IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A" : HYDERABAD
(THROUGH VIDEO CONFERENCE)

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.	A.Y.	Appellant	Respondent
456/Hyd/20	2014-15	Sri Tarun Kumar Goyal	Asst. Commissioner of Income Tax, Central Circle-3(2), Hyderabad
457/Hyd/20	2016-17		
458/Hyd/20	2016-17	Sri Arun Kumar Goyal	

For Assessee : Shri P.Murali Mohana Rao, AR
For Revenue : Shri Sibendu Moharana, DR

Date of Hearing : 01-02-2021
Date of Pronouncement : 20-04-2021

O R D E R

PER S.S.GODARA, J.M. :

The instant three appeals pertain to two assessees, S/Shri Tarun Kumar Goyal and Arun Kumar Goyal for AYs.2014-15 & 2016-17. The former assessee's appeals ITA Nos.456 & 457/Hyd/2020 arise against the CIT(A)-11, Hyderabad's separate orders, both dated 31-01-2020 (AYs.2014-15 & 2016-17) passed in case Nos.10252 & 10255/2018-19 followed by a latter assessee's appeal ITA No.458/Hyd/2020 for AY.2016-17 directed against the very CIT(A)'s order; of even date, passed in case No.10253/2018-19, involving proceedings u/s.143(3) r.w.s.153A of the Income Tax Act, 1961 [in short, 'the Act']; (in all cases), respectively.

Heard both the parties. Case files perused.

2. We proceed appeal-wise for the sake of convenience and brevity. The former assessee's in appeal ITA No.456/Hyd/2020 challenges correctness of both the lower authorities' action treating his long term capital gain claim of Rs.73,89,650/- as bogus alongwith 30% alleged commission charges thereupon to the tune of Rs.2,21,690/-; respectively. The CIT(A)'s detailed discussion confirming the Assessing Officer's action to this effect reads as under:

"5.2 I have considered the assessment order and submissions of the appellant. It is seen from the assessment order that the addition made is on estimate basis @1% on total purchases made during the year w.r.t the transactions in commodity trading. The addition made is based, on assumptions and presumptions of the AO and is not backed by any material evidence. Further, the addition in search assessment based on estimation without being backed by material evidence do not stand the test of law. In view of the factual and legal position as discussed above, the addition made is not warranted and the same is deleted.

6. Ground Nos. 10 to 21 are against the addition of Rs.73,89,650f - on account of capital gains claimed u/s.l0(38) of the I.T Act. The AO made addition of Rs.2,21,690/- on account of alleged commission for providing entries for capital gains @3% of exempt capital gains. The AO examined the issue of claim of capital gains. exemption u/s.10(38) at length. The AO discussed various facets of the facts related to the transaction in the order. The issue is discussed in P~ra-9.0 to Para 12.0 of the order. The AO brought out the SEBI order on manipulation in transactions in 'Penny Stocks', unrealistic circumstances as to the transaction, purchase price, sudden increase in share price of M/s.Kailash Auto Finance Ltd, which is not commensurate with financial results, unrealistic returns, the role of operators in arranging such transactions in detail. The findings of the AO are backed by results of sustained investigation, which are brought out in the order.

6.1 During the appellate proceedings, AR contended as under:

3. The AO erred in the transactions which are routed through proper banking channels and in appreciating the fact that assessee traded the c01nl1wdities through recognized stock exchange:

7.1. In relation to commodities Exchange it is to submit that during the course of assessment proceedings, the assessee filed copies of confirmation, bank statement, copy of the ITR, copy of financial statement of the parties etc. So these evidences confirm that the transactions are routed through proper banking channel.

7.2. The commodities 'were traded through a Stock Broker, M/s. Rajgharana Commodities Trade Pvt. Ltd, registered member of MCX/NCDEX that it is to submit that the Stock Broker had issued the contract note in proper form giving settlement number, trade time, trade number, amount of CIT and other details. The assessee also received the payment relating to the Commodities Sold from the broker after deduction of CTT. Once the transaction is routed through a registered broker in a recognized commodities exchange (MCX/NCD EX) with due suffering of CTT and which are also duly covered by the requisite documentation, the genuineness and credibility of the same cannot be questioned. The assessee had duly shown that transaction were done through banking channels right from purchase to sale of commodities and all the transaction have been routed through DMAT account sold in the MCX/NCDEX as per quoted price as on that date (Copy of the documents are enclosed vide paper book page no.17-72,131132).

7.3. Further it would be submitted that the documents relating to purchase and sale of commodities have neither been controverter nor disproved by the assessing officer. The A.O. merely on the basis of information from investigation wing and without any corroborative evidence nor making any enquiry further for the justification of additions. The report of Investigation wing could not be sole ground to implicate assessee and justify additions especially when, nowhere assessee had been found to be beneficiary of any kind of accommodation entry in. any inquiry by Investigation Wing or any such material had been unearthed by department in the course of search operation.

It would be the responsibility of the broker to ensure that the transaction is properly routed and CTT was paid as per stock exchange norms. It was also stated that in the secondary market transactions, no one knows who the buyer is and who the seller of the commodities is. When the assessee sold his commodities, several other persons also transacted in these commodities on MCX/NCDEX at prices similar to the price at which the assessee sold his holding.

7.A. The assessee has submitted the following information in support of the genuineness of transactions:

> Contract note for the sale of commodities through a registered stock broker with BSE.

> CIT had been duly suffered on the sale transactions.

7.5. In this regards, reliance is to be placed on the following case laws :-

• Smt. Sarita Devi vs ITO, TA.No.1228/Hyd/2016, wherein it was held that:

"10.1 Assessees have furnished the necessary information of purchase bills, sale bills, ledger accounts, De-mat account copies in support of transactions. Since there is no other information so as to come to conclusion that the transactions entered by the assessee are bogus, these are to be accepted as transactions entered in normal course. The enquiry from the NSE that M/s. Alliance Intermediaries and Net Work P. Lid; is not a broker or subbroker does not establish that the transactions with that company is bogus. Moreover, as far as Smt. Sarita Devi is concerned, the purchase transactions mostly pertain to long term capital gains and have been entered in earlier year and have been recorded as on 31.03.2006. A.O. even though has reopened the assessment in that year also, much before this assessment was reopened, the said proceedings were dropped without taking any adverse view.

Consequently, the purchases shown in that year in the balance sheet has to be accepted as genuine and subsequent sale thereon cannot be considered as bogus, on presumptions and assumptions. In view of that we have no hesitation in holding that the capital gains declared by the assessee should be assessed as capital gains only.

11. As seen from the orders, the A.O. has treated the entire sale consideration received as bogus and brought to tax the entire amount as stated to have communicated to him. The Ld. CIT(A) examined this aspect and gave finding that the transactions in the case' of Smt. Sarita Devi are not to the extent of Rs.2.20 crores and restricted the sale amount to the extent of Rs.90.75 lakhs correctly. She also gave correct finding that the entire gross receipts cannot be brought to tax and only the gain can be taxed.

Similarly in the case of Ms. Nitika also, the correct amount was determined and amount to be taxed was the short term capital gain received by assessee. To that extent findings of Ld. CIT(A) are correct. It is to be noted that the Revenue has not come in appeal on that

aspect. Therefore, only issue to be considered is with the direction of the CIT(A) to tax the said amounts as 'income from other sources'. For the reasons stated above, we are not in agreement with the action of the A.O. either for reopening of assessment or for treating the transactions as bogus, since the very basis for reopening the assessment 'was not provided to the assessee nor an opportunity was given to cross-examine the so called Mr. Chokshi. There is no basis for treating the said transactions as not genuine. Considering tile documents placed on record and the case law relied, we have no hesitation in directing the A.O. to accept the long term capital gains and short term capital gains declared by Smt. Sarita Devi and short term capital gains declared by Ms. Nitika Kumari under the head "Capital Gains" only. The grounds are accordingly allowed."

