

**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “B”, PUNE**

Before Shri Shailendra Kumar Yadav, Judicial Member,
and Shri R.K.Panda, Accountant Member.

ACIT, Central Circle-1,
Aurangabad.

.. Appellant

Vs.

- 1) Shri Surendra Shantilal Peety .. Respondents
(PAN: AJRPP4860F)
ITA.No.1157 to 1161/PN/2008
(Asstt. Year : 2002-03 to 2006-07)
- 2) Smt.Varsha Surendra Peety
(PAN: AJUPP4147N)
ITA.No.1162 to 1165/PN/2008
(Asstt. Year : 2003-04 to 2006-07)
- 3) Smt.Rachna Jitendra Peety
(PAN: AJRPP4857A)
ITA.No.1166 to 1169/PN/2008
(Asstt. Year : 2003-04 to 2006-07)
- 4) Shri Shantilal Goverdhan Peety
(PAN: AJRPP4858R)
ITA.No.1170 to 1174/PN/2008
(Asstt. Year : 2003-04 to 2006-07)
- 5) Shri Ravindra Shantilal Peety(HUF)
(PAN: AAJHR8689F)
ITA.No.1175 to 1177/PN/2008
(Asstt. Year : 2004-05 to 2006-07)
- 6) Shri Ravindra Shantilal Peety
(PAN: AJRPP4859Q)
ITA.No.1178 to 1181/PN/2008
(Asstt. Year : 2003-04 to 2006-07)
- 7) Smt. Namrata Ravindra Peety
(PAN: AJUPP4145Q)
ITA.No.1182 to 1185/PN/2008
(Asstt. Year : 2003-04 to 2006-07)
- 8) Shri Jintendra Shantilal Peety
(PAN: AJRPP4857A)
ITA.No.1186, 1187, 1189 & 1191/PN/2008
(Asstt. Year : 2003-04 to 2006-07)

9) Shri Jintendra Shantilal Peety (HUF)
 (PAN: AAEHJ2425G)
 ITA.No.1188 & 1190/PN/2008
 (Asstt. Year : 2004-05 & 2005-06)

AND

ITA.No.239 & 240/PN/2010
(Asstt. Year : 2004-05 & 2005-06)

ACIT, Circle-1,
 Aurangabad.

.. Appellant

Vs.

Shri Surendra Shantilal Peety(HUF),
 Sharda Kutir,
 Shani Mandir Road,
 Jalna
 (PAN: AAPHS3399B)

.. Respondent

Department by	:	Shri S.K.Singh
Assessee by	:	Shri J.P.Bairagra
Date of Hearing	:	18.09.2012
Date of Pronouncement	:	28.09.2012

ORDER

PER BENCH:

All these appeals filed by the Revenue pertain to Peety group on similar issue, so they are being decided by this consolidated order.

2. First we take up ITA.No. 1157 to 1161/PN/2008. In ITA.No.1157/PN/2008 revenue has raised the following grounds:

1. Whether on the facts and circumstances of the case the CIT (A)-I, Nagpur was justified in holding that the contract notes, and broker's bills etc., found and seized in the course of search action and proved to be bogus by the statement of the brokers who issued these broker notes do not amount to be incriminating material.
2. Whether on the facts and circumstances of the case the CIT (A)-I, Nagpur was justified in holding that the SEBI's action against the broker and certain companies cannot be given any weightage as this does not relate to the case of the assessee even though same brokers have admitted before the different

Income tax authorities that they have issued bogus broker notes to assessee.

3. Whether on the facts and circumstances of the case the CIT (A)-I, Nagpur was justified in holding that the broker note issued by the brokers and the companies which are tainted as reliable evidence for holding the transaction as genuine while at the same time not accepting the statements given by the brokers as correct.
4. Whether on the facts and circumstances of the CIT(A)-I, Nagpur was justified in holding that the application of sec.69A of the I.T. Act was not warranted even though it was proved that the assessee was in possession of money claimed to have been earned by long term and short term capital gain.
5. Whether on the facts and circumstances of the case the CIT (A)-I, Nagpur was justified in holding the application of the issue of Human probability as enunciated by the Supreme Court in Sumati Dayal Vs. CIT 214 ITR 801 (1995) and McDowell and Co. Ltd. Vs. CTO 154 ITR 148 (SC) is not applicable in the present case even though it is proved that this is a fit case for application of principals enunciated by the supreme court in above two cases.
6. Whether on the facts and circumstances of the case the CIT (A)-I, Nagpur was justified in holding that the income claimed as long term capital gains cannot be held as business income as adventure in nature of trade.
7. The appellant craves leaves to add, amend or alter any grounds if appeal at the time of hearing.
8. On the above grounds the order of the learned CIT(A) be set aside and the order of the Assessing Officer be restored.

3. The assessee is an individual belonging to Peety group of Jalna. This group consists of Shri Shantilal Govardhan Peety, his spouse Smt.Sharda Peety, their sons, Shri Surendra Shantilal Peety, Shri Ravindra Shantilal Peety, Shri Jitendra Shantilal Peety and their daughters-in-law Smt.Varsha Surendra Peety, Smt.Rachna Jitendra Peety and Smt.Namrata Ravindra Peety, and HUF of Shri Ravindra Shantilal Peety. Search & seizure operations u/s.132(1) of the Act were conducted on 17.03.2006 in this group. As stated above, this search covered following entities:

Premises searched	Business/ residential	Nature of activity/ sources of income	Remark
SRJ Peety Steels P. Ltd.	Business	Manufacture of mild steel ingots	---

Sri Om Rolling Mills P. Ltd.	-Do-	Manufacture of mild steel bars	---
S/Shri Shantilal Peety, Surendra Peety, Ravindra Peety, Jitendra Peety, Varsha Peety, Namrata Peety and Rachana Peety (All individuals)	Residential premises at Sharda Kutir, Shani Mandir Road, Old Jalna, Jalna	Capital Gain, salary, house rent, Business Income	All belong to Peety family who reside in a common residence. The searches were carried out on the strength of joint/common warrant of authorization issued in their names.
Ravindra Peety (HUF)	---	Capital Gain and Business Income	There was no warrant of authorization against this entity.
Jitendra Peety (HUF)	Do	Do	Do

4. The assessees were regularly filing returns of income under the jurisdiction of ACIT, Circle-1, Aurangabad. Consequent to search, case was centralised with ACIT, Central Circle-1, Aurangabad. Assessment particulars of the assessee Shri Surendra Peety are mentioned below:

Asst Year	Returned income (original)	Income returned u/s.153A	Income assessed u/s.153A/143(3)
2000-01	793,527	851,027	851,027
2001-02	17,51,567	17,77,367	17,77,367
2002-03	10,31,820 LTCG - 15,07,332	10,62,520 LTCG - 15,07,332	36,25,725
2003-04	125,854 LTCG - 4234,900	125,854 LTCG - 4234,900	46,58,190
2004-05	481,877 LTCG - 3490,640	496,524 LTCG - 3490,640	40,76,330
2005-06	-27,891 STCG - 5116,735 LTCG - 1927,680 Exempt LTCG - 107,77,291	-27,891 STCG - 5116,735 LTCG - 1927,680 Exempt LTCG - 107,77,291	196,24,860

2006-07	338,251 STCG – 11,78,132 Exempt LTCG – 139,20,086	538,251 STCG – 11,78,132 Exempt LTCG – 139,20,086	164,00,910
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5. The income shown in regular returns were accepted u/s.143(1) for various assessment years as indicated above. Income returned by the assessee in regular course, among other items, comprised of Long Term Capital Gains (hereinafter called 'LTCG') as indicated above. This income was claimed as exempt u/s.10(38) of the Act both in regular and in the returns filed in response to notice u/s.153A for A.Y. 2005-06 and 2006-07 and prior to it paid applicable tax for A.Y. 2002-03 to 2004-05. Assessee also paid tax on Short Term Capital Gains for A.Y. 2005-06 and 2006-07. However, in orders passed u/s.153A r.w.s. 143(3) consequent to search, which was subject matter of present appeal, the Assessing Officer sought to tax the income from LTCG u/s.69A of the Act. It was the case of the Assessing Officer that income under the head LTCG shown in return for all the above mentioned assessment years is sham and, therefore, the amount so generated represented unexplained money liable to be assessed under the head 'Income from Other Sources' u/s.69A of the Act. An alternative plea was taken by the Assessing Officer that income if not assessable u/s.69A, would fall to be assessed under the head 'Adventure in the nature of Trade'. While arriving at the above conclusion, the Assessing Officer mainly relied on the following evidences to support his case:

1. Statement u/s.132(4) recorded from Shri Surendra Shantilal Peety on the date of search offering the income shown in the regular return under the head LTCG as undisclosed income in various hands which was subsequently retracted at the time of filing the return.
2. Statements recorded by the department from few brokers namely Vishal Bhagwandas of Vijay Bhagwandas and Co., Pratik Shah of DPS Shares and Securities after the date of

search in which they had alleged that the transactions of purchases and sales of shares by various members of Peety family do not represent the correct position.

