capital gain earned as well as unexplained expenditure of 5% thereon.

020. On Appeal before the learned CIT (A), the assessee challenged that there is no incriminating material found during the course of search. The learned CIT (A) held that the background investigation regarding use of penny stock, subsequent search on assessee, investigation and analysis of the penny stock involved, statements of several persons such as exit providers, orders of SEBI and On being confronted during the search, assessee admitted using penny stock to obtain the bogus Long Term Capital Gain in case of the assessee, his family members and group concerns, clearly is incriminating evidence. Assessee's further confession during the statement under Section 132(4) of the Income-tax Act, 1961 (the Act) at his residence as well as statement under Section 132(4) at the office of the VERITAS India Ltd also



proves existence of incriminating material. Thus, the learned CIT (A) held that the admission of the assessee, his family members cannot be read out of context, which was with reference to specific transactions of Long Term Capital Gain therefore, there is an incriminating material found during the course of search.

021. On the merits of the additions, the learned CIT (A) upheld the addition because of penny stock as unexplained income of the assessee, confirming the findings of LD AO.
022. However, he held that during the statement made by the assessee under Section 132(4) of the Act, the source of the cash for obtaining Long Term Capital Gain was explained to be generated from one company M/s Hazel Mercantile. He also considered that as per the details filed, the money shown as long term capital gain has been brought back largely into M/s Hazel Mercantile Ltd directly and indirectly. He accepted the explanation of the learned Authorized Representative before him that funds were sourced from Hazel Mercantile is credible argument. He examined the statement of closing stock as per books of accounts and closing stock after accounting out of book sales of M/s Hazel Mercantile from A.Y. 2010-11 to 2016-17. He noted closing stock as the books of ₹445 crores as on 31<sup>st</sup> March, 2016 and the sale out of books in cash of ₹120 crores is possible. He therefore, held that it is reasonable to tax the same in the hands of entities that is the source. Therefore, he deleted the addition of Long Term Capital Gain and commission expenses for all these six years in the hands of the assessee and held that the addition is to be made in the hands of M/s Hazel Mercantile Ltd. He converted it on substantive basis in the hands of that company and deleted the addition in the hands of individual assessee. Therefore, finding of the learned CIT (A) is that though the assessee has earned bogus Long Term Capital Gain but as the money has been ploughed back in M/s Hazel Mercantile Ltd, no addition under Section 68 of the Act of Long Term Capital Gain earned by the assessee as well as commission expenses spend by the assessee for obtaining such income is not required to be added in the hands of the assessee.



023. We have already stated that records shown that the whole group has earned a Long Term Capital Gain of more than Rs. 115 crores. Therefore, if there is a source of ₹115 crores unaccounted income that has been taxed in the hands of Hazel Mercantile Ltd. on account of unaccounted sale, then perhaps the finding of the learned CIT (A) may be considered as plausible.
024. Though the issue may still arise that how the provisions of Section 68 of the Act can be given a go-bye merely because some other company has shown the unaccounted sales and has earned income in its hands. Thus, on careful reading of the Provisions of Section 68 of the Act, the order of the learned CIT (A) is clearly unsustainable on this count itself.
025. On the second aspect, we find that gross profit addition of unaccounted sales in case of M/s Hazel Mercantile Ltd. has been upheld by the learned CIT (A) for A.Ys. 2010-11 to A.Y. 2016-17 is only to the extent of ₹6,04,66,969/-. Thus, it is clear that the learned CIT (A) has deleted the Long Term Capital Gain addition of ₹115 crores and converting the protective addition of ₹604,66,969/- in the hands of M/s Hazel Mercantile as substantive addition to delete the bogus Long Term Capital Gain addition in the hands of this assessee. There is gross mismatch between the amount to be taxed in the hands of individuals and companies on account of penny stock addition and amount upheld as addition on account of gross profit of Hazel mercantile limited. Ld CIT (A) just referred answer to one question, i.e. q no 43 of the statement of Assessee and allowed telescoping in hands of different assessee.
026. The below mentioned statement of capital gain earned by Mr. Nitin Kumar Didwania, Mrs. Nitti Didwania and M/s Hazel Mercantile Ltd. for A.Y. 2010-11 to 2016-17 shows Long Term Capital Gain in the hands of these three assessee of ₹103 crores. The learned CIT (A) has made GP addition in the hands of Hazel Mercantile Ltd of only ₹6,04,66,969/- for deleting the addition of Long Term Capital Gain.