• Decision of Hon'ble Calcutta ITAT in the case of Vidhi Malhotra Vs ITO [2019] 101 taxmann.cont 361 (Delhi - Trib.) where in it was held that-

"Assessee had purchased and sold shares of a company which amalgamated into another company (Kailash) by order of High Court - Assessing Officer noticed that scrips of Kailash were used by entry providers for providing bogus accommodation entries and that in some other matter in course of proceedings before Investigation Wing, one Chartered Accountant had confirmed that he had provided accommodation entries in scrip of Kailash and, consequently, he treated long-term capital gain' under section 69 Assessee had duly shown transaction in cheques right from purchase to sale of shares and all transactions had been routed through DMAT account in Bombay Stock Exchange as per quoted price as on that date - SEBI did not find any prima facie material for manipulation in price of scrip of Kailash - Further, statement of Chartered Accountant could not be sale ground to implicate assessee and justify additions especially when; nowhere assessee had been found to be beneficiary of any kind of accommodation entry in any inquiry by Investigation Wing or any such material had been unearthed by department - Whether, on facts, long-term capital gain shown by assessee was genuine and, consequently liable for exemption under section 10(38) - Held, yes [Para 8]"

• Decision of Hon'ble Calcutta High Court in tile, case of CIT vs Carbo Industrial Holdings Ltd reported in 244 JTR 422 (Cal) wherein it was held

"The Tribunal allowed the claim on the ground that full details of the transactions as also the names and addresses of the brokers having been furnished, the assessee's claim could not be denied on the basis of mere suspicion regarding genuineness of the transactions,"

• Decision of the ITAT- Kolkata, in the case of Sri Dolarrai Hemani Vs. ITO, Kolkata Vide ITA No. 19/KoI/2014, where in it was held that

"…….. the addition has been made only on the basis of the suspicion that the difference in purchase and sale price of these shares is unusually high- The revenue had not brought any material on record to support its finding that there has been collusion /connivance between the broker and the assessee for the introduction of its unaccounted money. In view of the aforesaid facts and findings and the judicial precedents relied upon, 'we have no hesitation in directing the ld AO to accept the claim of exemption of LTCG of the assessee arising out of sale of shares of G.K.Consultants Ltd and accordingly allow the ground raised by the assessee in this regard",

7.6. It is pertinent to mention here that, as per the intent of the above section, the Assessing Officer cannot make addition u/s 69 of act if the assessee proves:

- *Identity*
- *Creditworthiness and*
- *Genuineness of transaction,*

In the present case, AO has made an addition of Rs.28,48,439/- and Rs.2,21,690/towards unexplained investment u/e 69 of the act, even though all the above mentioned conditions are satisfied.

7.7. We would like to place our reliance on the following case laws :-

• KLR Industries Limited vs DCIT 1480/Hyd/2014, judgment of Hon'ble Supreme

Court of India:-

"wherein the Hon'ble jurisdictional ITAT has held. that once the assessee has provide the identity, genuineness and creditworthiness of the creditor, no addition u/s 68 of the Act can be made in the hands of the assessee.

• Commissioner Of Income Tax Vs Lovely Exports (P) LTD (2008) 216 CTR (SC) 195, where in the Supreme Court held that

"if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as undisclosed income of assessee company".

7.8. Therefore, in view of the above details and submissions, it is very clear that the assessee has established the identity of the stock

broker, company in which the commodities are bought & sold along with the genuineness of the transactions and creditworthiness.

Therefore, the addition of Rs.28,48,439/- towards sale of commodities cannot be made in the hands of assessee as unexplained investments u/s 69 of the Act and the assessee has proved all the required field u/s 69 of the Act. Hence addition made by the A 0 is required to be deleted.

8. Wrongful disallowance of Long Term Capital Gains and making addition u/s.68 of Rs.73,89,650/-(Ground 13-14,16,18):

8.1. In relation to sale of shares in stock Exchange it is to submit that during the course of assessment proceedings, the assessee filed copies of confirmation; bank statement, copy of the ITR, copy of financial statement of the parties etc. So these evidences confirm that the transactions are ~outed through proper banking channel.

8.2. The commodities were traded through a Stock Broker, M/s. HSE Securities Ltd; registered member of stock exchange that it is to submit that the Stock Broker had issued the contract note in. proper form giving settlement number, trade time, trade number, amount of STT and other details. The assessee also received the payment relating to the shares sold from the broker after deduction of STT. Once the transaction is routed through a registered broker in a recognized stock exchange (BSE) with due suffering of STT and which are also duly covered by the requisite documentation, the genuineness and credibility of the same cannot be questioned. The assessee had duly shown that transaction were done through banking channels right from purchase to sale of shares and all the transaction have been routed through DMAT account sold in the Bombay Stock Exchange as per quoted price as 011 that date (Copy of the documents are enclosed vide paper book page no.73-128,131-132).

8.3. Further it would be submitted that the documents relating to purchase and sale of shares have neither been controverter nor disproved by the assessing officer. The A.O. merely on the basis of information from investigation wing and without any corroborative evidence nor making any enquiry further for the justification of additions. The report of Investigation wing could not be sale ground to implicate assessee and justify additions especially when, nowhere assessee had been found to be beneficiary of any kind of accommodation entry in any inquiry by Investigation Wing or any such material had been unearthed by department in the course of search operation.

It would be the responsibility of the broker to ensure that the transaction is properly routed and SIT was paid as per stock exchange norms. It was also stated that in the secondary market transactions, no one knows who the buyer is and who the seller of the shares is. When the assessee sold his shares, several other persons also transacted in these shares on stock exchange at prices similar to the price at which the assessee sold his holding.

8.4. The assessee has submitted the following information in support of the genuineness of transactions:

- *Contract note for the sale of commodities through a registered-stock broker with BSE.*
- *STT had been dilly suffered on the sale transactions.*

8.5. In this regards, reliance is to be placed on the following case laws :-

• Smt. Sarita Devi vs ITO, ITA.No.1228/Hyd/2016, wherein it was held that:

"10.1 Assessees have furnished the necessary information of purchase bills, sale bills, ledger accounts, De-mat account copies in support of transactions. Since there is no other information so as to come to conclusion that the transactions entered by the assessee are bogus, these are to be accepted as transactions entered in normal course. The enquiry from the NSE that M/s. Alliance Intermediaries and Net Work P. Ltd., is not a broker or subbroker does not establish that the transactions with that company is bogus. Moreover, as far as Smt. Sarita Devi is concerned, the purchase transactions mostly pertain to long term capital gains and have been entered in earlier year and have been recorded as on 31.03.2006. A.O. even though has reopened the assessment in that year also, much before this assessment was reopened, the said proceedings were dropped without taking any adverse view.

Consequently, the purchases shown in that year in the balance sheet has to be accepted as genuine and subsequent sale thereon cannot be considered as bogus, on presumptions and assumptions. In 'view of that we have no hesitation in holding that the capital gains declared by the assessee should be assessed as capital gains only.

11. As seen from the orders, the A.O. has treated the entire sale consideration received as bogus and brought to tax the entire amount as stated to have communicated to him. The Ld. CIT(A) examined this aspect and gave finding that the transactions in the case of smt. Sarita Devi are not to the extent of Rs.2.20 crores and restricted the sale amount to the extent of Rs.90.75 lakhs correctly. She also gave

correct finding that the entire gross receipts cannot be brought to tax and only the gain can be taxed.

Similarly in the case of Ms. Nitika also, the correct amount was determined and amount to be taxed was the short term capital gain received by assessee. To that extent findings of Ld. CIT(A) are correct. It is tv be noted that the Revenue has not come in appeal on that aspect. Therefore, only issue to be considered is with the direction of the CIT(A) to tax the said amounts as 'income from other sources'. For the reasons stated above, we are not in agreement with the action of the A.O. either for reopening of assessment or for treating the transactions as bogus, since the very basis for reopening the assessment was not provided to the assessee nor an opportunity was given to cross-examine the so called Mr. Choshi. There is no basis for treating the said transactions as not genuine. Considering the documents placed on record and the case law relied, we have no hesitation in directing the A.O. to accept the long term capital gains and short term capital gains declared by smt. Sarita Devi and short term capital gains declared by Ms. Nitika Kumari under the head "Capital Gains" only. The grounds are accordingly allowed."

• Decision of Hon'ble Calcutta IT AT in the case of Vidhi Malhotra Vs ITO [2019] 101 taxmann.com 361 (Delhi - Trib.) where in it was held that-

"Assessee had purchased and sold share, of a company which amalgamated into another company (Kailash) by order of High Court - Assessing Officer noticed that scrips of Kailash were used by entry providers for providing bogus accommodation entries and that in some other matter in course of proceedings before Investigation Wing, one Chartered Accountant had confirmed that he had provided accommodation entry in scrip of Kailash and, consequently, he treated long-term capital gain under section 69 Assessee had duly shown transaction in cheques right from purchase to sale of shares and all transactions had been routed through DMAT account in Bombay Stock Exchange as per quoted price as on that date - SEBI did not find any prima facie materiel for manipulation in price of scrip of Kailash - Further, statement of Chartered Accountant could not be sole ground to implicate assessee and justify additions especially when, nowhere assessee had been found to be beneficiary of any kind of accommodation entry in any inquiry by Investigation Wing or any such material had been unearthed by department - Whether, on facts, long-term capital gain shown by assessee was genuine and, consequently liable for exemption under section 10(38) - Held, yes [Para 8]"

• Decision of Hon'ble Calcutta High Court in the case of CIT us Carbo Industrial Holdings Ltd reported in 244 ITR 422 (Cal) wherein it was held

"The Tribunal allowed the claim on the ground that full details of the transactions as also the names and addresses of the brokers having been furnished, the assessee's claim could not be denied on the basis of mere suspicion regarding genuineness of the transactions".

