आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
''B'' BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED., ACCOUNTANT MEMBER &
MS. MADHUMITA ROY, JUDICIAL MEMBER

आयकरअपीलसं./**IT(SS)A Nos. 309 to 313/AHD/2019**
निर्धारणवर्ष/Asstt. Years: 2009-10 to 2010-11 & 2012-13 to 2014-15

DCIT Central Circle-1(4), Ahmedabad	Vs.	Shri Basant R. Agarwal 33, Shivalik Villa, Opp. Saudrya Villa, Ambli Bopal Road, Ahmedabad **PAN: AASPA8045M**
(Applicant)		**(Respondent)**

आयकरअपीलसं./**IT(SS)A No. 114/AHD/2018**
निर्धारणवर्ष/Asstt. Year: 2011-12

DCIT Central Circle-1(4), Ahmedabad	Vs.	Shri Basant R. Agrawal, 33, Shivalik Villa, Opp. Saudrya Villa, Ambli Bopal Road, Ahmedabad **PAN: AASPA8045M**
(Applicant)		**(Respondent)**

आयकरअपीलसं./**ITA No. 970/AHD/2019**
निर्धारणवर्ष/Asstt. Year: 2015-16

DCIT Central Circle-1(4), Ahmedabad	Vs.	Shri Basant R. Agarwal 33, Shivalik Villa, Opp. Saudrya Villa, Ambli Bopal Road, Ahmedabad **PAN: AGSPS7541N**
(Applicant)		**(Respondent)**

Revenue by :	Shri Sudhendu Das, CIT D.R.
Assessee by :	Shri Mehul K. Patel, A.R.

सुनवाईकीतारीख/**Date of Hearing : 20/02/2023**
घोषणाकीतारीख/**Date of Pronouncement: 12/05/2023**

आदेश/O R D E R

The captioned appeals have been filed at the instance of the Revenue against the order of the Learned Commissioner of Income Tax (Appeals)-6, Ahmedabad dated 28/03/2019 & 02/02/2018 arising in the matter of assessment order passed under s. 143 r.w.s. 153A & 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Years 2009-10 to 2015-16.

2. IT(SS)A 309 to 313/Ahd/2019, 114/Ahd/2018 and 970/Ahd/2019 appeals by the Revenue for A.Ys. 2009-10 to 2015-16

3. All the captioned appeals involve identical issue of protective assessment under section 68 of the Act on account of credit of share capital and premium thereon alleged to be bogus except for A.Y. 2012-13 bearing IT(SS)A No. 311/AHD/2019 and for AY 2015-16 bearing IT(SS) A No. 970/AHD/2019 wherein one additional issue of claim of exempted long term capital gain is also involved. Therefore, we proceed to decide the issue of protective assessment first by taking up the IT(SS)A No. 309/Ahd/2019 for A.Y. 2009-10 as lead case. However, the finding to be given therein will be applicable to all the captioned appeal. The grounds of appeal of the Revenue for the AY 2009-10 reads as under:

> *"1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs 5,74,50,000/- made in hands of assessee under section 68 of the IT Act on account of receipt of share capital and premium without appreciating the facts in the assessment order wherein the Assessing Officer had brought out the fact that the credits were from companies whose returns and balance sheet analysis show poor financials, and whose directors and operators/brokers had admitted under oath to the fact, that these were paper companies and had earned commission income for providing these accommodation entries to the concerned companies i.e. namely Globe Ecologistics Pvt. Ltd., GTC Oilfield Pvt. Ltd., GTC Petrotech Pvt. Ltd etc. When confronted with these facts, the main person of assessee-group, Basant Agrawal, during search and seizure operation had declined under oath to cross-examine these directors/operators, thereby establishing that these credits were not genuine.*
>
> *2. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs 5,74,50,000/- on receipt of share capital and premium without appreciating that the assessment order had brought out the fact that decisions in the cases of Trinetra Commerce & Trade Pvt. Ltd. (2016) 75 taxmann.com 70 (Calcutta) and Jagmohan Ramchandra (2004) 141 Taxman 574 (Allahabad) are applicable in case of assessee.*

3. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 5,74,50,000/ made in hands of assessee on receipt of share capital and premium without appreciating that assessment order had brought out the fact that nexus had not been proven between the funds credited to Company of which the assessee is the main Director and the funds of the declarant Company under IDS.

4. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating that the assessee was excluded from the list of persons who could avail of the Income Declaration Scheme, 2016 by virtue of clause (e) of section 198 of Finance Act, 2016 and could not, therefore, avail of the benefit of the Scheme indirectly though declaration made by another person under the Scheme.

5. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs 3,44,700/- made in hands of assessee on issue of unaccounted commission expenses u/s 60C on share capital and premium without appreciating that assessment order had brought out the fact that the credits of share capital and premium wore from paper companies as in ground (1) to (4) above on account of commission paid as accepted by the brokers in the statement recorded under oath.

6. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) ought to have upheld the order of the A.O.

7. It is, therefore, prayed that the order of the Ld. CIT(A) be set aside and that of the A.O. be restored to the above extent."

4. The only effective issue raised by the Revenue is that that the learned CIT(A) erred in deleting the protective addition made under section 68 of the Act for Rs. 5,74,50,000/- on account of bogus share capital and premium credited in the companies controlled by the assessee and erred in deleting the addition commission expenses of Rs. 3,44,700/- on such bogus share capital and premium.

5. The facts in brief are that the assessee is an individual deriving income from all sources. The assessee is partner is several firms as well as key person/promotor/director of Globe group of companies. There was search proceeding under section 132 of the Act carried out at the premises of assessee dated 23rd January 2015. During curse of investigation and assessment it was found the 4 companies control or managed by the assessee as received huge sum in the form of share capital and premium during the financial year 2008-09 to 2014-15, which is detailed as under:

F.Y.	*A.Y.*	*Globe Ecologistic Pvt Ltd*	*GTD Oilfield Services Pvt. Ltd.*	*GTC Petrotech Pvt. Ltd.*	*Winsto Corporation Pvt Ltd*	*Total*
2008-09	***09-10***	***0***	***57450000***	***0***	***0***	***57450000***
2009-10	*2010-11*	*0*	*31629000*	*0*	*0*	*31629000*
2010-11	*2011-12*	*117300000*	*20600000*	*0*	*0*	*137900000*
2011-12	*2012-13*	*165950000*	*210044500*	*0*	*0*	*375994500*
2012-13	*2013-14*	*120575000*	*0*	*0*	*0*	*120575000*
2013-14	*2014-15*	*7588800*	*53722500*	*21500000*	*10000000*	*92811300*
2014-15	*2015-16*	*0*	*30189500*	*0*	*0*	*30189500*
TOTAL		*411413800*	*401636000*	*21500000*	*10000000*	*846549300*

6. The above companies received impugned share capital and premium from M/s Ambika Commodeal Pvt. Ltd., M/s Bhaghbaan Marketing Pvt. Ltd., M/s Yamini Marketing Pvt. Ltd. and M/s Westwell Export Pvt. Ltd.

7. M/s Bhaghbaan Marketing Pvt. Ltd., M/s Yamini Marketing Pvt. Ltd. and M/s Westwell Export Pvt. Ltd are control and managed by one Shri Navneet Singhania whose statement was recorded under section 131(1) of the Act. Shri Navneet Singhania stated that cash was received from Shir Basant R Aggarwal (respondent assessee) which layered into different group concerned and finally the fund credited to concern of Basant R Aggarwal (Globe Ecologistics Pvt. Ltd. and GTC Oilfiled Services Pvt. Ltd.) through above mentioned companies in the form of investment in shares and premium thereon. Shri Navneet Singhania further stated that for providing such accommodation, he earned commission @ 0.25% aggregating to Rs. 15 Lacs which was offered to tax.

8. The above facts were also confirmed by one Shri Gagan Chnadra Pradhan an employee of Shir Shri Navneet Singhania who is also a dummy director in M/s Yamini Marketing Pvt. Ltd.

9. Likewise, the statement Shri Vijay Agarwal, the director of other investor company M/s Ambika Commodeal Pvt Ltd was also recorded under section 131(1A) of the Act who admitted to the identical facts.

10. Thus, AO in view of the above held that the amount received by the concerns of Shri Basant R Aggarwal (namely M/s Globe Ecologistics Pvt. Ltd., M/s GTC Oilfield Services Pvt. Ltd, GTC Petrotech Pvt. Ltd and M/s Winsto Corporation Pvt. Ltd) in the form of share capital and premium are bogus and unaccounted money of his concerns.

11. During the year under consideration, the sum in the form of Share Capital and premium aggregating to Rs. 5,74,50,000/- was credited only in one company namely M/s GTC Oilfield Services Pvt. Ltd from M/s Bhaghbaan Marketing Pvt. Ltd. which was treated as bogus share capital. Likewise, the commission expenses of Rs. 3,44,700/- being @ 0.6% of Rs. 5,74,50,000/- was calculated. Thus, the AO added the same to the total income of the assessee on a protective basis whereas substantive addition was made in the hands of beneficiary company M/s GTC Oilfield Services Pvt. Ltd.