3. Certain reports from Stock Exchanges (details of which were not mentioned in the Order).
 4. Alternative course adopted by the Assessing Officer in treating the transactions as adventure in the nature of trade was based on some general observation as to the nature of transaction and judicial proposition on the issue.
 5. While coming to the above conclusion the Assessing Officer relied on various case laws to support his findings particularly in the matter of admission u/s.132(4) of the Act.
6. Matter was carried before the first appellate authority wherein stand of the assessee has been evident from statement of facts, grounds of appeal, submissions on various dates, reply to the Remand Reports of Assessing Officer, note on adventure in the nature of trade, rebutting Assessing Officer's contention in assessment order dated 07.05.2008, reply to the report of Assessing Officer dated 09.06.2008, reply to the remand report of the Assessing Officer received on 10.06.2008.
7. The first appellate authority has addressed and adjudicated the major issues being subject matter of adjudication as under:
1. Whether on the sole basis of admission made in the statement recorded u/s.132(4) by Shri Surendra Shantilal Peety in course of search offering the income shown under the head LTCG for taxation, the Assessing Officer can fasten a liability against the assessee? In other words whether an admission de-hors corroborative evidence could form the basis of assessment in a search case.
 2. Whether the statements of brokers recorded prior to search, and in some cases after search which forms the sheet anchor of evidence against the assessee, and who could not be

produced for cross-examination as demanded by the assessee, could be utilized against the assessee to draw any adverse conclusion.

3. Whether on the facts and circumstances of the case, evidences gathered by the Assessing Officer in course of assessment proceedings and subsequently and those adduced by the assessee, the legal position on various issues and judicial exposition on the subject, the assessment made by the Assessing Officer could be sustained on the issue of treating the LTCG as sham and treating the same as unexplained money u/s.69A of the Act.
 4. Whether the alternative approach of the Assessing Officer in treating the entire transaction under the head 'an adventure in the nature of trade' is sustainable.
8. Firstly the issue of admission as the basis of assessment and retraction thereof has been addressed by the first appellate authority.

In this regard, observations of Assessing Officer are as under:

- (a) That Shri Surendra Shantilal Peety had given a statement u/s.132(4) on 24.03.2006, when confronted with the statements of certain brokers namely, Dhawal R Shah, Director, Trimiti Investment and Financial Services Ltd., Pune, Milan R Parikh, MD Action Financial Services P Ltd., and Vijay Bhagabandas, Vijay Bhagaban Das & Co., Mumbai, that the LTCG shown by various family members is not genuine and that the same is offered for taxation. Same was later confirmed in a letter dated 29.04.2006.
- (b) That the income so offered in course of search was not included in the returns filed in response to notice u/s.153A and the same amounts to a retraction which is not permissible under law.
- (c) That in the subsequent statement recorded on 14.12.2007, Sri Surendra Peety denied any coercion having been put on him in course of recording the statement on 24.03.2006 and therefore the statement per se has evidentiary value to frame the assessment.
- (d) The Assessing Officer also relied on certain decisions wherein the statements recorded u/s.132(4), though retracted, formed the basis of assessment.

- (i) Ramjas vs. CIT 183 CTR 144 Raj.
- (ii) Green View Restaurant vs. ACIT 263 ITR 169 Gau.
- (iii) Dr.S.C.Gupta vs. CIT 248 ITR 782 (All.).
- (iv) V.Kunhambu & Sons 219 ITR 235 Ker.
- (v) S.S.Ratan Chand Bholanath vs. CIT 210 ITR 682 MP.
- (vi) Hirasingh & Co. Vs. CIT 230 ITR 791 HP
- (vii) Mahesh B Saha vs. ACIT 238 ITR 130 Ker.

In view of above, the Assessing Officer observed that there was no valid reason for retraction.

8.1. On the issue of admission u/s.132(4), the assessee submitted his detailed reply vide his submission dated 04.03.2008, 07.05.2008 and 04.06.2008. In submission dated 04.03.2008, the assessee submitted that the Assessing Officer has laid down undue emphasis on admission made by Shri Surendra Shantilal Peety during course of search action u/s.132(4) of the Act pertaining to the matter of genuineness of the share transactions. He failed to appreciate the circumstances in which statement was obtained as has been explained by the assessee in course of assessment proceedings vide letter dated 24.08.2007. The assessee raised following objections in this regard:

- i) In course of search, the assessee was shown some statements of brokers (without providing copies thereof) and it was impressed upon that the brokers have denied the transactions. The assessee never had any occasion to know under what circumstances the brokers have given the statements and in what manner.
- ii) Assessee was in a state of shock and confusion because of search which continued beyond normal hours.
- iii) Assessee did not have the benefit of referring to the evidences available in their offices which were in the nature of documentary evidence like the contract notes, bills of the brokers for the purchase and sale of the alleged shares, bank statements, etc.
- iv) In the statement recorded u/s. 132(4) Shri Surendra Shantilal Peety asserted that all the members of the Peety family would

come out with the correct position of the nature of income from the alleged shares investment/business after evaluating the evidences.

- v) Members of the Peety family, after evaluating the evidence available with them and after obtaining the missing papers from the brokers, filed their returns without admitting that the transactions were not genuine.
- vi) It is not uncommon that such statements are recorded under inducement, promise, persuasion, under exceptional circumstances and in an atmosphere of high pressure liable to cause nervousness amounts to involuntary statements divorced from the actual facts on record. Thus statement given by the assessee cannot bind him on the face of other evidences supporting his case. In this regard the assessee relied on the decision in the case of *Deepchand and Co. Vs. ACIT* (1995) 51 TTJ Bom 421, wherein it was held that a statement recorded during search proceeding which continued for an unduly long period cannot be considered to be free, fearless and voluntary. Thus, an element of compulsion is discernible in the case of the assessee on the facts and circumstances of case justifying retraction.
- vii) It was submitted that the measure of search is to unearth documents, revealing concealed income and wealth since strictly speaking interrogation is not a part of the object of the search. It is expected that assessee is not put to pressure for making an admission and the statement should not go beyond what is discovered in course of search from the premises of the assessee. In the case of the assessee, no incriminating evidence was found in connection with share transactions from the residential and office premises of the Peetys and the entire declaration pertaining to the shares transactions were taken only on the basis of the statements recorded of the brokers and the returns of incomes filed during the regular course. The circumstances in which third party statements were just shown on the date of search without making

available copy of the same coupled with the mental condition of various members of assessee's family in the course of prolonged search beyond normal hours would indicate that the admission so made were not voluntary and have no evidentiary value.

- viii) Even the Government had reason to believe that there is widespread practice of obtaining confession. In the Budget speech for 2003-04, the Finance Minister informed the Parliament that no confessional statement shall be obtained during search and seizure operation. In pursuance to same Board's letter was issued numbered as from F.No 286/2/2003/IT(Inv) dt. 11.03.2003.

It shows that not an iota of evidence was found in course of search from the office and residential premises of Peety group to indicate that the transactions in shares are not genuine. There was no evidence showing flow of cash from the assessee to the brokers for indulging in such activities. There was evidence available in the premises of the assessee in the form of records of the department by way of returns and other supporting evidence to suggest that the transactions were genuine. Against this the Assessing Officer was in possession of some oral and hearsay evidence from some brokers who alleged without substantiating that the purchases and sales were by way of accommodation entries. Such unsubstantiated evidences should not be given undue weightage.