• Decision of the ITAT- Kolkata, in the case of Sri Dolarrai Hemani Vs. ITO, Kolkata Vide ITA No.19/Kol/2014, where in it was held that

" the addition has been made only on the basis of the suspicion that the difference in purchase and sale price of these shares is unusually high. The revenue had not brought any material on record to support its finding that there has been collusion/connivance between the broker and the assessee for the introduction of its unaccounted money. In view of the aforesaid facts and findings and the judicial precedents relied upon, we have no hesitation in directing the ld AO to accept the claim of exemption of LTCG of the assessee arising out of sale of shares of GK.Consultants Ltd and accordingly allow the ground raised by the assessee in this regard".

8.6. It is pertinent to mention here that, as per the intent of the above section, the Assessing Officer cannot make addition u/e 68 of act if the assessee proves ;

- *Identity*
- *Creditworthiness and*
- *Genuineness of transaction.*

In the present case, AO has made an addition of Rs. 73,89,650/- towards unexplained investment u/s 68 of the act, even though all the above mentioned conditions are satisfied.

8.7. We would like to place our reliance on the following case laws ;-

• KLR Industries Limited vs DCIT 1480/Hyd/2014, judgment of Hon'ble Supreme Court of India :-

"wherein the Hon'ble jurisdictional ITAT has held 'that once the assessee has provide the identity, genuineness and creditworthiness of the creditor, no addition u/s 68 of the Act can be made in the hands of the assessee.

• Commissioner Of Income Tax Vs Lovely Exports (P) LTD (2008) 216 CTR (SC) 195, where in the Supreme Court held that

"if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO,

then the department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as undisclosed income of assessee company".

8.8. Further it is to submit that, when the Assessing Officer has not brought any material on record to show that the assessee has paid over and above the purchase consideration as claimed and evident from the bank account then, in the absence of any evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long-term capital gain.

8.9. It is also brought on record for your kind reference that SEBI vide its order dated 21st September 2017 has revoked the ban on Kailash Auto Finance Ltd. Para 5 of the said order reads as under

"Pursuant to the interim order, SEBI conducted a detailed investigation into the role of various entities in price manipulation in the scrip of Kailash Auto so as to ascertain the violation of securities laws. Upon completion of investigation by SEBI, investigation did not find any adverse evidence/adverse findings in respect of violation of provisions of the PFUTP Regulations in respect of the following 244 entities (against whom directions were issued vide the interim order and/or confirmatory orders) warranting continuation of action under section 11B/r/w11 (4) of the Act. The details of the 244 entities are as follows".

And vide para 8 of the order there is direction of revocation. Thus, SEBI also did not find any prima facie material for manipulation of price of scrip of Kailash Auto Finance Limited. Further it is to submit that if A.O. has found that scrip was used for accommodation entry then he should have independently enquired prima facie that whether assessee's name was too involved in the buyers of accommodated entries. It is to submit that once SEBI has held that there was no adverse material or evidence to show that the scrip was manipulated and restraint of trade on same has been revoked, it is to observe that the share prices have been deduced genuinely and shares have been sold for genuinely quoted price and thus sale proceeds of the same as accounted in the books of accounts stands explained.

8.10. Further it is to submit that merely on the statement of some third party who the assessee never knew even and as the statement of the third party was recorded behind the back of the assessee and toas never allowed to cross examine nor it was furnished to the assessee, the same cannot be relied upon and can be used against the assessee. Even if presuming statements do have adverse inference against the assessee, they cannot be relied upon and in support of these view reliance is placed 011 the Hon'ble Supreme Court Judgement of Andaman Timber Industries in Civil Appeal No. 4228 of 2006.

8.11. Therefore, in view of the above details and submissions, it is very clear that the assessee has established the identity of the stock broker, company in which the shares are bought & sold along with the genuineness of the transactions and creditworthiness. Therefore, the addition of Rs. 73,89,650/- towards sale of shares cannot be made in the hands of assessee as unexplained investments u/s 68 of the Act and the assessee has proved all the required field u/s 68 of the Act. Hence addition made by the AO is required to be deleted.

Ground No.20:

9. Non-Opportunity for Cross Examination of Witness :

The AO erred in not affording proper opportunity of cross examining the person as mentioned in assessment order, on which the AO relied upon for making addition of accommodation entries for commodities and shares which is against to the principles of Natural Justice and thus the assessment deserves to be annulled, which view is supported by the case law in the case of Sunitha Daddaa vs. DCIT, Central Circle-(2), Jaipur, Vide SLP of the Hon'ble Supreme Court.

In view of the facts submitted above, it is therefore requested the Ld. Commissioner of Income Tax (Appeals), to annul the assessment and to delete the addition made.

6.2) I have considered the assessment order, submissions of the appellant and the material placed before me. The addition made refers to seized material which is the basis for the addition made by the Assessing Officer. The modus operandi as brought out and statements recorded during the course of Investigation in the cases involving 'penny stocks' have been referred to in the order to being out the bigger picture where manipulations on large scale are involved. The back ground of the companies where investigation is made, their promoters, operators in the shares of the aba e companies are not only relevant but have to be considered to understand the real nature of the transactions undertaken by the appellant. The manipulation in the price of shares of these companies is well established. The series of transactions in the above scrip which were indulged in to bring unexplained money into the books of account in a camouflaged way is very well documented in series of cases.

6.3) The Hon'ble ITAT, Pune Bench in their order in ITA Nos. 1648 to 1652/PUN/2015, dt.04.01.2019 in the case of Rajkumar B. Agarwal Vs. DCIT dealt with the issue of capital gains on sale of shares of M s.Prraneta Industries Ltd. held as under:

"12. We have heard both the sides and gone through the relevant material on record. It is seen that the assessee claimed to have

earned short term capital gain of Rs.22,02,745/- in respect of sale of shares of PIL which were purchased for a paltry sum of Rs.75,197/- and sold for RS.22,77,943/-. The AO, on verification of the credentials of PIL and other attending circumstances, observed that PIL was included in the list of penny stock companies in enquiries conducted by BSE and SEBI, whose prices were manipulated. The ld. AR was requested to place on record the balance sheet of PIL for verifying the findings of Id. CIT(A) of a very high PIE ratio of the shares of PIL, whose shares with Re.1/- face value raised sharply from the bottom level of 0.31 paise to Rs.21.10 paise with multiple of 300 times. The ld. AR could not place on record copy of balance sheet of PIL. M/s DSP shares and Securities Ltd. and M/s Galaxy Braking Ltd. were lined vide SEBI orders dated 22.9.2012 and 24.09.212 for manipulating the prices of PIL. The broker from whom the assessee allegedly purchased the shares of PIL namely, M/s. Vijay Bhagwandas & Company was visited with penalties vide SEBI orders dated 26-06-2009 31-08-2009, 26-11-2009 etc. for manipulating the prices of various shares. They were debarred from acting as a share broker vide order dt. 24.1.20006 passed by the SEBI. Then the assessee claimed to have sold the shares of PIL to Mis Macy Securities Pvt. Ltd. This company was also warned by SEBI vide orders dated 02-05-2011 and 02-06-2011 for manipulating the prices of different shares. All such details have been incorporated in the impugned order, which have not been controverted on behalf of the assessee. It is further relevant to note that the AO required the assessee to furnish certain details including Demat account for the shares of PIL. The assessee miserably failed to place such details except for transactions from 29-06-2005 to 30-06-2005 and 04-07-2005 to 07-07-2005. The entire position which thus emerges is that PIL is a penny stock company, which fact got established from enquiries conducted by BSE and SEBI. Not only the DSP shares and Securities Ltd. and Galaxy Braking Ltd. were fined for manipulating the prices of shares of PILI even the broker from whom the assessee allegedly purchased the shares was suspended and debarred from acting as a broker by SEBI and further the broker to whom such shares were sold, was also warned by SEBI for manipulating the prices of different shares during the relevant period. There is doubt that the assessee completed paper-trail by producing contract notes for the purchase and sale of shares of PIL. In our considered opinion, mere furnishing of contract notes etc. and more specifically when seen in the background of the above noted facts, does not inspire any confidence and cannot be a ground to delete an addition, which is otherwise made on the solid bedrock of detailed enquiries.