12. On appeal by the assessee, the learned CIT(A) deleted the addition made by the AO by observing as under:

> *"3.6 During appeal proceedings in the case of GTC Oilfield Services Pvt. Ltd. for A.Y. 2009-10, the company submitted that Baghbaan Marketing Pvt. Ltd. from whom share capital and share premium was received, had made declaration under Income Declaration Scheme 2016 (IDS 2016) and had included amount of share capital and share premium in GTC Oilfield Services Pvt. Ltd. in its income declared under IDS, 2016. Copy of declaration filed by Baghbaan Marketing Pvt. ltd. under IDS, 2016 and copy of Form 4 issued by Pr. CIT(Central), Ahmedabad was filed. Considering facts of the case, submission by company and IDS-2016 by Baghbaan Marketing Pvt. Ltd., the addition of share capital and share premium and unexplained expenditure in case of GTC Oilfield Services Pvt. Ltd. for Asst. Year 2009-10 deleted in Appeal No. CIT(A)-6/381/2016-17 vide order dated 22.03.2019.*
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> *3.7 Considering above facts of the case, appellate order in the case of GTC Oilfield Services Pvt. Ltd. for A.Y. 2009-10 in Appeal No. CIT(A)-6/38/2016-17 vide order dated 22.03.2019 and appellate order passed in the case of appellant by my predecessor CIT(A)-6 for A.Y. 2011-12 in Appeal No.CIT(A)-6/373/2016-17 vide order dated 02.02.2018, since substantive addition of Rs.5,74,50,000/- made in the hands of company GTC Oilfield Services Pvt. Ltd. have been deleted as the source of funds for share capital and share premium declared by investors in the scheme of IDS-2016 and the same is accepted by Income-tax Dept. The protective addition made on presumptions is not sustainable and does not survive. Accordingly, addition of Rs.5,74,50,000/- made on protective basis is* ***deleted.*** *This ground of appeal is* ***allowed.****"*

13. Being aggrieved by the order of the learned CIT(A), the Revenue is in appeal before us.

14. The learned DR before vehemently supported the order of the AO by reiterating the findings contained in the assessment order.

15. On the contrary the learned AR submitted that the source of share capital has already been suffered to tax in the hands of the other parties in the VSV Scheme. Thus, the addition based on protective basis does not survive. The AR before us vehemently supported the order of the ld. CIT-A.

16. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that there were four different private companies managed/controlled/owned by the respondent assessee. The books of accounts of these four private companies were credited in the form of share capital and premium during the A.Y. 2009-10 to 2015-16 from four different private companies alleged to be paper companies run by entry provider. Thus, the AO treated the credit of share capital and premium thereon as unexplained money under section 68 of the Act and added to total income of the respondent assessee on protective basis whereas substantive additions were made in the hand of respective companies in whose books the sum was so credited. On appeal by the assessee, the learned CIT(A) was pleased to delete the protective addition made in the hand of the respondent assessee for the reason stated therein. Now the question before us is whether the learned CIT(A) was correct in deleting the impugned protective addition or not.

16.1 The concept of protective assessment is not defined in the provisions of the Act. However, the same has been used by the revenue authority as a precautionary tool where there is some income accrued or arise, but the AO is not sure who is liable to pay tax on such income, the AO may proceed to assess such

income on protective and substantive basis. The Hon'ble Supreme court in the case of Lalji Haridas vs. ITO reported in [1961] 43 ITR 387 has defined the concept of protective assessment as under:

> *"In cases where it appears to the income-tax authorities that certain income has been received during the relevant assessment year but it is not clear who has received that income and* prima facie *it appears that the income may have been received either by A or B or by both together, it would be open to the relevant income-tax authorities to determine the said question by taking appropriate proceedings both against A and B."*

16.2 The objective of the protective assessment is that in case substantive assessment made in the hands of other person not sustained then tax shall be collected from the person in whose hand protective assessment has been made. However, the concept of protective or substantive assessment only be applied where it is established beyond doubt that some income has been accrued or arisen in a particular assessment year but there is some uncertainty about the person who is liable to tax. In other word this concept cannot be applied in cases where it cannot be established beyond that the income has accrued or arises. In holding so, we draw support and guidance from the order of coordinate bench of this tribunal in case of ITO ward 10(1) Ahmedabad vs. Ketan B Thakkar HUF reported in [2015] 61 taxmann.com 18 wherein it was held as under:

> *"The protective assessment of an income can be made where, in the opinion of the Assessing Officer, an income has definitely arisen in a particular assessment year but there is any doubt about the entity in whose income is to be brought to tax. In the light of this legal position, when court revert to the facts of the present case, the court find that even income having arisen is not free from doubt since the Assessing Officer himself is not sure about the embezzlement having actually taken place. In the course of assessment of 'V', it is an admitted position that the Assessing Officer has disallowed the embezzlement loss and is in appeal against such a disallowance. When the fact of embezzlement is not accepted by the Assessing Officer, there cannot be any occasion to make substantive assessment and protective assessment in respect of such an embezzlement income. The question of protective assessment of such an income in the hands of the assessee, on protective basis, could have arisen in a situation in which, for example, the Assessing Officer was to come to a conclusion that embezzlement in has taken place but he was not sure as to who has done the embezzlement. Of course, even this proceeds on the assumption that an amount embezzled by the assessee form his employer, even if that be so, would constitute his income notwithstanding the fact that, in such a situation, the fact of unlawful gains are coupled with corresponding obligation to return the same to its rightful owner. [Para 12]"*