- ix) It is a settled principle of law that the approach of a court is first to marshall evidence against the accused excluding confession altogether and see whether the accused can be held guilty. In the case of the assessee, on the face of the overwhelming nature of evidences available in the records of the department and those produced by the assessee during the course of assessment proceedings, the Assessing Officer

ought not have placed undue importance on the admission in absence of clinching corroborative evidence for same.

x) It is also a well accepted principle that an admission is not conclusive evidence as to the truth of the matters stated therein. It is only a piece of evidence, the relevancy of which is required to be judged basing on the material evidence and circumstances in which it is made. In the case of the assessee as explained above, the statement was made without having the benefit of referring to any document in confusion and on the assertion of the department that they have evidence against the assessee by way of some statements of brokers which were not made available to the assessee.

xi) A mere confessional statement without there being any documentary proof shall not be used as evidence against the assessee. The statement of managing director was recorded in course of search wherein he admitted undisclosed income but later retracted from the said statement and accordingly the Court held that without documentary proof, a statement alone cannot be utilized against the assessee as held in CIT vs. Shree Ramadas Motor Transport, 238 ITR 177 (183) AP. In the case of the assessee, no evidence whatsoever was found in course of search regarding the non genuineness of the transactions pertaining to the shares transaction in question. The principle evolved in the above case can be applied to the case of the assessee.

xii) It is a settled principle that in case evidence is in the form of statement which is sought to be utilised against the assessee pertains to an ex parte statement of witness, the same cannot be unilaterally utilized against the assessee without the witness being put to cross examination. In this regard, the assessee placed reliance on the decision in the case of Jaikishan R Agarwal vs. ACIT (2000) 66 TTJ 704,

wherein it was held that in a case where no document was seized in course of a search showing payment of extra consideration for purchase of a property, no additions can be made on the basis of statement recorded from third parties. It was held that any statement recorded at the back of the assessee has no evidentiary value and in the absence of any evidence found in the course of search indicating payment of extra consideration over and above what is mentioned in the document, the addition cannot be sustained. The facts of the case of the assessee are akin to the facts of the decided case cited supra and therefore the principle evolved in the said case is equally applicable to the case of the assessee where the department has relied on the statement of third parties which were recorded behind the back of the assessee and who were not made available for cross-examination despite specific request and despite the fact that the assessee was available for such examination at a place selected by the department to facilitate the process of enquiry. Thus, the process of taking evidence is complete and such ex parte statements cannot be utilized against the assessee.

xiii) The assessee further submitted that when an ex parte statement is recorded at the back of the assessee, without affording an opportunity to cross examine the witness, the statement cannot be made use of in framing an assessment. In this regard, the assessee placed reliance on the decision of the Hon'ble Supreme Court in the case of Kalra Glue Factory vs. Sales Tax Tribunal (1987) 167 ITR 498 SC and Kishninchand Chellaram vs. CIT (1980) 125 ITR 713 SC. These are cases where department failed to produce the witnesses, thus bringing to an end the process of taking evidence. In other words, the evidence is closed on this issue in favour of the assessee.

xiv) As regards retraction, the principle is that it should be retracted before the concerned authority decides the matter. In other words, the assessee should not place the authorities in such a position so as to thwart the process of investigation. In the case of the assessee, the retraction was well evident from the returns filed in response to notice under section 153A and assessee's letters addressed to the department. This gave the authorities sufficient time to collect corroborative evidence which they have failed to do as explained in the preceding paras.

xv) It was submitted that estoppel is a rule of evidence but not a cause of action and that it cannot be a basis of assessment and creation of a liability under the Act as held in CIT vs. Asit Kumar Ghosh (1953) 24 ITR 576 (SC). Therefore the assessee cannot be held liable on the basis of a mere statement which was made under exceptional circumstance as explained above. Assessing Officer cannot utilize contents of such a statement to frame assessment which is deficient in other aspects.

8.2. Vide submission dated 07.05.2008, the assessee reiterated the above submissions and the relevant portion of the submission is extracted below:

i) A statement which is in the realm of oral evidence is intended to supplement documentary evidence but not to supplant the same. If the logic of the Assessing Officer is accepted, then it would amount to completely displacing the voluminous evidence which are documentary in nature reflecting the correct statement of affair of assessee as explained in course of hearing and in this explanation. This is not permissible. Further pitted against documentary evidence, the oral evidence loses its significance for all purposes which is a sound rule of evidence.

ii) The return of income filed by the appellant in response to notice under section 153A without altering the position vis-a-vis the original return has been loosely termed as a retraction by the Assessing Officer. This is not so. Any return of income should faithfully reflect the actual transaction based on evidence. This is what the assessee has done on careful

appreciation of facts of the case. Law cannot compel a person to be assessed on income which he has not earned merely on the basis of a statement ignoring the actual state of affairs.

iii) It is submitted that in course of search, the assessee was shown certain statements of brokers recorded at the back of the appellant. There was hardly any time to refer to original documents and therefore under the circumstances which generally follows a search, there was a statement of a general nature made by the appellant. The sheet anchor of department's evidence utilized in the context of admission and in the assessment is the oral testimony of the brokers. The appellant is still at loss to find out under what circumstances these brokers were made to give statements incriminating the appellant when facts of the case show otherwise. No attempt was made to make available these statements till the last moment keeping the appellant in dark about what the department wished to utilize in the assessment. On appellant's insistence, the Assessing Officer gave opportunity to the appellant to cross-examine these witnesses at Mumbai in the last week of Dec '07. However the department failed to produce these brokers twice.... A third opportunity was given at the instance of this authority in course of appellate proceedings to produce the brokers. The Assessing Officer failed to produce these brokers, thereby closing the evidence for all intents and purposes. It may be worthwhile to mention here that although the Assessing Officer failed to produce the brokers for cross-examination before conclusion of assessment proceeding, there is no whisper in the assessment order in this regard.... The third failure not only compounds the matter but also gives an unmistakable impression that contents of the statements which were shown to the appellant in course of search were suspect and not recorded by following the due procedure of law. The admission of the appellant in course of search may be read in conjunction with the so called unsubstantiated statements of brokers but not in isolation, appreciating the entirety of the circumstances and in the background of documentary evidence supporting the case of the appellant which the department has failed to impeach till the stage of appellate proceeding.

8.3. In this regard, it was submitted that in the assessment order the Assessing Officer has made an observation that the assessee has reconfirmed the declaration vide another letter dated 29.04.2006. In this regard it was submitted that it is not a fact. In fact, the assessee was asked to furnish details regarding extent of capital gain reflected in the returns of various members of Peety family and accordingly the same was furnished vide forwarding letter dated 29.04.2006. This letter was produced by the Assessing

Officer in course of hearing on 24.04.2008 before the first appellate authority. Nowhere does the letter indicate that the assessee confirmed the disclosure in the said letter. In this regard, the categorical observations of the Assessing Officer in the assessment order are misleading.

8.4. The assessee also filed legal explanation wherein distinguishing the judgments cited by the Assessing Officer in his order. The stand of the assessee has been that there was no allegation of coercion. On the other hand, it was argued that in course of recording the statement the assessee was not in a position to refer to the documents, returns of income and was unduly influenced by the statements of certain brokers shown to him (without providing copies of the same) which were recorded prior to search behind the back of the assessee. It was explained in course of appeal proceedings that coupled with all these extraneous factors and under stress which prevailed during the search operation in the premises of the assessee for long hours and out of confusion, the assessee made statement admitting the transactions as not genuine for buying peace and put an end to protracted search proceedings. This statement was contrary to factual evidence obtaining from the records of the assessee.

8.5. The first appellate authority analysed the factual position and also examined various case laws relied on by the Assessing Officer. On the issue of retraction, case laws relied on by the Assessing Officer were distinguished by the first appellate authority and, accordingly, held that they are not applicable to the facts of the assessee. The case laws relied by the Assessing Officer have been discussed by the first appellate authority as under:

A. Ramjas Nawal vs. CIT & Anr. 183 CTR 144 Raj.

In above case, the assessee admitted the export profit and certain gifts as undisclosed income in his statement recorded

u/s.132(4) and offered the income to tax. While filing return the assessee retracted from the statement and offered no income. In course of assessment proceedings, the Assessing Officer asked the assessee to produce evidence to prove that the claim regarding export income and genuineness of gifts. The assessee apparently failed to produce any documentary evidence either in course of search or before Assessing Officer to support his contention that the export profit/gifts are genuine. The assessee also failed to substantiate the allegation that the statement was taken on duress, a ground taken subsequent to admission. The Assessing Officer also came to a finding that these receipts were introduced to explain investments made during the period. Therefore, the Assessing Officer came to a conclusion that the claim of the assessee is not acceptable and his retraction is an afterthought. In this regard, the first appellate authority observed,

- i) that the assessee failed to produce any documentary evidence at the time of search regarding genuineness of export profit and NRI gift.
- ii) that no evidence was found in course of search to corroborate assessee's claim that he had earned export profit or received NRI gift.
- iii) that the assessee failed to produce any documentary evidence in course of assessment proceedings regarding genuineness of export profit and NRI gift.
- iv) that the assessee failed to corroborate the allegation that the statement was taken under duress.
- v) that the Assessing Officer made out a case de hors the statement against the assessee. It is not a case where the Assessing Officer solely relied on the admission at the time of search and came to a finding against the assessee without corroborative evidence.