6.4) At this juncture, it will not be out of place to refer to the judgment of the Hon'ble Supreme Court in CIT vs. Durga Prasad More (1971) 82 ITR 540 (sq, in which the assessee claimed before the ITO that

income of certain property should not be taxed in his hands as it was a trust property. The ITO rejected the claim and included the income in the hands of the assessee. The Tribunal affirmed the decision of the ITO, which was reversed by the Hon'ble High Court. Reversing the verdict of the Hon'ble High Court, their Lordships noticed that though the assessee made a claim that income of the property was not his and produced conveyance executed in his favour and the deed of settlement executed by his wife, nearly about a year after the conveyance, however, when the ITO asked the assessee about the source from which his wife got the amount, apart from saying that it was 'sthridhan' property, he failed to disclose any source from which his wife could have got the amount for purchasing the premises. In this backdrop of facts, the Hon'ble Supreme Court held that although the apparent must be considered as real, but, if there are reasons to believe that the apparent is not real, as is the case under consideration as well, then the apparent should be ignored to unearth the harsh reality.

6.5) Similar view has been canvassed in Sumati Dayal vs. CIT (1995) 214 ITR 801 (SC). The question for consideration in that case was whether the assessee purchased winning tickets after the event. it was observed that in all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act, lies upon the assessee. But, in view of section 68, where any sum is found credited in the books of the assessee for any previous year the same may be charged to income-tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In deciding the issue against the issue, their Lordships held that: 'Apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real and that the taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities'. This shows that a decision based on the attending circumstances and human probabilities does not get vitiated if there are compelling reasons to reject the frontage of a transaction based on the so-called evidence, which is nothing more than a mere paper work.

6.6) The Hon'ble Delhi High Court in ITA No.220/2019 in the case of Mr. Udit Kalra Vs. ITO in their order dt. 08.03.2019 held as under:

"The main thrust of the assessee's argument is that he was denied the right to cross-examination of the two individuals whose

statements led to the inquiry and ultimate disallowance of the long term capital gain claim in the returns which are the subject matter of the present appeal.

This court has considered the submissions of the parties. Aside from the fact that the findings in this case are entirely concurrent - A.O., CIT(A) and the ITAT have all consistently rendered adverse findings - what is intriguing is that the company (M/s Kappac Pharma Lid.) had meagre resources and in fact reported consistent losses. In these circumstances, the astronomical growth of the value of company's shares naturally excited the suspicions of the Revenue. The company was even directed to be delisted from the stock exchange. Having regard to these circumstances and principally on the ground that the findings are entirely of fact, this court is of the opinion that no substantial question of law arises in the present appeal".

6.7) considering the fact that the facts and circumstances of the case are similar. it is held that the Assessing Officer rightly concluded that the claim of exemption u/s.10(38) to be incorrect and correctly assessed the income u/s.68. Further. the manipulations as brought out above Involves payment of commission also. The addition on account of commission is also confirmed. The grounds raised are rejected".

3. Both the lower authorities' case in nutshell is that the impugned capital gains claimed at assessee's behest are very much bogus as per the departmental investigation indicating much a bigger picture pinpointing scrip price(s)' rigging in collusion with entry operators based in various cities. The assessee's plea on the other hand as per its detailed paper book running into 132 pages is based on voluminous evidence i.e., ledger copies in the books of M/s.Rajgharana Commodities Trade Pvt. Ltd., for AY.2013-14, contract notes of sales and purchase copies with the very party similar evidence with M/s.Hse Securities Limited for AY.2013-14, their ledger copies followed by transactions done through banking channel only. There is no rebuttal to all this voluminous evidence coming from Revenue side during the course of hearing. It

also fails to dispute that the impugned addition(s) is based on circumstantial than actual evidence. And also that no entry operator till date has named the assessee in any investigation carried out by the department or SEBI; whatsoever. Coming to all the case law quoted in CIT(A)'s order (supra), we find that hon'ble Delhi high court's latest decision in ITA No.125/2020, dt.15-01-2021 in PCIT Vs. Smt. Krihna Devi has declined Revenue's identical arguments as follows:

"5. It is not in dispute, as noted in the Impugned Order, that the factual background in all the three appeals is quite similar. However, for the sake of convenience, the facts in respect of ITA 125/2020 are being noted and discussed elaborately. Briefly stated, the Respondent-Assessee is an individual who has derived income from interest on loan, FDR, NSC and bank interest under the head of 'income from other sources' in respect of A.Y. 2015-16. She filed her return of income, declaring total income of Rs.13,96,116/-. After claiming deduction of Rs. 1,60,000/- under Chapter VI-A, the total taxable income of Respondent was declared to be Rs. 12,36,120/-. The return was processed under Section 143(1) of the Act and thereafter the case was selected for scrutiny. During the scrutiny proceedings, the AO noticed that for the relevant year under consideration, the Respondent had claimed exempted income of Rs. 96,75,939/- as receipts from Long Term Capital Gain [hereinafter referred to as 'LTCG'] under Section 10(38) of the Act. He inter alia concluded that the assessee had adopted a colorable device of LTCG to avoid tax and accordingly framed the assessment order under Section 143(3) of the Act at the total income of Rs. 1,09,12,060/-, making an addition of Rs. 96,75,939/- under Section 68 read with 115BBE of the Act on account of bogus LTCG on sale of penny stocks of a company named M/s Gold Line International Finvest Limited. The appeal before the CIT(A) was dismissed and additions were confirmed with the observation that the Respondent had introduced unaccounted money into the books without paying taxes. Further appeal filed by the Respondent before the learned ITAT was allowed in her favour, and the additions were deleted vide the Impugned Order, relevant portion whereof reads as under:

"21. A perusal of the assessment order clearly shows that the Assessing officer was carried away by the report of the Investigation Wing Kolkata. It can be seen that the entire assessment has been framed by the Assessing Officer without conducting any enquiry from the relevant parties or independent source or evidence but has merely

relied upon the statements recorded by the Investigation Wing as well as information received from the Investigation Wing. It is apparent from the Assessment Order that the Assessing Officer has not conducted any independent and separate enquiry in the case of the assessee. Even, the statement recorded by the Investigation Wing has not been got confirmed or corroborated by the person during the assessment proceedings. xx xx xx 23. It is provided u/s. 142 (2) of the Act that for the purpose of obtaining full information in respect of income or loss of any person, the Assessing Officer may make such enquiry as he considers necessary. In our considered view the Assessing Officer ought to have conducted a separate and independent enquiry and any information received from the Investigation Wing is required to be corroborated and affirm during the assessment by the Assessing Officer by examining the concerned persons who can affirm the statements already recorded by any other authority of the department. Facts narrated above clearly show that the Assessing Officer has not made any enquiry and the entire assessment order and the order of the first Appellate Authority are devoid of any such enquiry. 24. The report from the Directorate Income Tax Investigation Wing, Kolkata is dated 27.04.2015 whereas the impugned sales transactions took place in the month of March, 2014. The exparte ad interim order of SEBI is dated 29.06.2015 wherein at page 34 under para 50 (a) M/s. Esteem Bio Organic Food Processing Ltd was restrained from accessing the securities market and buying selling and dealing in securities either directly or indirectly in any manner till further directions. A list of 239 persons is also mentioned in SEBI order which are at pages 34 to 42 of the order the names of the appellants do not find any place in the said list. At pages 58 and 59 the names of pre IPO transferee in the scrip of M/s. Esteem Bio Organic Food Processing Ltd is given and in the said list also the names of the appellants do not find any place. At page 63 of the SEBI order-trading by trading in M/s. Esteem Bio Qrganic food Processing Ltd – a further list of 25 persons is mentioned and once again the names of the appellants do not find place in this list also. 25. As mentioned elsewhere the brokers of the assessee namely ISG Securities Limited and SMC Global Securities Limited are stationed at New Delhi and their names also do not find place in the list mentioned here in above in the SEBI order. There is nothing on record to show that the brokers were suspended by the SEBI nor there anything on record to show that the two brokers of the appellants mentioned here in above were involved in the alleged scam. The Assessing Officer has not even considered examining the brokers of the appellants. It is a matter of the fact that SEBI looks into irregular movements in share prices on range and warn investor against any such unusual increase in shares prices. No such warnings were issued by the SEBI. 26. There is no dispute that the statements which were relied by the Assessing Officer were not recorded by the