16.3 Coming to the facts of the case to hand, the AO based on the statement recorded by the investigation wing of certain person held that the share capital and premium thereon credited in the books of private company managed/controlled/owned by the respondent assessee are not genuine and treated the same as unexplained credit under section 68 of the Act. At the outset we note that the provision of section 68 of the Act is a deeming provision wherein any sum credited in the books of the assessee can be treated deemed income of the concerned assessee if fails to explain the nature and source of such credit to the satisfaction of the AO. Thus, under the provision of section 68 of the Act, it is not the case that it has been established beyond that the certain income accrued or arisen in a particular assessment year but there is uncertainty regarding the person liable to tax. Indeed, the provision of section 68 of the Act triggered when any sum credited in the books of an assessee and that assessee fails explain the nature and source of such credit then same can be deemed to be the income of that assessee in whose books the sum was credited. Thus, to assess deemed income under section 68 of the Act, there is no ambiguity regarding who should be liable to pay tax. Therefore, in our considered opinion the concept of protective assessment cannot be applied in the given facts and circumstances.

16.4 Be that as it may be, the learned CIT(A) during the appellate proceedings found that the substantive addition made in the hands of M/s GTC Oilfield Services Pvt. Ltd. was deleted since the investor party has surrendered the income under VSV Scheme. Thus, once the amount has been taxed in the hands of the investing party, the same should not brought to tax again tax in the hands of receiving party in the form of share capital and premium.

17. In view of the above, and after considering the facts in totality we do not find infirmity in the order of the learned CIT(A) regarding the issue of deleting the protective assessment. Therefore, we uphold the same. Hence the grounds of appeal of the Revenue for A.Y. 2009-10 to 2015-16 are hereby dismissed.

18. **Coming to** the issue of claim of exempted long-term capital, the relevant ground of appeal of the Revenue in IT(SS) A No. 311/AHD/2019 for AY 2012-13 reads as under:

> *"1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 58,08,455/- claimed by the assessee as exempt 'Long Term Capital Gain' and treated by the Assessing Officer as 'Income from Other Sources'. In doing so the CIT(A) has not appreciated the facts brought out by the Assessing Officer that the share is a penny stock and the gains have been entirely stage managed to claim exempt Long Term Capital Gain."*

19. The necessary fact is that the assessee during the year under consideration sold 2.1 Lacs Share of M/s KGN Industries Ltd (formerly known as M/s Royal Finance Ltd.) for Rs. 57,86,708/- and profit earned on the same claimed as exempted income under section 10(38) of the Act.

20. The AO found that the KGN Industries (formerly known as M/s Royal Finance) was an NBFC during the period 1999-2001 which was revoked by RBI due to irregularity. The scrip of the impugned company was also delisted/suspended by BSE as on 08-06-2001. At the time of delisting/suspension, the face value of share of impugned company was Rs. 10 per share and the last traded price on BSE was at Rs. 11.85 per share. The shares of the impugned company got relisted on BSE dated 21st May 2008 with the new name being KGN Industries Ltd.

21. The assessee and his family members claimed to have purchased the shares of impugned company during the FY 2003 and 2006 from Standard Leasing & Finance Pvt. Ltd and Convenant Finvestment Pvt. Ltd @ Rs. 1 per share having a face value of Rs. 10 per and consideration was paid in cash. Thereafter, the shares got splitted into 10 shares having face value of Rs. 1 per share. The shares were dematerialized as on 27thJanuary 2012 and subsequently sold the entire holding during 3rd to 17th February 2012 through BSE platform at the price ranging

between 21.64 to 25.75. The AO held the transaction of purchase and sale of shares of impugned company as fictious for the following reason:

(i) The share having face value of Rs. 10 and the last traded market value of Rs. 11.85 per share were surprisingly purchased by the assessee @ Rs.1 per share and consideration was paid in cash sources of which was not explained. There is no reason for not making the payment through the banking channel.

(ii) The assessee was having demat account during the year 2003 and 2006 when shares were claimed to be purchased, still the shares were dematerialized on 9th January 2012 i.e. just before the sale of shares.

(iii) As per the website of the impugned company as on 30th September 2010 only 5 individuals other than promotors were holding more than 1 lakh shares whereas the assessee claimed, along with 6 other family members, to have been holding shares of impugned company more than 1 lakh shares each. Thus, the claim of the assessee that purchased shares in the year 2003 and 2006 is found to be incorrect. It is because the name of the assessee and his family members were not appearing therein.