The first appellate authority observed that all the above elements are absent in assessee's case for following reasons:

- i) Documentary evidence was found in course of search by way of contract notes, bills of brokers, etc., showing that various members of assessee's family were investing in shares.
- ii) The transactions in shares were well documented by way of various communication of brokers, passing of transactions through Demat accounts, payments through banking channels, etc., as explained in detail above.
- iii) All the supporting documents were produced before the Assessing Officer in course of assessment proceedings.
- iv) The Assessing Officer solely relied on the unsubstantiated statements of some brokers in framing the assessment and at the same time failed to produce the brokers for cross examination. Therefore, the Assessing Officer failed to discharge the burden which lay on him.
- v) The assessments are for most part based on surmises, suspicion and presumption.

In this background, the first appellate authority held that the admissions made by the assessee in course of search and subsequent non-disclosure of the income in the returns are well supported by evidence. It was not a case where in the absence of evidence or failure to produce such evidence, the issue of retraction needs to be judged. What eminently distinguishes the case of the assessee from the one relied on by the Assessing Officer is the ability of the assessee to adduce evidence in course of assessment proceedings and failure of the department to comply to all legal requirements in the process of evidence gathering and appreciating the same in its totality and in the correct perspective.

B. Green View Restaurant vs. ACIT (2003) 263 ITR 169 (Gau)

In this case relied on by the Assessing Officer, we find that the assessee in this case admitted income of Rs.4,00,000/- in the

statement recorded u/s.132(4) of the Act. Subsequently the admission was retracted and the income so admitted was not included in the return. It was alleged that the statement was recorded under force and coercion. Since the assessee failed to substantiate its assertion that the department coerced the assessee in making the admission, the Assessing Officer added the amount as admitted. This was upheld by the ITAT for similar reasons. Before the Hon'ble High Court, two issues were raised. (a) the plea of coercion (b) It was also argued that a mere statement cannot be sole basis of assessment made u/s.143(3). The concerned Hon'ble High Court dismissed the allegation of coercion as untenable. At the same time the Court remanded the matter for the reason that the order failed to reveal on what evidence the assessment was made as the same is the specific mandate of law while framing the assessment u/s.143(3). The first appellate authority observed that the ratio of the above case does not apply to facts of the present case for the following reasons:

- i) The assessee has not raised the plea of coercion.
- ii) There is no failure on the part of the assessee to adduce evidence. The contention of the assessee is that undue emphasis should not be placed on a statement recorded u/s.132(4) to frame an assessment u/s.143(3) and same cannot be sole basis of an assessment ignoring documentary evidence. In other words it was the contention of the assessee that in the light of overwhelming nature of material evidence found during the course of search and those placed in course of assessment proceedings, the Assessing Officer should have applied his mind to the issues pending before him in the correct perspective and done the assessment as required under law instead of basing the assessment on surmises and conjectures.

C. The Assessing Officer has relied on decision in the case of V.Kunhambu & Sons vs. CIT (1996) 219 ITR 235 Ker. In this

case the assessee declared undisclosed income on account of suppression of stock to the tune of Rs.3,00,000/- in the statement recorded u/s.132(4) of the Act. Subsequently, it raised the plea of coercion and intimidation and retracted from the admission. The assessment was completed adding the above amount as the assessee failed to substantiate his allegations. Same was upheld in appeal before the ITAT for similar reasons. Before the High Court similar plea was raised in addition to plea of competence of the Authorised Officer to record the statement. The Hon'ble concerned High Court did not uphold the arguments of the assessee for similar reasons as held by the ITAT. The first appellate authority in present case found the facts of the case are distinguishable so as not applicable to facts of assessee, for the following reasons:

- i) In the case of the assessee there was no allegation of use of coercion and intimidation.
- ii) The grievance of the assessee was that the Assessing Officer should have appreciated the entire evidence available in course of search and placed before him in course of assessment to come to a correct conclusion instead of laying undue emphasis on the admission.
- iii) It was worthwhile to point out that in the case before appellate forum, no attempt was made by the assessee to factually dislodge the admission by placing independent evidence and this influenced the appellate forum to decide that the statement could be a basis for assessment. In the case of the assessee, the documentary evidence produced by the assessee was overwhelming in nature and therefore the Assessing Officer should have reached the correct conclusion in appreciation of these facts in totality in an order passed u/s.153A r.w.s. 143(3).

D. The Assessing Officer's next reliance is Dr. S.C.Gupta vs. CIT (2000) 248 ITR 782 (All.). The facts in the said case are that in course of survey the assessee admitted certain income as

undisclosed but subsequently retracted from the same on the grounds of coercion. The assessee failed to prove the allegation. Further assessee did not go beyond mere allegation and failed to produce any evidence that he has not earned the admitted income. Under such circumstances the appellate forum decided against the assessee. The case of the assessee is different as there is no allegation of duress. The assessee produced voluminous documentary evidence before the Assessing Officer to prove that the transactions in shares are genuine but the Assessing Officer failed to consider the same in its totality and framed the assessment on mere surmise and conjecture. Similarly the first appellate authority distinguished case of *Saratchand Bholanath vs. CIT* (1994) 210 ITR 682 (MP) and *Mahesh B Shah vs. ACIT* (1999) 238 ITR 130 Ker, relied by the Assessing Officer.

8.6. In view of the above, the first appellate authority held that the issue of genuineness of the claim of LTCG and STCG of assessee group should be judged independently on the strength and merit of documentary and other third party contemporary evidences, irrespective of the admission/retraction of the assessee. This exercise was carried out by the first appellate authority in the subsequent part of the order.

9. Second issue addressed by first appellate authority is with regard to Long Term Capital Gains and genuineness thereof.

9.1. The assessees of this group have declared LTCG in their respective returns filed in regular course and also in the returns filed in response to notice u/s.153A of the Act. As stated above, the income arising from the LTCG was claimed as exempt u/s.10(38) of the Act wherever the same was in conformity with the said provisions by assessee. The details of the capital gains shown in the returns are given below:

Name of the Assessee	Assessment Year	Long Term Capital Gains	Short Term Capital Gains
Shantilal Peety	2002-2003	2,022,084	
	2003-2004	3,414,411	
	2004-2005	1,516,204	
	2005-2006	9,779,172	2,556,494
	2006-2007	7,927,974	
		-----	-----
		24,659,845	2,556,494
Surendra Peety	2002-2003	1,507,332	
	2003-2004	4,234,900	
	2004-2005	3,490,640	
	2005-2006	12,704,971	5,116,736
	2006-2007	13,920,086	1,178,132
		-----	-----
		35,857,929	6,294,868
Ravindra Peety	2003-2004	2,217,617	
	2004-2005	3,417,070	
	2005-2006	13,506,996	5,112,199
	2006-2007	14,121,867	1,187,900
		-----	-----
		33,263,550	6,300,099
Jitendra Peety	2003-2004	572,400	
	2004-2005	3,123,440	
	2005-2006	10,380,183	2,896,856
	2006-2007	16,277,690	1,205,873
		-----	-----
		30,353,713	4,102,729
Ravindra Peety HUF	2004-2005	1,241,154	
	2005-2006	10,010,858	4,366,231
	2006-2007	14,375,252	144,763
		-----	-----
		25,627,264	4,510,994
Jitendra Peety HUF	2004-2005	1,256,060	
	2005-2006	8,591,274	410,329
		-----	-----
		9,847,334	410,329
Varsha Peety	2003-2004	2,628,465	
	2004-2005	2,456,940	
	2005-2006	8,820,174	129,015
	2006-2007	22,819,621	252,827
		-----	-----
		36,725,200	381,842

Namrata Peety	2003-2004	2,628,194	
	2004-2005	2,462,010	
	2005-2006	8,859,802	129,015
	2006-2007	15,010,902	225,037
		-----	-----
		28,960,908	354,052
Rachna Peety	2003-2004	2,569,923	
	2004-2005	2,485,000	
	2005-2006	8,835,795	128,515
	2006-2007	7,915,540	251,399
		-----	-----
		21,806,258	379,914

Scrip and year-wise details

Asst Year	Name of Scrip	Name of Assessee	Amount of Investment
2001-2002	Bharat Heavy	Surendra Peety	214,266
		Shantilal Peety	212,198

			397,148
2001-2002	Corporation Bank	Shantilal Peety	169,989
2001-2002	Hindustan Zinc	Shantilal Peety	60,275
2001-2002	Hi Tech Drill	Shantilal Peety	118,845
		Surendra Peety	117,531

		Total	236,376
2001-2002	Karur Vysya	Shantilal Peety	245,647
		Surendra Peety	245,345