Assessing Officer in the assessment proceedings but they were pre-existing statements recorded by the Investigation Wing and the same cannot be the sole basis of assessment without conducting proper enquiry and examination during the assessment proceedings itself. In our humble opinion, neither the Assessing Officer conducted any enquiry nor has brought any clinching evidences to disprove the evidences produced by the assessee. The report of Investigation Wing is much later than the dates of purchase / sale of shares and the order of the SEBI is also much later than the date of transactions transacted and nowhere SEBI has declared the transaction transacted at earlier dates as void. xx xx xx 30. Considering the vortex of evidences, we are of the considered view that the assessee has successfully discharged the onus cast upon him by provisions of section 68 of the Act as mentioned elsewhere, such discharge of onus is purely a question of fact and therefore the judicial decisions relied upon by the DR would do no good on the peculiar plethora of evidences in respect of the facts of the case in hand and hence the judicial decisions relied upon by both the sides, though perused, but not considered on the facts of the case in hand." 6. Aggrieved by the aforesaid findings, the Revenue has filed the instant appeals contending that, notwithstanding the tax effect in the appeals falling below the threshold prescribed under Circular No. 23 dated 6 th September, 2019, the appeals are maintainable in view of the Office Memorandum dated 16th September, 2019 issued by the CBDT, which clarifies that the monetary limits prescribed in the aforementioned circular shall not apply where an assessee is claiming bogus LTCG through penny stocks, and the appeals be heard on merits. 7. Mr. Zoheb Hossain, learned senior standing counsel for the revenue (Appellant herein), contends that the learned ITAT has completely erred in law in deleting the addition, and thus the Impugned Order suffers from perversity. He submits that there are certain germane factual errors, inasmuch as the learned ITAT has wrongly recorded that there was no independent enquiry conducted by the AO, when in fact the AO had issued notices to the companies in question under Section 133(6) of the Act. He points out that the observations recorded in para 25 of the Impugned Order are factually incorrect, and in conflict with para 4 of the order of the CIT(A) dated 24th December, 2018 which reads as follows: "4. Even the broker through whom the shares were dematerialized and sold i.e. SMC Global Securities Ltd. was also a part of the scam. This is a Delhi based broker whose regional office was also surveyed. The sub brokers were also surveyed and also statements recorded which confirmed the payment of cash commission by the beneficiaries for being part of the syndicate." 8. Mr. Hossain argues that in cases relating to LTCG in penny stocks, there may not be any direct evidence in the hands of the Revenue to establish that the investment made in such companies was an accommodation entry. Thus the

Court should take the aspect of human probabilities into consideration that no prudent investor would invest in penny scrips. Considering the fact that the financials of these companies do not support the gains made by these companies in the stock exchange, as well as the fact that despite the notices issued by the AO, there was no evidence forthcoming to sustain the credibility of these companies, he argues that it can be safely concluded that the investments made by the present Respondents were not genuine. He submits that the AO made sufficient independent enquiry and analysis to test the veracity of the claims of the Respondent and after objective examination of the facts and documents, the conclusion arrived at by the AO in respect of the transaction in question, ought not to have been interfered with. In support of his submission, Mr. Hossain relies upon the judgment of this Court in Suman Poddar v. ITO, [2020] 423 ITR 480 (Delhi), and of the Supreme Court in Sumati Dayal v. CIT, (1995) Supp. (2) SCC 453. Mr. Hossain further argues that the learned ITAT has erred in holding that the AO did not consider examining the brokers of the Respondent. He asserts that this holding is contrary to the findings of the AO. As a matter of fact, the demat account statement of the Respondent was called for from the broker M/s SMC Global Securities Ltd under Section 133(6) of the Act, on perusal whereof it was found that the Respondent was not a regular investor in penny scrips. 10. We have heard Mr. Hossain at length and given our thoughtful consideration to his contentions, but are not convinced with the same for the reasons stated hereinafter. 11. On a perusal of the record, it is easily discernible that in the instant case, the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites, the AO observes that the quantum leap in the share price is not justified; the trade pattern of the aforesaid company did not move along with the sensex; and the financials of the company did not show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an agreement to convert unaccounted money by claiming fictitious LTCG, which is exempt under Section 10(38), in a preplanned manner to evade taxes. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income Tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of providing entries of bogus LTCG. However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his

conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued under Sections 133(6)/131 of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh. Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from de-mat account and the consideration has been received through banking channels." The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material that could support the case put forth by the Appellant, the additions cannot be sustained. 12. Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent. With regard to the claim that observations made by the CIT(A) were in conflict with the Impugned Order, we may only note that the said observations are general in nature and later in the order, the CIT(A) itself notes that the broker did not respond to the notices. Be that as it

may, the CIT(A) has only approved the order of the AO, following the same reasoning, and relying upon the report of the Investigation Wing. Lastly, reliance placed by the Revenue on Suman Poddar v. ITO (supra) and Sumati Dayal v. CIT (supra) is of no assistance. Upon examining the judgment of Suman Poddar (supra) at length, we find that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. On such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the factual matrix at hand. Similarly, the case of Sumati Dayal v. CIT (supra) too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue. 13. The learned ITAT, being the last fact-finding authority, on the basis of the evidence brought on record, has rightly come to the conclusion that the lower tax authorities are not able to sustain the addition without any cogent material on record. We thus find no perversity in the Impugned Order. 14. In this view of the matter, no question of law, much less a substantial question of law arises for our consideration".

3.1. We adopt the lordships above detailed reasoning *mutatis mutandis* and hold that both the lower authorities have erred in law and on facts in treating assessee's long term capital gain as bogus ones in absence of any supportive evidence in their support; whatsoever. The impugned addition(s) *qua* both aspects (supra) are directed to be deleted.

This former appeal ITA No.456/Hyd/2020 is accepted.

4. Next comes both assessee's appeals ITA Nos.457 & 458/Hyd/2020 seeking to reverse the lower authorities' identical action making the alleged un-explained un accounted cash investment addition of Rs.6.40 Crores each in the nature of on-money paid to M/s.Western Constructions. The CIT(A)'s detailed discussion, affirming the Assessing Officer's action to this effect reads as under:

"5.2 I have considered the assessment order, facts of the case and submissions of the case. The Ground no.4 raised is devoid of merit as the time limit for issue of notice u/s.143(2) for· the original return filed has not expired and the assessment stood abated on account of Search. Since this assessment after the abatement of proceedings in respect of original return, the contentions raised by the appellant are not applicable to the facts of the case. Further the following factual position emerges from the perusal of the order and the submissions of the assessee.

i) During the course of Search the material seized was confronted to the appellant and the appellant explained the contents of the same.

ii) The developer and the appellant (who is buyer) both have accepted the contents of the material seized during the course of Search.

iii) The developer has accepted receipt of such cash arid offered the same to tax by way of filing the return of income after the Search proceedings.

iv) The appellant was not confused or under pressure as is made out as a ground for retraction of the statement given under the oath. The appellant clearly identified the entries gave explanation accepting certain entries and certain other entries were not accepted. This clearly shows that there was no such coercion or pressure as alleged. The retraction of the statement given is not on sound logical basis but only to evade the tax payable on the amount admitted as income.

v) The statement of Mr. Sivarama Raju is only secondary. The basis of addition is the documents found and the explanation of the contents of such documents by the appellant and his family members during the course of Search individually.

vi) The legal contentions raised are not applicable as the facts of the case are completely different as discussed above. This is not a case where addition is made on the basis of document found and based on third party statement. Here, the document was confronted to the appellant during the Search itself, the contents of such papers were explained by the appellant and the appellant also denied of certain entries. The basis of addition is not third party statement but the appellant's own statement explaining the entries in the material seized which was confronted during the course of Search itself.

vii) The basis for retraction as given atpara-2 of the affidavit are that due to fatigue and sleeplessness I was not in a sound state of mind ....'. The reason above is not bonafide as can be seen from the detailed statement given during the course of Search. The appellant was able to identify the entries therein and explained the nature of

certain entries and denied certain entries clearly. The ploy adopted by the appellant is to be seen in this context.

viii) In view of the factual and legal position as brought out above, the addition made by AO is confirmed and the grounds raised are rejected".

We now advert to the basic relevant facts.

5. The department had carried out the impugned search dt.02-11-2016 in these twin assessee's cases namely Sri Tarun Kumar Goyal and Sri Arun Kumar Goyal/vendees as well as the vendor M/s.Western Constructions and other parties. The same culminated in Section 153A proceedings initiated against them.

6. Coming to the issue of on-money payment to the vendor, M/s.Western Constructions, it is an admitted fact that the purchase transaction is regarding commercial space admeasuring 38,700 sft. (11th floor) of the Western Pearl Project. The Revenue's case is that the impugned search has found/seized the incriminating document 'No.A/GSR/02' in the nature of an 'Excel' sheet. The assessing authority's assessment order dt.28-12-2018 in pg.3 para 4 states that the said Excel sheet revealed the assessee's vendor and Shri Narendra Kumar Goyal's debit and credit entries followed by registration of the sale deed in former's name only. The Assessing Officer took note of the former assessee Shri Tarun Kumar Goyal's statement dt.02-11-2016 u/s.132 of the Act allegedly referring to a document recovered from Shri S.Raju (partner of M/s.Western Constructions) during search that the same sufficiently indicated details of the on-money payment in issue.