(iv) The scrip of impugned company regularly faced action from BSE or SEBI for price manipulation.

(v) The price at which shares were sold was abnormally high as compared to the book value and PE ratio of the share.

(vi) The managing director of the impugned company Shri Arif Memon was arrested for fraud.

(vii) The Ex-CEO, current CEO namely JethalalJivabhai Hirani & Shri Deepak Vrajlal Rawal as well as one of director namely Shri Babubhai Jethalal Hirani in their respective statement recorded under section 132(4)/131(1)/133A of the of Act categorically admitted that the impugned company is a paper a company and all the transactions were

carried on papers only. They also admitted that scrip of impugned company was utilized for providing bogus exempted LTCG to number of beneficiaries.

(viii) There was no record of shareholder register either with the impugned company or with share registrar of the impugned company namely M/s Link Intime India Pvt Ltd was available for the period before 1st October 2009.

22. Thus, the AO in view of the above, held the entire claim of exempted capital gain of Rs. 58,08,455/- by the assessee on account of sale of impugned share as fictitious and added the same to the total income of the assessee as income from unexplained sources.

23. The aggrieved assessee preferred an appeal before the learned CIT(A).

24. The assessee before the learned CIT(A) submitted that he purchased 21000 shares of KGN Industries Ltd during the month of December 2006 @ Rs. 1 per share. The reason for such low price was that the script got delisted by the order of the BSE. The consideration was paid in cash out of bank withdrawal, but bank statement could not be arranged due to lapse of considerable time. However, the genuineness of purchases of share cannot be doubted merely for the above given reason as the purchase of share was duly supported by the share certificate issued in his name which was furnished during the assessment proceedings. The script of the impugned company got re-listed with new name and split into 10 shares for 1 share each, thereafter he made request to the company to issue new share certificate but the same were received to him only in January 2012. Therefore, the same was not dematerialized earlier. The shares were sold in a hurry due to the reason that price was regularly declining.

25. The allegation of the AO that the transaction of sale and purchases of impugned share is fictious, and it was arranged to evade tax is without any merit.

Had the transaction been arranged, then he should have sold the impugned share at the time when the same was trading at a price more than Rs. 1000/- per share. On the contrary, shares were sold at the stock exchange through registered broker and proceeds were received after STT. Therefore, the action of the AO should be quashed which is based on mere surmise and presumption.

26. The assessee, besides the above, also contented on merit that the addition was made by the AO on account of technical ground. It was contended that the exempted long term capital gain was claimed in original return of income and the time limit for the issue of notice of scrutiny assessment under section 143(2) of the Act elapsed on 30th September 2013 which means regular assessment got completed. The assessment reopened under section 153A of the Act was based on a search carried out on 23rd January 2015 where no incriminating material in relation to the transaction of purchase and sale of impugned share was found. It is settled position of law that in case of completed assessee the regular item shown in the return of income cannot be disturbed in the absence of incriminating material.

27. The learned CIT(A) after considering the facts in totality deleted the addition made by the AO on technical count as well as on merit. The relevant finding of the learned CIT(A) reads as under:

On technical count:

> *"5.2 It is a fact that no incriminating material was found in search, time for issue of notice u/s 143(2) to select the case in scrutiny was also passed over prior to the date of initiation of search. It is undisputed fact that on the date of initiation of search, no assessment proceedings were pending for this assessment year. The completed assessment can be interfered by the AO while making assessment u/s 153A only on the basis of some incriminating material unearthed during the course of search. In this case, the appellant has claimed long-term capital gain exempt in AY 2012-13 in original return of income filed prior to search and the date of issuance of notice u/s 143(2) was already passed on 30-09-2013, since no incriminating material was found during search with respect to sale of shares of KGN Industries Ltd, the assessment for this year cannot be disturbed and no addition can be made in completed assessment u/s 153A as decided in the case of Saumya Construction Pvt. Ltd (supra), where by Jurisdictional High Court held that*

"18. In this case, it is not the case of the appellant that any incriminating material in respect of the assessment year under consideration was found during the course of search. At the relevant time when the notice came to be issued under section 153A of the Act, the assessee filed its return of income. Much later, at the fag end of the period within which the order under section 153A of the Act was to be made, in other words when the limit for framing the assessment as provided under section 153 was about to expire, the notice has been issued in the present case seeking to make the proposed addition of Rs 11,05,51,000/ on the basis of the material which was not found during the course of search, but on the basis of a statement of another person in the opinion of this court in a case like the present one, where an assessment has been framed earlier and no assessment or reassessment was pending on the date of initiation of search under section 132 or making of requisition under section 132A while computing the total income of the assessee under section 153A of the Act additions or disallowances can be made only on the basis of the incriminating material found during the search or requisition in the present case, it is an admitted position that no incriminating material was found during the course of search, however, it is on the basis of some material collected by the Assessing Officer much subsequent to the search, that the impugned additions came to be made.