		Total	490,992
2001-2002	National Alu.	Shantilal Peety	190,054
		Surendra Peety	186,391

		Total	376,444
2001-2002	Saw Pipes	Shantilal Peety	120,349
		Surendra Peety	96,688

		Total	217,036
2001-2002	Tata Power	Shantilal Peety	119,463
		Surendra Peety	120,316

		Total	239,779
2001-2002	Voltas Limited	Surendra Peety	75,338
2002-2003	Aftek Information.	Shantilal Peety	93,006
2002-2003	Database Fin.	Shantilal Peety	24,150
		Surendra Peety	61,110
		Ravindra Peety	36,640

		Total	121,900
2002-2003	Geometrick Soft	Shantilal Peety	111,659
2002-2003	Bharat Electricals	Surendra Peety	184,950
		Jitendra Peety	102,900

		Total	287,850
2002-2003	Mastek Limited	Surendra Peety	51,184
		Jitendra Peety	92,748

		Total	143,932
2002-2003	Hinduja TMT	Shantilal Peety	129,795
2002-2003	KPIT Sys. Ltd.	Shantilal Peety	43,920
2002-2003	Jay Kay Dee	Varsha Peety	101,193
		Namrata Peety	97,153
		Rachna Peety	95,278

		Total	293,625
2003-2004	G-Tech Info	Surendra Peety	44,114
		Ravindra Peety	44,154
		Jitendra Peety	33,085
		Ravindra Peety HUF	11,028
		Jitendra Peety HUF	11,028
		Varsha Peety	22,057
		Namrata Peety	22,057
		Rachna Peety	22,057

		Total	209,580

2003-2004	Highland Industries	Shantilal Peety	28,809
		Surendra Peety	43,966
		Ravindra Peety	43,925
		Jitendra Peety	44,168
		Ravindra Peety HUF	14,271
		Jitendra Peety HUF	14,441
		Varsha Peety	28,857
		Namrata Peety	28,806
		Rachna Peety	28,834

		Total	276,076
2004-2005	Fast Track	Shantilal Peety	160,097
		Surendra Peety	274,025
		Ravindra Peety	277,385
		Jitendra Peety	252,845
		Ravindra Peety HUF	170,558
		Jitendra Peety HUF	169,680
		Varsha Peety	216,717
		Namrata Peety	215,447
		Rachna Peety	212,412

		Total	1,949,166
2005-2006	Prannet Industries	Shantilal Peety	146,280
		Surendra Peety	304,509
		Ravindra Peety	307,510
		Jitendra Peety	304,960
		Ravindra Peety HUF	137,524
		Varsha Peety	306,610
		Namrata Peety	297,259
		Rachna Peety	149,845

		Total	1,954,497

9.2. The shares purchased were claimed to be received in physical form in all the scrips except for few transactions of scrip, i.e., Fast Track Ent, received in electronic mode. All scrips purchased in AY 2001-2002 and scrips purchased in 2002-03 except for Database Finance were sold in physical form. For the other scrips the physical shares purchased were got demated and sales were

effected through stock exchange and payments were received through banking channel.

9.3. In the assessment the conclusion was drawn that the transactions in these scrips are not genuine and accordingly the full value of consideration received is liable as Income from other sources u/s. 69A of the Act. In case of all assessees the Assessing Officer has based his findings and inferences on the same reasoning. For coming to this conclusion, the Assessing Officer has placed reliance on the following evidences.

- i. Admission by Sri Surendra Shantllal Peety.
- ii. Statements of certain brokers, namely; Vishal Bhagwandas of Vljay Bhagwandas and Company, and Pratik Shah of DPS Shares and Securities through whom transactions of purchases and sales were effected who have given adverse statements against the assessees.
- iii. Veracity of purchases in physical form and, payments made towards purchase consideration.
- iv. Verification with Bombay and Saurashtra Stock exchanges regarding purchases.
- v. Investigation carried out by the BSE against some brokers.
- vi. Offer of Income by some assessees (not related to Peety group) in relation to transactions in Penny stocks.
- vii. Newspaper reports.
- viii. Background of certain companies whose shares were purchased and sold.
- ix. Case laws on human probability.'

9.4. The above evidences relied on in assessment order were broadly divided into two categories. The first category relates to admission by Shri Surendra Shantilal Peety, adverse statement of some brokers through whom transactions in purchase and sales were effected. The second category relates to circumstantial

evidences. In course of hearing before the first appellate authority from time to time, the assessee has filed their explanations on the observations made by the Assessing Officer in the order, which are being discussed below, as appreciated by the first appellate authority:

9.5. Assessee relied on submissions dated 04.03.2008. In this regard, the first appellate authority observed that while completing the assessment, the Assessing Officer has totally ignored the un rebuttable documentary evidence on record and those produced by assessee without any valid material to the contrary.

i) The Assessing Officer while framing the order relied on the statements recorded of various stock/share brokers. The statements of the brokers were recorded behind the back of the assessee which were not provided to the assessee till concluding stage of the proceedings, although for all Intents and purposes the Assessing Officer sought to utilize the same in the assessment. The assessee was quite apprehensive about the legality of the action on department's silence on the vital issue involving share transaction. This prompted the assessee to ask for the copies of the statements vide letter dated 19.12.2007 after paying the necessary copying charges. These statements were made available to the assessee on 25.12.2007. The opportunity for cross-examination was afforded to the assessee on 26-12-2007. The assessee was directed to be present at the office of Director of Investigation situated at Scindia House at Ballard Estate, Mumbai for cross-examination of Department's witnesses. The assessee along with his authorized representatives was present in Mumbai. However, the department failed to produce their witnesses for cross examination. Another opportunity was given on 31-12-2007 at the same premises but again there was failure on the part of the department to produce the witnesses. As the cross-examination could not be done because of failure of the

department to produce the Witnesses, an email was sent to the Assessing Officer immediately requesting him not to rely on the ex-parte statements recorded earlier while framing the order and determining the income of various members in the group. The order was originally dated 28-12-2007 which was over written as 31-12-2007 which indicates that affording the opportunity for cross-examination was an empty formality and only to technically comply to assessee's request to cross-examine the brokers which could never materialise. Therefore a decision reached much ahead of compliance to legal procedures/procedures would show that the conclusion was predetermined.

ii) The Xerox copy of the same were filed before the first appellate authority for perusal at page No.301 to 327 of the paper book. This proves that the statements given by them against the assesseees have no legal sanctity and the same cannot be used against the assessee.

iii) At that stage, the assessee contended that the Assessing Officer passed the order on 28.12.2007 as would be evident from assessment order. This was changed to 31.12.2007. The inferences against the assesseees for all intents and purposes were drawn on 28.12.2007 itself and ex parte evidence was made use of without following any legal procedure as mandated by law. There was no whisper in the said order as to the request of the assessee for cross-examination and results thereof which was most crucial aspect of the proceeding for fastening a liability against the assessee. This further shows that the authorities worked with a closed and predetermined mind to tax the assessee on evidences not recognized in law. Thus affording of the opportunity was a mere idle formality.

iv) The Assessing Officer has totally ignored various written submissions submitted by the assessee from time to time, regarding the entire share transactions, in reply to his various questionnaires or has not dealt with them properly. Written submissions were filed by the assessee on 24.08.2007, 07.09.2007, 20.10.2007, 08.11.2007 and 17.12.2007. The same were annexed before the first appellate authority in the paper book which has not been disputed by Revenue. In all these submissions an attempt was made to place all the evidences available with the assessee with regard to the genuineness of share transactions.

v) The Assessing Officer while framing the order selectively relied on some uncorroborated statements of some of the brokers which were obtained behind the back of the assessee. He failed to evaluate the transaction in shares in its entirety. The Assessing Officer relied only on ,some unsubstantiated allegations of some of the brokers. Some of the statements favourable to the assessee were ignored by him in toto.

9.6. The appellant further stated before the first appellate authority that it may be seen that all the statements referred to by the Assessing Officer in the assessment order are selective and therefore self-serving, to say the least, and, therefore, not admissible as evidence, inter alia, for the following reasons:

- i) All the deponents have affirmed that they were involved in share broking business.
- ii) All of them have admitted that they had transactions with the members of the Peety family.
- iii) They have not disputed the payment of purchase and sale consideration either through running settlement or by cheques/demand drafts.
- iv) At the same time, some of them namely Pratik Shah of DPS Shares and Securities have stated that they used to issue bogus

purchase bills of the shares of particular company(s) to parties seeking accommodation entry.

v) All of them have stated that they were involved in share broking business, they either did not maintain any books of accounts or; their books of accounts and relevant records are lost / misplaced or did not record in their books of account any record of the accommodation bills for the purchase of the shares of a particular company issued by them to parties seeking such accommodation.