AY	Long term capital gain earned by Mr.	Long term capital gain earned by	Long term capital gain earned by	Gross profit addition upheld in case
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	Nitin Didwania	Mrs. Nitti Didwania	Hazel mercantile Limited	of Hazel Mercantile Limited
(1)	(2)	(3)	(4)	(5)
2010-11	7,01,34,900	5,59,17,609	2,02,05,648	77,92,092
2011-12	5,77,49,901	2,98,13,063	2,89,39,693	67,63,037
2012-13	23,86,97,745	64,52,967	1,58,20,785	1,40,21,741
2013-14	Nil	Nil	3,57,55,020	28,80,000
2014-15	21,48,94,044	1,00,91,369	2,97,47,206	1,67,64,049
2015-16	16,80,27,919	2,19,72,700	2,99,64,323	1,20,60,372
Total	74,95,04,509	12,42,47,438	16,04,32,675	6,02,81,291

027. There is no working mentioned by the learned CIT (A) in his order that how he is telescoping the addition of Long Term Capital Gain earned by these entities with the gross profit addition made in the hands of M/s Hazel Mercantile Ltd.
028. There is no justification/ reasoning of the time of long-term capital gain earned in respective years and amount of gross profit addition in case of company. There is year wise gross mismatch between AY of earning of capital gain and profit taxed in the hands of Hazel mercantile Limited.
029. There is no evidence found during the course of search, which even remotely suggests that income is earned by company, and it came in to hands of this assessee for conversion of that unaccounted income as LTCG in their hands. No evidence mentioned by the LD CIT (A) for allowing the telescoping.



030. In case of Hazel Mercantile Limited Bogus LTCG is Rs 16.04 Cr, whereas addition because of GP is merely Rs. 6.02 Cr, which is not even enough to cover Bogus LTCG in the same company, how the other entities unaccounted income is subsumed in that is not made clear by the LD CIT (A).
031. Therefore, all the grounds of appeal of the Revenue are set aside back to the file of the learned CIT (A) to give a reasoned finding how the amount of Long Term Capital Gain earned by the assessee is subsumed in gross profit addition made in the hands of Hazel Mercantile Ltd. Thus, ground nos.1 to 6 of the appeal of the learned Assessing Officer are allowed.
032. Now, we come to the cross objection filed by the assessee. Ground no.2 to 4 of the CO, are relating to the addition on the merits, which we have already held in the appeal of the learned Assessing Officer therefore, the same are dismissed.
033. The ground no.1 of the CO challenged the facts that there is no incriminating material found during the course of search and therefore, no addition can be made in the hands of the assessee. The fact clearly shows that there was a search on 10 September 2015 on the assessee and all the group concerns. The main allegation of the search was that the assessee and his family members along with group entities have earned bogus long term capital gain of ₹115 crores. We are fully convinced that there are enough incriminating material found prior to research as well as during the course of search based on which the addition on account of bogus long-term capital gain on by the assessee on penny stock is based. Firstly there was an information prior to the search that the assessee and his family members along with the companies controlled by him have earned bogus long-term capital gain accommodation entries by selling the sale of various non-descript companies through a fraudulent scheme of tax evasion and money-laundering in a very large scale over the years and unaccounted money generated has been colored as exempt long-term capital gain introduced into the books of accounts of the family members in a pre-arranged manner of hundreds of crores of rupees. This has led to search on 10/9/2015. During the course of search, the long-term capital gain earned by the assessee claimed as exempt under section 10 (38) of the act was found recorded in the books of account of these non-genuine



companies. The statement recorded of the assessee under section 132 (4), assessee himself has explained whole modus operandi of the scheme and admitted that long-term capital gain claimed by the assessee and his family members and the companies is bogus, nongenuine and all out of many political and fraudulent transactions. Further statement recorded on 14 October 2015 in case of VERITAS India Ltd, assessee confirmed that long-term capital gain earned by him, his family member and the companies is bogus. He also mentioned the name of the person Mr. Girish Zaveri, giving his telephone numbers, giving the name of the companies in which the long-term capital gain is shown, corroborating that he has claimed bogus long-term capital gain. He also gave Person wise, script -wise, assessment year wise, minutely to the extent of each and every rupee of such bogus long-term capital gain earned and also explained from which companies such gain are obtained. He also confirmed that how the above scheme was explained to him by the accommodation entry provider and how he obtained such bogus gains. He also confirmed how the cash was paid to the brokers. He also confirmed that he has taken all the responsibility of obtaining such bogus gain in the hands of the assessee, his family members and companies operated by him. He also admitted that he has paid commission to Mr. Girish Jhaveri and Mr. Natwar for obtaining these accommodation entries. He also explained that unaccounted income is generated out of Hazel mercantile Limited. However, he did not stated how much income he earned out of unaccounted sales. He admitted to have made the sales of ₹ 120 crores out of the books of Hazel Mercantile Ltd (5% of which is added as income of the assessee being gross profit of Rs. 120 crores amounting to ₹ 6 crores). The books of accounts of Hazel Mercantile Ltd Hazel Mercantile Ltd was not produced, the reconciliation or systematic records of the cash generation in that company used for obtaining accommodation entries was also not mentioned. Further, the reason of the search was capital gain claimed as exempt income shown by the assessee, which was contrary to the investigation of the various agencies including securities and exchange board of India. The inquiries were also confirmed by statements of accommodation entry providers, the directors of the companies shares of those companies were sold to obtained bogus long-term capital gain, statement of exit providers, statement of and identification of persons who acted on behalf of the assessee at the