19. On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of all the six assessment years. In the opinion of this court, the said contention does not merit acceptance, inasmuch as the assessment in respect of each of the six assessment years is a separate and distinct assessment Under section 153A of the Act an assessment has to be made in relation to the search or requisition, namely in relation to material disclosed during the search or requisition, namely, in relation to material disclosed during the search or requisition. If in relation to any assessment year, no incriminating material is found, no addition of disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of Jai Steel (India), Jodhpur (supra). Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court in the case of JayabenRatilal Sorathia (supra) wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years; however, there must be some incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year.

20. For the foregoing reasons, it is not possible to state that the impugned order passed by the Tribunal suffers from any legal infirmity so as to give rise to a question of law, much less, a substantial question of law, warranting interference. The appeal, therefore, fails and is, accordingly, dismissed.

The ration of above cited case is duly approved by Hon'ble Supreme Court in the case of ***CIT vs. Singhad Technical Education Society [2017] 84 taxmann.com 290 (SC).***

5.3 Under the above facts of the case that on the date of initiation of search no assessment proceedings were pending in this assessment year. Therefore, the proceedings

in the case were not abated as mentioned in the second proviso to section 153A(1) of the Act. As discussed herein above, there is no indication in the contents of the assessment order that the addition was made on the basis of any incriminating seized material. Therefore, after considering the position of law on the issue and respectfully following the decisions of the Hon'ble Courts and Tribunals, in my considered opinion, the action of the AO was not justified. Accordingly, addition made of long-term capital gain as fictitious gain without any incriminating material in assessment order u/s. 153A of the I. T. Act is deleted. These ground of appeals are allowed."

On merit:

*"3.6 I have carefully gone through the facts mentioned in the assessment order and submission of the appellant on the issue of long term capital gain on sale of shares of KGN Industries Ltd. Considering above facts and appellate order of CIT(A)-11, Ahmedabad in the case of father of appellant Shri Ramswaroop S. Agarwal for AY 2012-12 in Appeal no. CIT(A0-11/C. C-1(4)/Ahd/387-A/2016-17 dated 21.02.2018, I am of considered view that the appellant has produced evidences and provided elaborate explanations on long-term capital gain as narrated in above paras. Therefore, the gain on sale of shares appears to be genuine and in the nature of long-term capital gain exempt u/s. 10(38), which cannot be denied on the basis of mere presumptions and assumptions. Hence, the A.O. was not justified in treating exempt long term capital gain as income from unexplained sources. Accordingly, the A.O. is directed to treat capital gain on sale of shares of Rs. 58,08,455/- as long term capital gain exempt u/s. 10(38) of the Act. This ground of appeal is **allowed.**"*

28. Being aggrieved by the order of the learned CIT(A) the assessee is in appeal before us.

29. The learned DR before us submitted that the assessee has shown the long-term capital on the sale of shares of the bogus company. Therefore, the same is entitled for exemption under section 10(38) of the Act.

30. On the contrary the learned AR submitted that the year being unabated assessment year, the same cannot be disturbed in the search proceedings under section 153A of the Act.

30.1 Both the ld. DR and the AR before us vehemently supported the order of the authorities below as favourable to them.

31. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly, there was search proceeding under section 132 of the Act dated 23rdJanuary 2015 carried out on the assessee and his group concern "Globe Group" and in consequence to the same proceeding under section 153A of the Act was initiated in case of respondent assessee for year under consideration. The assessment under section 153A r.w.s section 143(3) of the Act for the year under consideration i.e. A.Y. 2012-13 was framed after making additions on account of disallowances of exempted long term capital gain by alleging bogus/accommodation entry in nature. On appeal by the assessee, the learned CIT (A) deleted the addition made by the AO on technical ground by holding that there was no material incriminating in nature found in the course of the search with reference to year under consideration, therefore the year under consideration being unabated/completed assessment year no addition should be made in absence of incriminating material. The learned DR before us vehemently argued that there is no provision under section 153A of the Act which restricts the assessment or reassessment in case of search to the extent of incriminating materials only.

31.1 In this regard, we find that it has been settled by various Hon'ble Court including Hon'ble Jurisdictional High Court that the completed assessment cannot be disturbed in the absence of any incriminating material/ documents whereas the assessment/ reassessment can be made with respect to abated assessment years. The word 'assess' in Section 153A/153C of the Act is relatable to abated proceedings (*i.e.* those pending on the date of search) and the word 'reassess' to the completed assessment proceedings. The Hon'ble Gujarat High Court in the case of Saumya Construction Pvt. Ltd. reported in 81 taxmann.com 292, has held that there cannot be any addition of regular items shown in the books of accounts until and unless there were certain materials of incriminating nature found during search. The word incriminating has not been defined under the Act, but it refers to that materials/ documents/ information which were collected during the search

proceedings and not produced in the original assessment proceeding. Simultaneously, these documents had bearing on the total income of the assessee. Now coming to the case, we note that addition was made based statement of some unconnected person and action of the SEBI on the group concern of the company the shares of which has been sold by the assessee without referring to incriminating document found from the premises of the assessee.