9.7. In the statements recorded by the department one of the broker Sri Vishal Shah of Vijay Bhagwandas and Co. has cleverly stated that they maintained duplicate books for such accommodation and that their books have been lost, while Sri Pratik Shah of DPS has stated that parallel books of accounts were maintained. While stating so they were well aware of the falsity of their assertion that they would not be able to establish their contention with any documentary evidence. This proves beyond doubt that the statements given by them were in the capacity of interested witness rather than as an independent witness.

9.8. The appellant stated that as to how a quasi judicial authority can utilise such statements which are evasive and contradictory and not supported by any material evidence beyond oral evidence. For all purposes these are circumstantial in nature. Such statements should not be relied on for reaching reasonable conclusions. The moot question that arises is, can such statements be available as evidence to be used against another person as such.

9.9. As against the presumptions and assumptions of the Assessing Officer, the appellant contended that he has strong evidence that share transactions are genuine which is evident from following facts:

i) As mentioned earlier regular books of accounts are maintained by all the members of the Peety family right from day one.

- ii) The Purchases and Sales of Shares in question were duly accounted in the regular books of accounts for the year/s in which the purchases/sales were made.
- iii) The purchase and sale of the shares were evidenced by their having been shown in the Annual Accounts attached with the regular returns of income for the relevant year/s.
- iv) The purchase of the shares was further evidenced by :
 - a) The shares which were held as an investment are listed on recognised stock exchange.
 - b) All the purchases are supported by contract notes giving full details as to the name of the scrip, quantity, price at which purchased, total purchase consideration, brokerage, bills of brokers, etc. All the contract notes were found at the time of action u/s 132 and some of the contract notes were also seized by the raiding party.
 - c) The transactions are duly recorded in the books of the share brokers. Confirmations of the share brokers were also found at the time of action.
 - d) Actual delivery of shares were taken physically.
 - e) Shares so purchased are duly transferred in the name of the appellant in the records of respective companies. Company's intimation of transfer of shares is on record.
 - f) The Company has also duly transferred the shares in the name of the appellant from the previous owner and such transferred shares were received by the appellant.
 - g) Such shares duly transferred in the name of the appellant were dematerialised before the sale of the same. Here it should be noted that the date of dematerialisation cannot be considered as the date of acquisition of the said shares. There is no dispute with respect to genuinity of shares.
 - h) The payment consideration for the purchase of the shares was either through regular banking channels or through running account maintained with the concerned broker. The Assessing Officer has not objected to date of payment.

i) The shares purchased by the appellant have been sold during the year on different dates.

9.10. The Assessee justified the sale of shares as under:

i) The above referred shares were sold through the share brokers registered with SEBI and concerned Stock Exchanges.

ii) Securities Transaction Tax charged by the brokers on transactions effected after 01-10-2004 were duly paid and this fact was also mentioned in the Investment account filed during the regular course. Form No.10DB evidencing payment of Security Transaction Tax on transaction entered on Stock Exchange signed by the broker was placed on record before the first appellate authority.

iii) According to the assessee all the sales are supported by contract notes giving full details as to name of the scrip, quantity, price at which sold, total sale consideration, brokerage, settlement no., trade no., order no., bills of broker, all the contract notes were found at the time of action u/s 132 and some of the contract notes were also seized by the raiding party. The above bills show that the sale was effected through the electronic trading platform of recognized Stock Exchange.

iv) There was no dispute with regard to date of sales.

v) The sale consideration on sale of shares was received through regular bank channel in the form of account payee cheques/drafts and the same were credited in regular bank account maintained by the appellant. There is no dispute that the sale price is actually received by the appellant from brokers and was duly supported by their bills, etc. There is no dispute with regard to date of receipt of the sale proceeds.

vi) The transactions are duly recorded in the books of the share brokers. Brokers confirmation statement are submitted before the first appellate authority.

vii) Shares sold have been actually delivered and routed through demat accounts identifying the brokers to whom the delivery of shares are given.

viii) The debit entries in assessee's demat account evidencing delivery of the Shares.

ix) Sale of same could not have been possible without a purchase.

9.11. In the light of the above the appellant submitted that in view of the voluminous documentary evidence and material on record and there being no material in the possession of the Assessing Officer to rebut the said evidence, the transactions of purchase and sale of shares were conclusively proved by the appellant. The same should not have been washed away by the revenue by indulging in assumptions and arbitrary conclusions, and by selectively referring to some stray pieces of so-called evidence. Drawing inferences which on the face of it is not tenable. The Assessing Officer failed to provide adequate opportunity to the appellant for cross-examination of brokers whose statements were recorded behind the back of the appellant and were used to the detriment of the appellant. The Assessing Officer did not refer to the various replies filed by the assessee to Assessing Officer's queries. All these have rendered the assessment order to be bad in law and absolutely unjustified.

9.12. The assessee also filed para-wise comments on order of the Assessing Officer. The assessee submitted that there is no evidence on record which falsifies the transactions of Purchase / Sale of Shares of the Peety Group.

10. Stand of the assessee has been that search assessment should be evidence based. In this regard it is important to understand the provisions and method devised for search assessments as laid down in the Income Tax Act submitted by assessee before the first appellate authority.

i) A search assessment under section 153A should be evidence based. A search is authorized to unearth undisclosed assets or transactions resulting in income which are not recorded in the books of account of a person. Therefore, a search puts in

motion the process of assessment of the undisclosed income of a tax payer which is not disclosed to the department.

- ii) This is the reason why separate and special provisions have been made to complete search related assessments. Section 153A,B,C therefore deals with search assessments. Therefore the assessment should normally base on evidences found during the course of search.
- iii) Although a notice could be issued under section 153A calling for return on execution of a warrant, the same is an enabling provision to start the process of assessment without going through the requirements of law as contemplated in section 139/147.
- iv) It may be appreciated that "reason to believe" being essential stipulation in law to issue a warrant, any further satisfaction by the Assessing Officer, at the threshold stage has been dispensed with in the matter of issuance of a notice consequent to search. The same does not mean that mere issuance of a notice would give unfettered freedom to the Assessing Officer to complete the assessment when no evidence is discovered in search.
- v) An assessment proceeding consequent to search is not meant to unsettle the income shown in the regular return in the absence of evidence. It is not meant to make roving and fishing enquiry. This notice is meant to assess the undisclosed Income, if any discovered in course of search basing on the material found.
- vi) The legislature could never have intended to give unfettered freedom to unsettle the entire process of assessment of all the earlier years in the absence of evidence discovered in course of search. A search u/s. 132 is authorised to unearth undisclosed income which the assessee would not disclose in normal course. Section 153A which is the charging section in search cases should normally be read harmoniously in the context of the purpose for which a search is authorized. The Assessing Officer is expected to frame the assessment under

the new provisions basing the material found in course of search.

- vii) It was submitted that the requirements of section 147 for assessing the escaped/undisclosed income is equally applicable to a proceeding under section 153A, although for limited purpose, some of the procedural requirements of section 147 (issue of notice without recording reasons, sanction for issue of notice) have been dispensed with because of the non obstante clause in section 153A. This does not mean that all the settled principles with regard to reassessment of income have been given a go-bye under the new procedure. Where no incriminating material is found in course of search, the same cannot even justify assumption of normal jurisdiction under section 147. Therefore, the provisions of section 153A may be read down to justify an assessment where incriminating material is found to justify liability. As otherwise, the new process of assessment would militate against certain basic principles of law enunciated by the legislature particularly the stringent conditions and safeguards provided in assessing escaped income.

11. The objectives are kept in view of the context of framing assessments under new provisions – 153A, it would indicate that the basic structure of search assessments are retained and the new provisions aim at trust based, hassle free assessment. If these are the avowed objectives, the search related assessment should base on evidence found on search. In course of search, no such evidence was found indicating that the share transactions are bogus. Hence the assessment made by the Assessing Officer on surmises and presumptions is not sustainable.