insistence of the assessee such as Mr. Girish and Mr. Natwar, data of stock exchange showing trading data of group companies of the assessee and assessee and his relatives, ignorance of the assessee about the companies in which assessee has invested to earn unaccounted income, the operators operating on behalf of the exit providers having their permanent account number is and matching stock exchange trading data, unfamiliarity of the assessee with respect to trading of shares, ignorance of the assessee how he came to know about preferential shares allotment of the invested companies, despite investing heavily in preferential sale allotment of the companies ignorance about even the business of those companies and directors of those companies, no explanation provided by the assessee despite confronting assessee with all those statements of persons involved in scheme of conversion of unaccounted income in bogus long-term capital gain, authorization of obtaining long-term capital gain scheme shown to the assessee by Mr. Girish and Mr. Natwar, Mr. Girish being an employee of the assessee, explaining the scheme in answer to question number 42, explaining the source of money given for obtaining unaccounted income in question number 43, explaining how the unaccounted payments were made in answer to question number 44, confirming in answer to question number 45 that he has entered into a scheme for conversion of unaccounted income, non-attendance in any of the company's annual general meeting confirmed by him wide answer to question number 46, non-receipt of any dividend from these companies clearly shows that authorities who conducted search, show all the documents in their possession which are confirmed by the assessee and admitted the unaccounted income. Therefore, thereafter nothing is required to be unearthed during the course of search as more than enough incriminating material was already available with the search party confronted to the assessee were admitted having the unaccounted income. It is always not necessary that there have to be some paper trail, which should have been found during the course of search for making an addition. The statement made by the assessee confirming the information, admitting the unaccounted income, explaining the modus operandi of earning such income, naming the parties involved in such activity shows clear-cut evidences of earning unaccounted income. Therefore, we do not find any infirmity in the order of the learned CIT - A the extent holding that that the addition of unaccounted



long-term capital gain which is proved to be bogus is based on material found during the course of search and satisfies all the conditions prescribed under section 153A of the.

034. In view of this, we do not find any merit in the cross objections of the assessee, hence it is dismissed.
035. In view of this, the appeal filed by the learned assessing officer is allowed for statistical purposes setting aside back to the file of the learned CIT - A to give clear-cut finding as to how merely an addition of ₹ 6 crores is enough where as bogus long-term capital gain earned is more than ₹ 120 crores. The learned CIT - A is also directed to give a specific finding year wise, amount twice, assessee wise with reasons that how telescoping of the long-term capital gain earned by individuals and companies can be subsumed in a meager addition of ₹ 6 crores in the hands of Hazel Mercantile Ltd. Needless to say, the assessee is directed to submit, if desired, all his submissions within 90 days of this order, thereafter, the learned CIT - A may decide the issue in accordance with the law.
036. Accordingly, appeals of the learned AO are allowed for statistical purposes and the cross objections of the assessee are dismissed.
037. Identical facts exists for assessment year 2011 - 12, 2012 - 13, 2014 - 15, 2015 - 16 and 2016 - 17. Therefore, similar directions are also given for all these years allowing the appeal of the learned assessing officer for statistical purposes and dismissing cross objections of the assessee.
038. Accordingly, in case of Mr. Nitinkumar Deendayal Didwania, all the appeals filed by the learned assessing officer are allowed for statistical purposes and cross objections filed by the assessee are dismissed for all these years.
039. Coming to the appeal is filed by the learned assessing officer in case of Mrs. Nitti Nitinkumar Didwania for assessment year 2010 - 11, 2011 - 12, 2012 - 13, 2014 - 15 and 2015 - 16 as well as cross objections filed by the assessee for all these assessment years are having similar facts except the change of amounts of long-term capital gain. Therefore, for the reasons given by us while disposing of the appeal of the learned AO and cross objections of Mr.