7. Learned CIT-DR invited our attention to the assessee's reply in pg.4, Question No.19 that during the course of search duly admitting his share of 50% on money followed by the necessary clarification on the relevant transactions. The Assessing Officer adopted the very course of action for the latter assessee as well. He further observed that both these statements had admitted the on-money component in issue. This followed the assessees' retraction affidavit dt.03-01-2017 that there was no incriminating document found or seized regarding the impugned cash sum and therefore, they did not know anything about the incriminating material found/seized from M/s.Western Constructions partners' premises. And that Mr.Raju's statement had also not been made available to them. He thus rejected all these contentions and made the impugned identical addition on money payment of Rs.6.40 Crores each in both of their hands as under:

4.1 Further, the issue is put across to other assessees, Sri Arun Kumar Goyal, as it involves joint property of Shri Arun Kumar Goyal and Sri Tarun Kumar Goyal, sons of Shri Narendra Kumar Goyal, who has in fact facilitated/ referred in the purchase of this commercial space details in the referred seized annexure. With reference to this, Sri Arun Kumar Goyal has made following submissions vide his statement under section 132 dated 2.11.2016 as at question number (34) to (37) as extracted below.

Q.34 Please go through a statement found in the Laptop of Mr. Shivaram Raju, partner of Western constructions and which is seized during the course of search u/s 132 of Income Tax Act 1961 from his residence located at Flat No: A 717, Western Plaza Apartments, Manikonda, Hyderabad. The said statement named " 11TH FLOOR NARENDER GOEL" contains the details of payment made by you and your brother Sri Tarun Kumar Goyal to M/s Western Construction for purchase of 38700/Sft at 11 th floor Western Pearl Kondapur. What you want to say about the transaction mentioned in said statement?

1. W1 – Krishna 2/11/16
2. W-2 – A. Radha 02-11-16

10

Ans. I have gone through the statement, which is shown to me and it relates to the details of payments made by us to M/s Western Constructions towards purchase of property to the extent to 38,700 Sq Ft at 11th Floor, Western Pearl, Kondapur.

Q.35 During the course of search at the residence of Shivaram Raju, partner of Western constructions, it has been ascertained that you and your brother have paid a total consideration of Rs. 30,89,47,001/- (including cash component of Rs 12,80,00,000/-) towards purchase of above mentioned property having registered value of Rs. 11,61,00,000/-. Please explain the additional consideration of Rs. 19,28,47,001/- paid by you and your brother over and above the registered value.

Ans. I wish to inform you that we have purchased the above property measuring 38700 Sq. ft at the rate of Rs. 5492.30/- per sq. ft. amounting to Rs. 21,25,52,010/- as mentioned in the said statement. The difference of Rs. 9,64,52,010/- {(Rs.5492.30-Rs.3000) X 38700} has been paid over and above the registered sale value. I my self being 50% owner of the said property, want to admit Rs.4,82,26,005/- (50% of Rs.9,64,52,010/-) as unaccounted investment by me in the said property during the F.Y.2015-16 and offer to pay tax on the same. The balance amount has been paid by my brother and he will offer the same to tax.

Q. 36 Please go through the amounts mentioned under the head " debit" in the statement found at the residence of Sri Shivaram Raju, partner of Western constructions, where it is mentioned as follows.

Date	Amount	Particulars
	212552010	38700SFTX5492.3
16.12.15	5000000	CHQ
28.12.15	5000000	CHQ
2.1.16	17000000	CHQ
11.1.16	1627989	INT RETURNED CHQ
11.1.16	165254	VENKATESWARA FLAXO CHQ
9.1.16	36700001 —	TRANSFER TO NEW SIDE ADVANCE
	30901747 —	TRANSFER TO NEW SIDE ADVANCE
	308947001	TOTAL -
	308947001	PAID
	0	BALANCE

Please go through all the transactions and also explain if you have paid any advance to Sri Shivaram Raju, partner of Western constructions.

Ans. Regarding this, I want to explain that we have paid an amount of Rs 212552010/- towards total purchase consideration of the property and the remaining amounts mentioned are the transactions not related to us, and I do not know anythi8ng regarding the same . I also confirm that we have not paid any advance to Sri Shivaram Raju

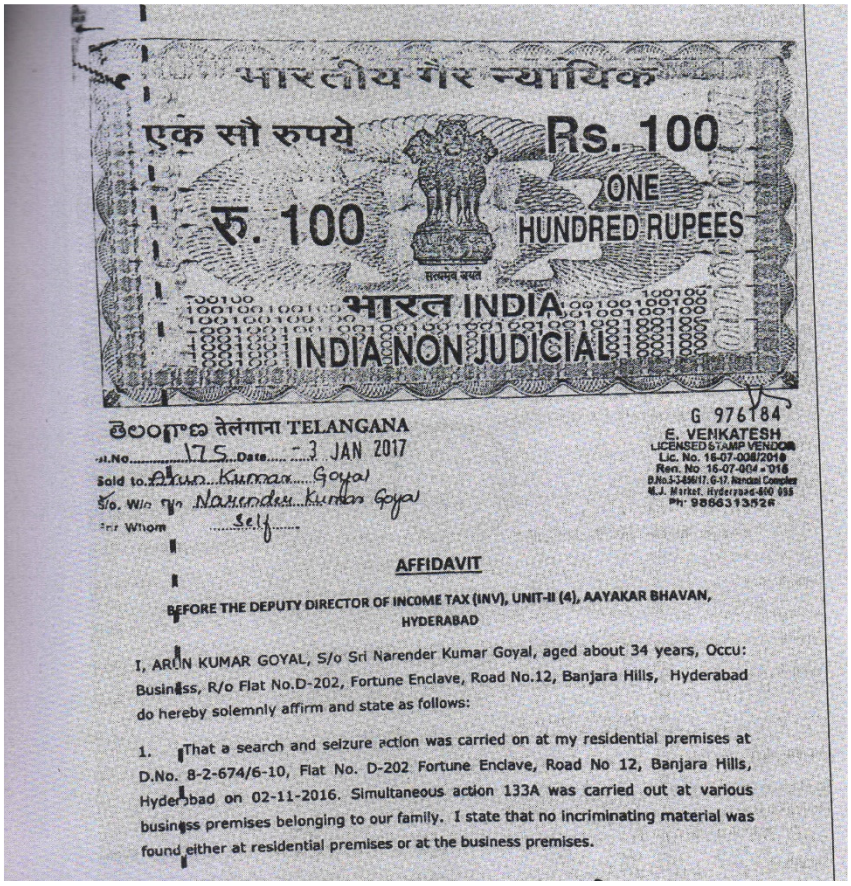
Q.37. Do you want to say anything else?

Ans. Sir, as stated above, I want to reconfirm that I have made an investment of Rs.4,82,26,005/- in the purchase of property which was not accounted and now I am offering the same to Tax. I will pay the Tax. However, I request you to give us some time for payment of the same. Further, I also offer another amount of Rs 17,73,995/- as additional undisclosed income for A.Y 2016-17 towards any further discrepancies to be found during the course of further investigation. Further, I wish to inform that the above amount which has been declared is out of the income related to me, my family members and our business concerns.

I request you not to initiate any penalty or prosecution proceedings against me or my family members for any discrepancies found during the course of search operations conducted in my house and office premises.

[Deponent]

4.2 Subsequently, assessees did not adhere to the admission and has filed an affidavit on 3rd January 2017 stating as under:



भारतीय गैर न्यायिक

एक सौ रुपये Rs. 100

रु. 100 ONE HUNDRED RUPEES

सत्यमेव जयते

भारत INDIA

INDIA NON JUDICIAL

తెలంగాణ तेलंगाना TELANGANA

G 976184

Rs.No. 175 Date 3 JAN 2017

Sold to Arun Kumar Goyal

S/o. W/o D/o Narender Kumar Goyal

For Whom Self

E. VENKATESH
LICENSED STAMP VENDOR
Lic. No. 16-07-008/2010
Ren. No. 16-07-004/2016
D.No.3-4-96/17, G-17, Ramani Complex
M.J. Market, Hyderabad-500 095
Ph: 9866313526

AFFIDAVIT

BEFORE THE DEPUTY DIRECTOR OF INCOME TAX (INV), UNIT-II (4), AAYAKAR BHAVAN, HYDERABAD

I, ARUN KUMAR GOYAL, S/o Sri Narender Kumar Goyal, aged about 34 years, Occu: Business, R/o Flat No.D-202, Fortune Enclave, Road No.12, Banjara Hills, Hyderabad do hereby solemnly affirm and state as follows:

1. That a search and seizure action was carried on at my residential premises at D.No. 8-2-674/6-10, Flat No. D-202 Fortune Enclave, Road No 12, Banjara Hills, Hyderabad on 02-11-2016. Simultaneous action 133A was carried out at various business premises belonging to our family. I state that no incriminating material was found either at residential premises or at the business premises.

2. The search operations and survey action started at about 9 AM of 2-11-2016 and the statement was recorded at an odd hour around 03.00 AM on 3-11-2016 and due to fatigue and sleeplessness i was not in a sound state of mind. In course of search, various bank accounts were attached without any reason. It placed all of us in utter confusion about the future of our business.