11.1. The first appellate authority also analysed the facts of the case, the remand report and comments of assessee on remand report. The first appellate authority made scrip-wise, assessee-wise and year-wise analysis of facts and scanned the same in legal

propositions on the issue. The first appellate authority appreciated facts of the case with regard to role of concerned brokers. The first appellate authority has also examined the matter in light of approach adopted by the Assessing Officer for bringing the entire sale proceeds on share transactions to tax at maximum rate and applicability of section 69A of the Act for all years for all assessees. The first appellate authority also appreciated the alternate stand of the Assessing Officer whether assessees were investors or engaged in adventure of trade of share business. The first appellate authority found the approach of Assessing Officer a half hearted and tentative to the issues involved. He also addressed some significant aspects of assessment order vis-a-vis the returns filed in regular course and also after search. The first appellate authority summed up the transactions as under:

- i) That the contract notes were genuine and were acted upon and there is nothing in the submissions of the Assessing Officer except suspicion to assail the genuineness of the contract notes and all other subsequent action.
- ii) That since the contract notes were acted upon culminating in credit of these shares in the DEMAT account, after following successive steps and procedures, there is no room for any suspicion in respect of the income earned from the transaction in shares.
- iii) That the date of contract note is the date of holding of the shares as the same are followed by delivery of shares and period of holding should be reckoned from the date of contract note to work out long term capital gain or short term capital gain as applicable. This accords with the Board's Instruction on the subject (cited supra).
- iv) That the appellants had correctly declared the capital gain in the returns filed in regular course which were accepted by the department over a period of years. Therefore, the same should have been accepted as no incriminating material was found to prove to the contrary either during the course of search, post

search investigation or during the course of assessment proceedings. The very fact that there was no whisper in the assessment order framed after search about the genuineness of the transaction in shares goes to prove that the AO has accepted the same after due verification and application of his mind as to the genuineness of the transactions. The present attempt to find fault with the same on some flimsy and technical grounds unsupported by any sustainable evidence shows change of mind on the part of the AO, which is not permissible under law for taking any adverse view on the same issues. The present submissions are grossly in variance with the submissions in the assessment order.

- v) The AO's attempt to reactivate the stale and settled issues digressing from the main issues dealt with and considered in the assessment order is not permissible under law. Appellant has made elaborate submissions on the issues dealt with in the order.
- vi) For any assumption of the AO that income arising out of sale of share is bogus and therefore assessable under the head "other sources" has to be supported by cogent evidence and reasons. His order and subsequent submissions are bereft of any such finding and evidence.
- vii) That no assessment can be framed on suspicion, an issue settled by the Apex Court in a number of cases as suspicion cannot be treated as an evidence. It is seen, on the basis of exhaustive discussions supra that the final submissions of the AO could not disprove the transactions of the group. The appellants have rightly explained their investment and claimed Long Term Capital Gain/Short Term Capital Gain.

Having analysed all facts and circumstances, the first appellate authority granted relief to assessee. Same has been opposed before us.

12. The Ld. Departmental Representative submitted that the CIT(A) was not justified in holding that the contract notes, and

broker's bills etc., found and seized in the course of search action and proved to be bogus by the statement of the brokers who issued these broker notes do not amount to be incriminating material. The CIT(A) was not justified in holding that the SEBI's action against the broker and certain companies cannot be given any weightage as this does not relate to the case of the assessee even though same brokers have admitted before different Income tax authorities that they had issued bogus broker notes to assessee. The CIT(A) was not justified in holding that the broker notes issued by the brokers and the companies which are tainted as reliable evidence for holding the transaction as genuine while at the same time not accepting the statements given by the brokers as correct. The CIT(A) was also not justified in holding that the application of section 69A of the Act was not warranted even though it was proved that the assessee was in possession of money claimed to have been earned by long term and short term capital gain. The CIT(A) was also not justified in holding that the application of the issue of human probability as enunciated by Hon'ble Supreme Court in the case of Sumati Dayal Vs. CIT 214 ITR 801 (1995) and McDowell and Co. Ltd. Vs. CTO 154 ITR 148 (SC) is not applicable in the present case even though it is proved that this is a fit case for application of principles enunciated by the supreme court in above two cases. The Ld. Departmental Representative also relied on the decision of ITAT Pune Bench in the case of Surekha Bhagvatiprasad Mundada vs ITO and Ors., in ITA.No.1332/PN/2009 dated 16.02.2010, and in this background Ld. Departmental Representative also placed reliance on the decisions relied on by the Assessing Officer and submitted that the CIT(A) was not justified in holding that income as Long Term Capital Gains cannot be held as business income as adventure in the nature of trade. Accordingly, he vehemently submitted that the order of the Assessing Officer be restored and that of the CIT(A) be set aside.

13. On the other hand, Ld. Authorised Representative heavily relied on the order of the CIT(A). The assessee has also filed

detailed paper book having compilations of facts as well as case laws. He submitted that main issue involved is with regard to Long Term Capital Gains earned by the assessee in different years and declared the income as Long Term Capital Gains in respective year's returns. The Assessing Officer at his own will and assumption held the income declared by various members of the Peety group in different years as bogus and that the sale proceeds received on sale of shares by all assessees and for all the years as undisclosed income of the group and entire sale proceeds were assessed as unexplained cash credit u/s.69A of the Act. In this regard it was submitted that the sale proceeds of the shares have been recorded in the books of account maintained by the assessees. Same have been shown as Long Term Capital Gains/ Short Term Capital Gains as the case may be in their respective I.T. returns for all the years. The charging section 69A provides for addition of only unrecorded income, bullion, jewellery or other valuable articles where no satisfactory explanation is given by the assessee regarding its nature and source of acquisition. Assessees have recorded the sales in their books of account and explained its nature and source of acquisition. Such addition made by treating the sale proceeds of shares as unexplained income and unrecorded in books of account and adding u/s.69A of the Act is not justified. The Assessing Officer has erred in placing undue weightage to the admission made by the assessee u/s.132(4) of the Act totally ignoring assessee's repeated submissions that the statement was given in a confused state of mind and without having benefit of referring to various documents which conclusively proved the genuineness of the transactions. The Assessing Officer was not justified in making addition by treating the same as unexplained money u/s.69A of the Act. The Assessing Officer was not justified in observing that amount in question be taxed as business income/adventure in the nature of trade if at any point of time transactions were found to be genuine. The Assessing Officer was not justified in treating certain shares of Fast Tract Entertainment and Prannet Industries as not genuine.

13.1. Referring to the following decisions the Ld. Counsel for the assessee submitted that all the issues raised by the Assessing Officer and Ld. Departmental Representative have been dealt with and the order of the Ld. CIT(A) being in consonance with the judicial pronouncements, should be upheld.

- i) CIT vs. Smt.Jamnadevi Agrawal (2010) 328 ITR 656 (Bom.)
- ii) CIT vs. Arun Kumar Agarwal & Ors., 2012-TIOL-603-HC-JHARKHAND-IT
- iii) ITO vs. Ajay Shantilal Lalwani (2012) 145 TTJ 511
- iv) Shri Jafferli K Rattsonsey vs. DCIT 2012-TIOL-236-ITAT-MUM
- v) ITO vs. Mrs.Rasila N Gada & Ors. (ITAT, Mumbai.)
- vi) ACIT vs. Kamal Kumar S.Agrawal & Ors., 133 TTJ 818 (ITAT, Nagpur).
- vii) Tushar Tanna vs. CIT (2006) 284 ITR 453 (Bom)
- viii) Smt.Sushiladevi S. Agarwal [1994] 50 ITD 524 (Ahmedabad)
- ix) Maheshwari Industries 81 TTJ 914 (ITAT, Jodhpur, SMC Bench)
- x) CIT vs. Shri Ramdas Motor Transport [1999] 238 ITR 177 (AP)
- xi) Deepchand & Co. vs. ACIT [1995] 51 TTJ 421 (ITAT, Mumbai)
- xii) Pullangode Rubber Produce Co. Ltd. Vs. State of Kerala 91 ITR 18 (SC)
- xiii) CIT vs. Kishanlal Shivchand Rai 88 ITR 293 (P&H)
- xiv) R.P.Monga vs. DCIT (2004) 269 ITR(AT) 1 (Delhi)
- xv) DCIT vs. Premsons 130 TTJ 159
- xvi) CIT vs. Omprakash Jain 24 DTR 157 (Bom.)
- xvii) Mukesh R. Marolia vs. Addl. CIT, Range-15(2) (2006) 6 SOT 247 (Mum)
- xviii) P.S.Abdul Majeed (1994) 209 ITR 821 (Ker)
- xix) CIT vs. Shri Sandeep Shorewala(HUF) in ITA No. 2010 of 2009 (Mumbai High Court)
- xx) Man Mohan Sadani vs. CIT (2008) 304 ITR 52 (MP)
- xxi) Anup Kumar Jayaswal in ITA Nos.1678/Kol/2004 & 1679/Kol/2004 (ITAT, Kolkata)
- xxii) Shri Acchyalal Shaw ITA No.1977/KoI/2008 (ITAT, Kolkata)
- xxiii) ACIT vs. Claridges Investment & Finances (P) Ltd. (2007) 18 SOT 390 (Mum)

He also relied on various other decisions copies of which are filed in the paper books.