Nitinkumar Didwania, we also allow the appeals of the learned assessing officer in case of Mrs. Nitti Nitinkumar Didwania for statistical purposes with similar direction and dismiss the cross objections of the assessee for all these years.

040. Now we come to the appeal of learned assessing officer in Hazel Mercantile Ltd for respective assessment years and cross objections or appeal of the assessee.
041. For assessment year 2010 - 11, the assessee has filed its original return under section 139 (1) on 22/01/2011 declaring a total income of ₹ 21,798,074. This return was revised at the same income on 22/2/2014. The assessment was completed under section 143 (3) of the act on 26/11/2012 assessing the total income of the assessee at ₹ 26,636,430. The assessment was reopened under section 148 of the act which was also resulted into an assessment passed under section 143 (3) read with section 147 of the income tax act at ₹ 31,574,830. Subsequently, re-assessment order was challenged before the CIT - A wherein as per order dated 14/7 /2016 the additions were deleted.
042. Subsequently on account of search on 10/9/2015, respective is under section 153C was issued on 29/12/2017 wherein the income of the assessee was assessed at ₹ 55,644,450/-. The assessee company was found to have earned bogus long-term capital gain of ₹ 20,205,648/- for the impugned assessment year. Similarly, for other assessment years starting from assessment year 2011 - 12 - 2015 - 16 also assessee was found to have earned non-genuine long-term capital gain. The total long-term capital gain allegedly as bogus unaccounted income was to the tune of ₹ 16.04 crores. Based on the statement of the managing director/main officer of the assessee company this long-term capital gain was added to the total income of the assessee under section 68 of the income tax act. Further commission thereon for earning such bogus long-term capital gain at the rate of 5% that too based on the statement of Mr. Nitinkumar Didwania was made in the hands of the assessee for all those years. Accordingly, commission at the rate of 5% for assessment year 2010 - 11 to 2015 - 16 was determined at ₹ 57,514,654. It was added as unexplained expenditure under section 69C. The learned assessing officer for the impugned assessment year made an addition of ₹

20,205,648 on account of bogus long-term capital gain and commission expenditure of ₹ 1,010,282.

043. The learned assessing officer also found that assessee has unrecorded sales of ₹ 155,841,837 for assessment year 2010 - 11, ₹ 135,216,734 for assessment year 2011 - 12, ₹ 284,034,824 for assessment year 2012 - 13, ₹ 576 Lacs for assessment year 2013 - 14, ₹ 335,280,986 for assessment year 14 - 15 and ₹ 243,389,364/- for assessment year 2015 - 16 amounting to ₹ 1,207,870,747 for all these years taken together. The learned assessing officer also added to the income of the assessee 5% gross profit out of these unaccounted sales. Therefore, on account of unaccounted sales of ₹ 120 crores taken together for all these years 5% of gross profit works out to ₹ 6 crores. Thus, corresponding addition was made for all these years.
044. On appeal before the learned CIT - A, the addition of long-term capital gain and commission expenditure was confirmed on the merits where the learned CIT - A has categorically held that about long-term capital gain shown by the assessee is bogus and correctly taxed under section 68 of the act. Similar findings were with respect to the expenditure.
045. However, the learned CIT - A held that the addition in the Hands of the assessee on account of gross profit on account of unaccounted sales subsumes the addition on account of nongenuine long-term capital gain. He held that when the unaccounted income on account of gross profit earned on unaccounted sales is added in hands of the assessee, there is no requirement of further making an addition of unaccounted long-term capital gain.
046. Accordingly, in a nutshell, he held that though the long-term capital gain earned by the assessee is nongenuine and correctly taxable in the hands of the assessee but however for the reasons that gross profit on unaccounted sale is already taxed at the rate of 5% in the hands of the assessee, no separate addition with respect to the bogus long-term capital gain is required. Thus, he confirmed addition to the extent of ₹ 6 crores for all these assessment years but held that bogus long-term capital gain earned of ₹ 16.04 crores in the Hands of the assessee subsumes in the above addition of ₹ 6 crores.