3. In course of search my father Sri Narender Kumar Goyal, myself and my brother Sri Tarun Kumar Goyal were subjected to continuous interrogation initially for very long hours on various aspects by the officers of the search and survey party. The presence of police officers added to confusion. This was taxing and the atmosphere of fear and fatigue resulted in confusion. The same was not conducive to record a voluntary statement.

4. After extensive search, I had verified the whole matter, and found that the statement was not properly recorded as I stated. The same could not be pointed out as the same was recorded at odd hours after prolonged and continuous interrogation during search. I wish to clarify the same as far as possible.

5. Among other questions, one of the question was directed towards payment of additional consideration to Western Construction towards purchase of 11th Floor in Western Pearl. The same was purchased by me and my brother Sri Tarun Kumar Goyal on a total consideration Rs.11,61,00,000/- vide Document No. 8778/2015 Dt.28.12.2015. The payments were made as under by cheque/RTGS :-

Date	Amount	Bank cheque/RTGS
06.11.2015	5,00,000.00	Paid by Bank DD. No.792480
22.12.2015	1,01,86,600.00	Cheque No.550635
28.12.2015	9,45,00,000.00	Paid by Bank DD. No.005173
28.12.2015	97,52,400.00	Rental Security Deposit Transferred from Uber India Systems Pvt. Ltd
28.12.2015	5,80,000.00	TDS Paid vide CIN NO.05103082812201501630
28.12.2015	5,80,000.00	TDS Paid vide CIN NO.05103082812201501666
Total	**11,61,00,000.00**	

6. In course of search, a leading question was put to me (vide Q.No.34 & 35 dt.02-11-16) suggesting an answer that myself and my brother Sri Tarun Kumar Goyal have paid Rs.30,89,47,000/- including cash component of Rs.12,80,00,000 towards purchase of property as above in Western Pearl. For the purpose a loose paper containing some notings was shown to me. It was further indicated that the said amount was noted in the Pen Drive retrieved from the residence of one Sri Shivram Raju, partner of Western Construction. (By adding Rs.11,61,00,000 and Rs.12,80,00,000 together could not get totalled to Rs.30,89,47,000/-)

7. I wish to clarify that neither myself nor my brother know Sri Shivram Raju. The circumstances in which the amounts were found noted in the loose paper are not made known to us. Sri Shivram Raju was not produced before us for seeking any further clarification. It was a unilateral and untested evidence.

8. I have applied for the copy of the statement of Sri Shivram Raju on Dt. 05.12.2016 but so far the same has not been provided to me or to my brother. This being the crucial document, even now I am not in a position to throw any further light except what I could remember.

9. Due to prolonged hours of search myself including my family members were fatigued and in a state of utter confusion. *In fact in course of extensive search of our residence and factory, not an iota of evidence was found showing payment of any cash over and above the recorded/ official consideration in respect of the subject property.* In retrospect, I feel that the statement was obtained from me by the officials by putting leading questions when I was not in a sound mind. Being ruffled and confused because of long hours of search I gave a mechanical answer for which I was led to. This statement cannot be said to be voluntary to have evidentiary value and the same cannot be used against me to draw adverse inference. It is mere so because the same is not recorded as I have stated. I clarify emphatically that I have not paid any additional consideration in purchase of 11th floor of the building in Western Pearl. This may be taken on record. The fact can also be verified.

10. I further clarify that the admission of Rs.4,82,26,005 and Rs.17,73,995 as undisclosed income as given in answer to Q.No37 of my statement dt.2-11-2016 is not correct in the given facts and circumstances of the case and may be treated as retracted.

DECLARATION

I Arun Kumar Goyal, S/o Sri Narender Kumar Goyal wish to declare that whatever has been stated above is true to the best of my knowledge and belief.

Place : Hyderabad
Date : 03.01.2017

[DEPONENT]

"4.3 Apparently, assessee's above contentions are neither acceptable nor reconcilable considering the fact that the stated, property is registered in the names of both the assesses by duly referring the cheque payments and extent of SFT and rate per SFT etc. These details are reconcilable as it is comparable to the reconcilable totals of all credits of the workings as put across to both the assessees during the search proceedings as the stated property is registered in their name as extracted in the above statements. With reference to this, assessee firm partner has admitted the relevant receipts as part of gross receipts of the firm on account of sale of this commercial space etc. including additional cash receipts along with availed advances prior to registration of space / during construction period as additional income in the hands of firms partners to the extent of difference amount of Rs. 9,64,52,010/- i.e., assessee firm which has sold this commercial space to assessee has admitted these receipts as part of, their additional gross receipts to the extent of Rs.9,64,52,010/- as per the workings in the sheet with agreed rate per SFT as discussed and brought out in the assessee statements.' Hence, on this additional receipts of firm, both the assessee have admitted their additional income of Rs.5.0 crores each as attributable to Rs.9,64,52,010/- for this sale and balance for any other such discrepancies as detailed in their statements extracted supra. Hence the amount of Rs.9,64,52,010/- being the difference of total cash advance/ receipts reconcilable with SFT rate referred at Rs. 5492.30 read with registered market value of SRO per square feet involving the total area registered at 38,700 SFT, the same was admitted on this account. Hence, considering these facts of case and circumstances of reconciliation, it is possible that assessee has not reconciled the total difference of cash advances I payments attributable to sales transaction of Rs 9,64,52,010 f - vis-a-vis total of cash transactions noticed at Rs. 12.8 Crores as put across to assessees during search proceedings as brought out in their oath, statements extracted supra. Hence, considering assessee's submissions and subsequent withdrawal, assessee could not reconcile the balance difference amount of Rs.3,15,47,990/- explaining the nature of payment of further additional receipts and consequent proposal for acquiring additional space etc. from buyer etc. In view-of this, assessee was requested to reconcile the same with supporting explanation of sources / submissions so as to consider the same as per provisions of IT Act during assessment proceedings vide this office letter dated 17.12.2018. In response to the same, assessees made following submissions. vide their letters dated 21.12.2018 as submitted by both the assessees Shri Tarun Kumar Goyal and Shri Arun Kumar Goyal.

B.Proposal addition towards unexplained investment in Building

- *I would like to submit that I along with my brother, Sri Arun Kumar Goyal, have purchased a part of building in the FY 2015-16 for a total consideration of Rs.11,61,00,000/- from M/s. Western Construction and my share of investment was Rs.5,80,50,000/-. The source of the above investment was out of my advances received back from my companies and also loan obtained from HDFC Bank Limited.*
- *During the course of search proceedings, I was shown a statement extracted from the laptop of Mr.Shivram Raju, partner of M/s.Western Constructions containing some alleged receipts of Rs.30,89,47,001/-. As I was under lot of pressure and confusion due to long search proceedins, I had gfiven a statement stating tha the same represents my payments to M/s.Western Constructions against the purchase of property.*
- *However, immediately, I had reconciled my books and I had withdrawn the statement recorded on 02.11.2016 vide my letter dated 28.12.2016 filed with Deputy Director of Income Tax (Inv), I am herewith enclosing a copy of same for your kind consideration.*
- *I wish to submit that I am not aware of any statement prepared by Sri Shivram Raju. Neither I am owner of such document nor is the document in my wiring or from my electronic records.*
- *I once again submit that the property was purchased by me for a total agreed consideration of Rs.11,61,00,000/- which is from my explained sources of income and via banking channel. I further state that I have not paid any amount over and above the amount mentioned in the sale deed.*

4.4 After careful consideration of assessees submissions and keeping in view facts and admission of reconciliation during search and post search proceedings, assessee's plea/above submissions are neither reasonable nor acceptable in view of the following logical and legible conclusions as per provisions of IT Act as assessee failed to explain sources of total cash payments of Rs.12,80,00,000/- and same needs to be treated as additional in the hands of both the assessees as rightly admitted by these two assessees during search at a total of Rs.10 crores as against of Rs.12.80 crores.

a) *It is a fact on record, that both the assessees were categorically put across the seized sheet referring to reconciliation of various receipts and payments with comparable facts of purchase of SFT and its price, payment schedule etc. this is celarly evident from statements recorded from both the assessees, that when the evidence is put across to them during search proceedings assessees have submitted it as true and correct. Based on the*

same, assessee has reconciled to admit the difference amount of cash, as compared with total registered value vis-a-vis total cash payments, in the respective hands of. Shri Tarun Kumar Goyal and Sri Arun Kumar Goyal. Hence, assessees' plain/bald reply that he is not aware and he was never provided the details / information, and that he is not aware of' the search oath statements recorded on the visible facts of their purchases and evidences, recording of statements from relevant persons of evidences found etc., is far stretched imagination, devoid of facts, merits and substance of truth. Accordingly same' is not acceptable.