31.2 At the time of hearing, the learned DR has not brought anything on record contrary to the finding of the learned CIT (A). Accordingly, we hold that there cannot be any addition of the regular items which were disclosed by the assessee in the regular books of accounts. In holding so, we draw support and guidance from the judgment of Hon'ble Gujarat High Court in case of Saumya Construction (P.) Ltd (supra) wherein it was held as under:

> *"Thus, while in view of the mandate of sub-section (1) of section 153A in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition or disallowance can be made only on the basis of material collected during the search or requisition. In case no incriminating material is found, the earlier assessment would have to be reiterated."*

31.3 In view of the above we hold that there cannot be any addition to the total income of the assessee of the regular items as made by the AO in the present case. Accordingly, we do not find any infirmity in the order of the learned CIT (A). Hence, we uphold the same. Thus, the ground of the appeal of the Revenue is hereby dismissed.

34. **Coming to** the issue of claim of exempted long-term capital, the relevant ground of appeal of the Revenue in IT(SS) A No. 970/AHD/2019 for AY 2015-16 reads as under:

"Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.1,90,57,117/- claimed by the assessee as Short Term Capital Gain during the course of assessment proceedings and exempt Long Term Capital Gain in ROI and treated by the Assessing Officer as 'Income from Other Sources'. In doing so the CIT(A) has not appreciated the facts brought out by the Assessing Officer that the share is a penny stock and the gains had been entirely stage managed to claim large Capital Gain."

35. The assessee in the year under consideration has shown Short Term Capital Gain on the sale of shares of the company namely Surabhi Chemicals & Investments Ltd. for Rs. 1,95,55,453/- only. Against the sale of impugned shares the assessee has claimed the cost of acquisition of such shares at Rs. 5,00,000/- only which has resulted Short Term Capital Gain of Rs. 1,90,55,453/-. However, the Assessing Officer was of the opinion that the impugned Short Term Capital Gain is representing the manipulated transaction and therefore the same is bogus. The view of the Assessing Officer was based on the following observation:

"6. The reply of the assessee has been perused. But the same is not acceptable. Here is a scrip whose performance in the stock market does not justify the performance of the company. Since last many years, its revenue from operation is hardly existing. The EPS ranges from Rs. 0.03 to Rs. 0.07. Its book value as at March 2014, 2015 and 2016 is virtually NIL. The assessee has sold the shares purchased by him for Rs. 2.50 per share, for as high as Rs 104/share. All this in a short time of just over 12 months. It is also seen that the volumes traded were also scant. There is no doubt that the prices were rigged in connivance with brokers in order to get maximum benefit of exempt capital gain u/s. 10(38). In the past also, the assessee himself had claimed such fictitious long term capital gain on sale of shares of one M/s. KGN Industries ltd. In the said order for AY 2012-13, it has been conclusively established that the claim of exempt income is bogus. In fact, the assessee himself has come forward and changed his stand. Instead of exempt long term capital gain, the assessee has now offered short term capital gain on the sale of shares of SCIL. Therefore, the entire sale proceeds is treated as income from other sources, which is nothing but stage managed to claim exempt long term capital gain. Therefore, the sum of Rs. 1,90,55,453/- is treated as unexplained income, brought in the guise of exempt long term capital, which is subsequently offered as short term capital gain. Penalty proceedings u/s. 271(1)(c) is initiated for concealment of income. Further, the assessee may contest this issue in appeal."

36. Aggrieved assessee preferred an appeal to the Ld. CIT(A) who directed the AO to treat the income of Rs. 1,9057,117/- as income under the head Short Term

Capital Gain on the sale of shares. The observation of the Ld. CIT(A) is reproduced as under:

> *"5.6 I have carefully gone through the facts mentioned in the assessment order and submission of the appellant on the issue of short term capital gain on sale of shares of Surabhi Chemicals & Investments Ltd. Considering above facts and appellate order of CIT(A)-11, Ahmedabad in the case of father of appellant Shri Ramswaroop S. Agrawal for AY 2015-16 in Appeal no. CIT(A)-11/C.C-1(4)/Ahd/388-A/2016-17 dated 21.02.2018, I am of considered view that the appellant has produced evidences and provided elaborate explanations on short term capital gain as narrated in above paras. Therefore, the gain on sale of shares appears to be genuine and in the nature of short term capital gain, which cannot be denied on the basis of mere presumptions and assumptions without any corroborative evidences. Hence, the A.O. was not justified in treating short term capital gain as income from other sources. Accordingly, the A.O. is directed to treat capital gain on sale of shares of Rs.1,90,57,117/- as short term capital gain. This ground of appeal is* ***allowed.****"*