047. Therefore, the assessee as well as the learned assessing officer both are aggrieved by the order of the learned CIT - A. Assessee is aggrieved by the confirmation of the addition of bogus long-term capital gain and commission expenses earned thereon as well as 5% gross profit confirmed on unaccounted sales. The learned assessing officer is aggrieved with giving telescoping of the addition of ₹ 6 crores for covering bogus long-term capital gain of ₹ 16.04 crores.
048. We have carefully considered the contentions of the learned CIT DR and perused the orders of lower authorities. As we have confirmed the long-term capital gain chargeability in the hands of Mr. Nitinkumar Didwania as well as payment of 5% of the commission for earning such long-term capital gain, the facts and circumstances are exactly similar except the change of the amount. Therefore, we do not have any hesitation in dismissing ground number 1 - 4 of the appeal of the assessee for all these assessment years.
049. For the reasons given by us while allowing the appeal of the learned assessing officer in case of Mr. Nitinkumar Didwania challenging the action of the learned CIT - A in not making a separate addition for long-term capital gain but holding that capital gain addition is subsumed in the addition of 5% on account of unaccounted sales of Hazel Mercantile Ltd, we set aside the whole appeal of the learned assessing officer for all these years back to the file of the learned CIT - A to decide a fresh and give a detailed finding as to how the telescoping of the gross profit addition in the hands of this assessee company amounting to ₹ 6 crores subsumes all the additions of penny stock in the hands of Mr. Nitin Didwania as well as his family members and companies of Rs 120 crores can be telescoped. Accordingly the appeal of the learned assessing officer for all these assessment years are allowed for statistical purposes with above directions.
050. For assessment year 2014 - 15 development assessing officer is made disallowance under section 14 A of ₹ 350,406/- deemed learned assessing officer invoke the provisions of rule 8D despite the assessee making a disallowance of ₹ 109,504, made an addition of ₹ 459,910. The learned CIT - A held that there is no dispute on applicability of section 14 A, the assessee is not given its working for the computation of disallowance, therefore the



satisfaction recorded by the learned AO is correct. However, he held that the investment made by the assessee in its subsidiaries and where share capital and free reserve of the assessee stands at ₹ 616 crores, which is far in excess of the investment made in those subsidiary companies. Therefore he confirmed the disallowance only with respect to 0.5% of the administrative expenditure to ₹ 174634/-. No infirmity is pointed out. Therefore, the action of the learned CIT - A cannot be found fault with. Ground number 7 of the appeal of the assessee for assessment year 2014 - 15 is dismissed. These findings also apply to the assessment year 2015 - 16.

051. Ground number eight relates to disallowance of 10% of business promotion expenses amounting to ₹ 1,024,645. In absence of any details furnished by the assessee, disallowance was confirmed. As we also do not have any other details, we do not have any hesitation in confirming the disallowance. Ground number 8 is dismissed. For other years, also the above finding covers the issue against the assessee.
052. For assessment year 2016 - 17, the learned CIT - S confirmed addition of ₹ 50 lakhs with respect to certain transactions pertaining to one-company Sumilon industries Ltd. During the course of search, the papers were found related to the above transaction. Those paper shows that VERITAS group concerns along with other creditors had received part consideration for since made to one company in cash along with payments from other debtors. The part consideration in cash was also received through sale of property of one company. The papers seized and marked as annexure A - 3 in premises of VERITAS India Ltd indicated that Assessee Company had received a cash of ₹ 50 lakhs from Surat metallics Ltd on behalf of Sumilon 's group. The learned assessing officer questioned the assessee. The learned AO observed that the seized papers and noting is contained therein are very clear and we are denied by the assessee cannot absolve of its responsibility to explain the contention to reconcile the same with the books of accounts. The assessee also contested without prejudice to give credit of the above addition with respect to several other payments paid. The learned assessing officer made the addition of ₹ 50 lakhs. Before the learned CIT - A assessee contended that the seized paper is merely a loose paper and irrelevant and inadmissible as evidence. The learned and CIT - A considered the seized documents and



reproduce the content page number 109 - 111 of his order and held that an amount of ₹ 50 lakhs is written by hand against the above company and further there is an Angadia expenses on 30 July 2015 which clearly shows that assessee has sent the above amount through courier and commission is paid for the same. Accordingly applying the provisions of section 292C he confirmed the addition. We do not find any infirmity in the order of the learned CIT - A as the seized documents clearly shows the nature of the payment, the amount paid, the party to whom it is paid and the courier details showing the commission how it is paid. Therefore, the addition deserves to be confirmed.

053. Therefore the appeal filed by the assessee for all these years are dismissed and appeal of the learned assessing officer are allowed for statistical purposes as per direction given above.

054. Accordingly, All the appeals of the learned assessing officer as well as the assessee and cross objections are disposed of by this common order with respect to all the above three assessees.

Order pronounced in open court on 23 January 2023.

Sd/-  
(PAVAN KUMAR GADALE)  
(JUDICIAL MEMBER)

Sd/-  
(PRASHANT MAHARISHI)  
(ACCOUNTANT MEMBER)

Mumbai, Dated: 23.01.2023

Sudip Sarkar, Sr.PS

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.

BY ORDER,

True Copy//



Sr. Private Secretary/ Asst. Registrar  
Income Tax Appellate Tribunal, Mumbai

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