b) *It is a fact on record that assessee has clearly computed and arrived at total value, as RS. 21.25 crores for purchase of total SFT 38700 @ 5492.30 and the same was further subtracted from registered SRO value Rs. 11.61 crores and difference amount of Rs. 9.64 crores was duly arrived as reconciled with seized document as forming part of total cash Payments of Rs.12.80 crores. This in fact was only admitted while giving the admission in the hands of both the assessee put together at Rs.4.82. Crores each as attributable to additional investment made in purchase of commercial space and additional income of Rs.17,73,995/- each is admitted by both the assessee to cover up further discrepancies involving balance payments of Rs.3,15,47,990/- subject to final reconciliation of relevant cash/fund flow statements of each assessee. This entire fact is evident as in at answer to Q. No (35) and (19) of relevant statements of both the assessee as extracted supra read with Q.No. (36) of Sri Arun Kumar Goyal statement wherein the seized annexure sheet was categorically put across to the assessee for necessary reconciliation and reconfirmation of the admissions made. Further, it is noticeable that at Q.No. (37) of Sri Arun Kumar Goyal statement dated 02.11.2016 in the same sequence of questions, it has been categorically admitted further additional income of Rs. 17,73,995/- to cover up any other discrepancies and reconciliation of above totals involving additional payments made in purchase of commercial space as total cash paid involved is Rs.12.8Crores as against reconciled of Rs. 9.64 Crores. Hence, it is sine-qua-non that assessee has to reconcile all the totals as put across to him during search and post search proceedings with relevant show cause during assessment proceedings for further necessary reconciliation vis-a-vis statements recorded during search as discussed supra. However, without explaining any justifiable reconciliation on comparable facts of extent of commercial space and rate of commercial space, it is not justifiable to contradict the admission made based on compared and*

reconciled evidences as found during search involving clear purchase of commercial space through a registered documents with reconcilable cheques payments forming part of totals etc. Accordingly assessee contradictory submissions retracting the original admission made on evidences of circumstantial proofs etc. is not acceptable and is to be rejected as not acceptable as per I.T. Act. Further, assessee contention that they were not offered opportunity to cross examine the evidences and statements of buyer/partners of firm is not acceptable as assessees failed to avail the opportunity offered vide summons dated 21.12.2018 for this purpose and chose to avoid the same in the guise of ill health clearly proves, assessees unfair claims on this analogy and same is not acceptable.

4.5 Accordingly, assessee's stand of contradicting the admission without any basis 'has neither the support of law nor any verifiable contradictory proofs except making an afterthought to avoid genuine payment of taxes. Accordingly, assessee's plea is not a reasonable contention as per provisions of I.T. Act and entire amount of Rs. 12.8 Crores needs to be brought to tax at Rs.6.40 crores each as unexplained and un-reconciled cash investments of assessee, as admitted during search and is assessed accordingly".

8. Suffice to say, the CIT(A) has rejected assessees' pleas *inter alia* that the impugned search had not found or seized any incriminating material since their alleged admission (supra) had already retracted even if there were some evidence against them which formed the basis of addition in the recipients' than their hands, there was no cash component involved in the commercial space's purchase, no cross-examination of Shri Raju had been provided to them and that the source of the purchase price was the loans obtained from M/s.HDFC bank than any cash sum, respectively. This leaves both the assessees aggrieved.

9. Learned authorised representative has filed a detailed note *inter alia* reiterating the assessees' stand before the CIT(A)'s *qua* the impugned money payment addition that the

same has been wrongly made on the basis of a mere 'dumb' document. He has also referred to catena of case law, which will be discussed; if any need arises in succeeding paragraphs. Learned departmental representative has strongly supported both the lower authorities' action making the impugned addition of money payment in cash in both assessees' hands based on the seized document (supra).

10. We have given our thoughtful consideration to rival arguments. We find no reason to sustain the impugned identical addition of money payment in cash addition in these assessees' hands. It is an admitted fact that learned lower authorities have gone by the alleged loose sheet only allegedly revealing the impugned payments made out at assessees' behest over and above the sale price involving M/s.Western Pearl Project sold by M/s.Western Constructions/vendees. Learned departmental authorities have treated the latter's partner's statement and the alleged 'Excel' sheet as the basis of the impugned additions. Learned CIT-DR also quoted Section 132(4) r.w.s.292C of the Act that such an incriminating material found/seized during the course of search carries presumption of correctness as well. He fails to rebut the clinching legislative expression used in Section 292C of the Act carrying presumption *inter alia* that the specified categories of the incriminating material are presumed to be belonging to 'such persons' and their contents are true, validly signed and are executed and are treated to be in the possession; *qua* the concerned assessee only than in case of any third person as well. The Revenue's endeavour to this effect seeking to apply 292C r.w.s.132(4) presumptions fails.

We make it clear that hon'ble apex court's recent landmark decision (2018) 9 SCC 1 (FB)(SC) has recently settled the law that provisions of a taxing statement have to be interpreted in stricter parlance only.

11. Next comes yet another equally important facet of the instant issue. The Revenue has cited statement of M/s.Western Construction's partner (supra) that the same duly proved that the on-money payments had been made in cash by these assessees. This argument also fails *inter alia* for the reasons that Shri Raju had made it clear during and after search that he was not aware of the company's business affairs. And that the alleged document never mentioned these assessee's names at all as it is not only the Assessing Officer in the impugned assessment but even in case of the recipient M/s.Western Construction's assessment order dt.28-12-2018 as well wherein it had been held that the on money amount was attributable to Shri Narendra Kumar Goyal than these twin assessees. Ld.CIT-DR was fair enough in informing the bench that the department has not initiated any action against Shri Narendra Kumar Goyal. That being the case, the Revenue's stand of having strictly gone by the contents of the seized document only to this effect itself is self-contradictory since Shri Goyal (assessees' father) has nowhere been examined till date.

12. Shri Moharana's next argument is the assessees' statement (supra) had duly admitted the impugned on money payment. We are unable to agree with the instant plea based on mere admission made post search in view of the CBDT's

circular(s) dt.10-03-2003 and 18-02-2011 making it clear that such an admission of undisclosed income made during search or survey does not carry any significance and the same has to be based on evidence collected in the very process only.

13. Lastly comes the crucial issue as to whether the impugned seized material / 'Excel' sheet (not mentioning the assessees' names) forms a dumb document or not. We make it clear that the department has failed to corroborate the impugned seized document indicating assessee's alleged on money payment over and above the sale price itself. All it has done is to rely on their father's name only. It is nowhere clear as to whether it is an alleged document forming part of the books of account maintained in the regular course of business either by the vendor or vendee side. All it contains therefore is rough notings and jottings only. This tribunal co-ordinate bench's decision Nishan Constructions Vs. ACIT ITA No.1502/Ahd/2015; after considering the hon'ble apex court's landmark decision in Common Cause, Vs. Union of India (2017) 77 taxmann.com 245 (SC) and CBI Vs. V.C.Shukla (1998) 3 SCC 410 (SC) holds that such loose sheets deserves to be treated as a dumb documents only since not revealing full details about the dates containing lack of further particulars and therefore, ought not to be made basis of an addition. Similar other judicial precedents ACIT Vs. Layer Exports P.Ltd., (2017) [184 TTJ 469] (Mumbai) & ITO Vs. Kranti Impex Pvt. Ltd., ITA No.1229/Mum/2013, dt.28-02-2018 (dealing with a seized document seized not either bearing the taxpayer's name or signature). Shri Neeraj Goyal Vs. ACIT, ITA No.5951/Del/2017, dt.21-03-2018, (Del) (2012) 23

taxmann.com 269] Nagarjuna Construction Co. Ltd., Vs. DCIT, CIT Vs. S.M.Agarwal, [293 ITR 43], CIT Vs. Shri Girish Chaudhary (2008) 296 ITR 619 (Del) also echo the very principle. We accordingly hold that the impugned addition of on-money payment made in both these assessees' hands on the basis of a mere dumb document and not corroborated by any other evidence is not sustainable. We thus direct to delete the impugned identical addition forming subject matter of adjudication in both these cases.

All other grounds raised in assessees' instant appeals are rendered infructuous in view of our adjudication on merits. Ordered accordingly.

14. These assessees' appeals are allowed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open court on 20th April, 2021

Sd/-	Sd/-
(LAXMI PRASAD SAHU)	**(S.S.GODARA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad,
Dated: 20-04-2021
TNMM

Copy to :

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2.Sri Arun Kumar Goyal, C/o. P. Murali & Co., Chartered Accountants, 6-3-655/2/3, 1st Floor, Somajiguda, Hyderabad.

3.The Asst.Commissioner of Income Tax, Central Circle-3(2), Hyderabad.

4.CIT(Appeals)-11, Hyderabad.

5.Pr.CIT-Central, Hyderabad.

6.D.R. ITAT, Hyderabad.

7.Guard File.