37. Being aggrieved by the order of the Ld. CIT(A), the Revenue is in appeal before us. The Ld. DR before us submitted that considering financials of the company namely Surabhi Chemicals & Investments Ltd., it is not expected that the price of the shares will rise manifold in a short span of time. Thus, he was of the view that the impugned Short Term Capital Gain has arisen to the assessee by manipulating the transactions. As such, the impugned income represents the income from other sources. The Ld. DR vehemently supported the order of the Assessing Officer.

38. On the contrary, the Ld. AR before us filed two Paper Books running from Pages 1 to 12 and 1 to 69 of and contended that the shares were sold on the Stock Exchange after the payment of Securities Transaction Tax. Therefore, the same cannot be assumed as income from other sources. The Ld. A.R. before us vehemently supported the order of the Ld. CIT(A).

39. We have heard the rival contentions of both the parties and perused the materials available on record. In the present case, the assessee has shown short term capital gain on sale of shares of M/s Surabhi Chemicals & Investments Ltd. (for short SCIL) amounting to Rs. 1,90,55,453.00 which was treated as bogus and

manipulated, leading to the addition by the AO as unexplained income. The view of the AO was based that the price of the share of M/s SCIL was increased manifolds in a short period of time which was not believed by the AO on the principles of preponderance of human probabilities in the given facts and circumstances. The rise in the price of the scripts of a company, having no financial base/business activity/profitability certainly gives rise to doubt about such an increase in the price. However, in our considered view, the sharp rise in the price of script cannot be a sole criterion for reaching the conclusion that the price was rigged up to generate the short-term capital gain. Such observation during the assessment proceedings provides reasons to investigate the matter in detail and the same cannot take the place of the evidence. In the case on hand, there was no enquiry conducted either by the SEBI or the stock exchange with respect to rigging up of share price of M/s SCIL either by the assessee or his broker. Similarly, the AO has not conducted an enquiry from the SEBI or Stock Exchange about the assessee whether he was engaged in frivolous activities as alleged. The AO has not pointed out whether SEBI has prohibited the impugned company from entering the transaction at stock market. Further, the price of a share on the stock exchange cannot be linked to the financial strength of the company, as such the same is governed by several market driven factors.

39.1 On further analyzing the facts of the present case, we note that the AO on one hand has alleged that the entire transaction was bogus but on the other hand the AO himself has allowed the cost of acquisition against the sale of shares, meaning thereby, the purchase cost of the shares has been admitted as genuine. The transactions of purchase and sales go hand in hand. In simple words, a sale is not possible without having the purchases. Thus, once purchases have been admitted as genuine, then corresponding sales cannot be doubted until and unless some adverse materials are brought on record. As such, we note that the AO in the present case has taken contradictory stand. On one hand, the AO is treating the entire transaction as sham transaction and on the other hand he's allowing the

benefit of the cost of acquisition for the shares while determining the bogus short-term capital gain.

39.2 In our view, the income generated by the assessee cannot be held bogus only based on the modus operandi, generalisation, and preponderance of human probabilities. In order to hold income earned by the assessee as bogus, specific evidence has to be brought on record by the Revenue to prove that the assessee was involved in the collusion with the entry operator/ stock brokers for such an arrangements. In simple words, there were not brought any evidence from independent enquiry to corroborate the allegation. In holding so we draw support and guidance from the judgment of Hon'ble Delhi High court in case of Pr. CIT vs. Smt. Krishna Devi reported in 126 taxmann.com 80 where it was held as under:

> ***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.*

39.3 Respectfully, following the judgment of Hon'ble Delhi High Court *(Supra)*, we hold that in absence of any specific finding against the assessee, the assessee cannot be held to be guilty. Hence, we don't find any reason to interfere in the order of the Ld. CIT-A. Hence, the ground of appeal of the Revenue is hereby dismissed.

40. In the result, the appeal of the Revenue is hereby dismissed.

41. In the combined result, all the appeals filed by the revenue are hereby dismissed.

Order pronounced in the open Court on 12/05/2023 at Ahmedabad.

Sd/-	**Sd/-**
(MADHUMITA ROY)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad; Dated 12/05/2023
Manish

TRUE COPY

आदेशकीप्रतिलिपिप्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. संबंधितआयकरआयुक्त/ Concerned CIT
4. आयकरआयुक्त(अपील) / The CIT(A)
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण/ DR, ITAT,
6. गार्डफाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, अहमदाबाद / ITAT, Ahmedabad