14. We have considered the rival submissions made by both the sides, perused the orders of the Assessing Officer and CIT(A) and the paper books filed on behalf of the assessee. We find, Respondent No.1 is an individual belonging to the Peety Group of Jalna. This group consists of Shri Shantilal Govardhandas Peety, his spouse Smt.Sharda S.Peety, their sons Shri Surendra S Peety, Ravindra S Peety and Jitendra S Peety, their daughters in law Smt.Varsha S Peety, Smt.Rachana R Peety and Smt. Namrata J Peety, HUF of Shri Ravindra Peety and HUF of Shri Jitendra Peety. The business concerns of the Peety group are SRJ Peety Steels Pvt. Ltd. wherein mild steel ingots/billets are manufactured, Dhanlakshmi Sponge Iron, a branch of SRJ Peety Steels (P) Ltd., where sponge iron is manufactured and Sri Om Rolling Mills Pvt. Ltd., wherein mild steel bars are manufactured.

14.1. Returns of income for A.Ys. 2002-03 to 2005-06 were filed u/s.139(1) of the Act accompanied by all requisite documents and were processed u/s.143(1) for each of the years under consideration. In the returns for each year, assessee had shown an income under the head Long Term Capital Gains pertaining to sale of shares held as investment which was accepted as such by the Department.

14.2. In respect of above, stand of the assessee has been that-

- a) Regular books of accounts are maintained by all the members of the Peety family right from the beginning. Copies of Balance Sheet, P & L A/c and computation of income for the assessment years under consideration are attached as pages 1 to 30 of Paper Book-I.
- b) The purchases and sales of shares in question were duly accounted for in the regular books of accounts for the years in which the purchases/sales were made.
- c) The purchase and sale of the shares were evidenced by their having been shown in the Annual Accounts attached with the regular returns of income for relevant year/years.

- d) The shares which were held as investment are listed on recognised stock exchanges.
- e) All purchases are supported by contract notes giving full details as to the name of the scrip, quantity, price at which purchased, total purchase consideration, brokerage, bills of brokers etc. All the contract notes were found at the time of the action u/s.132 and some of the contract notes were also seized by the raiding party.
- f) The transactions are duly recorded in the books of the share brokers. Confirmations of the share brokers were also found at the time of search action.
- g) Actual delivery of the shares were claimed to be taken physically.
- h) Shares so purchased are duly transferred in the name of the respondent in the records of respective companies. Company's intimation of transfer of shares has been placed on the record.
- i) Such transferred shares were received by the respondent and were demated before the sale of the same.
- j) The payment consideration for the purchase of the shares was either through regular banking channels or through running account maintained with the concerned broker. Copies of contract notes, purchase bills, broker ledger account, client ledger in the books of broker, day trading profit bills against which purchase consideration is set off, bank statements and Demat account are attached as pages 62-79, 204-224, 264-277, 293-306, 391-416, 442-459, 510-520 and 530-534 of the Paper Book-I.
- k) The shares purchased by the respondent have been sold in the respective assessment years on different dates.
- l) The above referred shares were sold through share brokers registered with SEBI and concerned Stock Exchanges.
- m) Securities Transaction Tax (STT) charged by the brokers on transactions effected after 1.10.2004 were duly paid and this fact was also mentioned in the investment account filed during the regular course. Form No.10DB evidencing payment of SST

on transaction entered on Stock Exchange signed by the broker is on record. Copies of the said form/confirmation has been placed at Pages 388, 389, 504-508 of the Paper Book-1

- n) All the sales were supported by contract notes giving full details as to name of the scrip, quantity, price at which sold, total sale consideration, brokerage, settlement no, trade no, order no, bills of brokers, etc. All the contract notes were found at the time of action u/s. 132 and some of the contract notes were also seized by the raiding party. The above bills reveal that the sale was effected through the electronic trading platform of recognized Stock Exchange. There is no dispute with regard to date of sales which is a matter of record.
- o) The sale consideration of the sale of shares is received through regular banking channels in the form of account payee cheques/drafts and the same were credited in regular bank account maintained by the assessee.
- p) The transactions were duly recorded in the books of the share brokers.
- q) Shares sold have been actually delivered and routed through Demat accounts identifying the brokers to whom the delivery of the shares were made.
- r) The debit entries in the Demat Account evidences the delivery of the shares.
- s) Copies of contract notes, Sales bills, broker account, client ledger in the books of broker, Bank statements, Demat Account and BSE Stock Price list are submitted as Pages 33-60, 174-202, 257-262, 278-291, 334-387, 419-440, 462-503 & 523-528 of the Paper Book-I.

14.3. All the above details indicate that the transactions in shares were well regulated and were through authorized brokers, routed through appropriate channels including banks and the assessee had recorded the sale proceeds of the shares in its books of accounts and had very well explained its nature and source of acquisition. The Long term capital gains on the sale of shares was

claimed as exempt u/s. 10(38) of the Act in the returns for A.Ys. 2005-06 and 2006-07 as per the amendment brought about by the Finance Act, 2004 w.e.f. 1.10.2004 and paid the tax on STCG earned in these two years. Further, assessee paid tax as per applicable rate on LTCG earned from A.Y. 2002-03 to 2004-05.

14.4. A search action u/s. 132 was carried out in the residential and business premises of the Peety Group on 17.03.2006. Assessee claimed that during the course of search, no incriminating evidences was found to draw any adverse conclusion in respect of the transactions in shares and the computation of income in respect thereof. Notices u/s. 153A were issued for all the years under consideration to all the assesseees of the group and the returns of income were filed on 29.08.2006 for each year. The table below indicates the details of the amount of income returned u/s.139, income shown in the return filed in compliance to the notice u/s.153A and the income assessed u/s. 153A/143(3) vide order dated 31.12.2007 for the A.Ys. 2000-01 to 2006-07 of Sri Surendra S Peety as detailed earlier also:

Assessment Year	Returned Income	Income returned u/s 153A	Income assessed u/s 153A/143(3)
2000-01	7,93,527	8,51,027	8,51,027
2001-02	17,51,567	17,77,367	17,77,367
2002-03	10,31,820 LTCG 15,07,332	10,62,520 LTCG 15,07,332	36,25,725
2003-04	1,25,854 LTCG 42,34,900	1,25,854 LTCG 42,34,900	46,58,190
2004-05	4,81,877 LTCG 34,90,640	4,96,524 LTCG 34,90,640	40,76,330
2005-06	-27,891 STCG 51,16,735 LTCG 19,27,680 Exempt LTCH 1,07,77,291	-27,891 STCG 51,16,735 LTCG 19,27,680 Exempt LTCH 1,07,77,291	1,96,24,860

2006-07	3,38,251 STCG 11,78,132 LTCG Exempt 1,39,20,086	5,38,251 STCG 11,78,132 LTCG Exempt 1,39,20,086	1,64,00,910
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14.5. Basically, the sale proceeds of the shares, held as investment, has been added to the income returned u/s.153A for each of the year under consideration by holding that these amounts represent the unexplained money of the company. It was contended that prior to the search, the returns of income for the A.Ys. 2002-03 to 2005-06 had already been filed u/s.139(1) of the Act accompanied by all the requisite documents and processing u/s.143(1) of the Act stood completed. During the course of search no incriminating materials were found relating to these years which could have been added back in the proceedings u/s.153A. The details regarding the transaction in shares for each of the year under consideration were very well placed before the Department in the computation of income of each year and no query was ever raised by the Department. There was nothing in the intimation u/s.143(1) to indicate any deficiency with regard to the assessee's claim of transaction in shares, the income shown and the evidences furnished in respect thereof.

14.6. The additions made u/s. 153A were based on the statement of some brokers which were recorded behind the back of the assessee without producing them before the assessee for cross examination despite specific request. Under peculiar circumstances assessee offered this amount in his statement recorded u/s. 132(4) though as such nothing incriminating was found in the course of search relating to assessment years under consideration. Normally no new addition should be made where all the facts were placed before the department during the course of regular assessments which stood completed on the date of initiation of action u/s. 132.

14.7. The details of Long Term Capital Gain, Short Term Capital Gain and Share Dealing Profits earned by the assessee for the various assessment years, are as under:

A.Y.	Sale Amount (added by the A.O.)	Purchase Amount	LTCG	STCG	Share Dealing profit
2002-03	25,63,206	10,55,874	15,07,332		15,13,568
2003-04	45,32,143	2,97,244	42,34,899		4,51,762
2004-05	35,78,717	88,079	34,90,638		8,61,384
2005-06	1,29,94,997 66,57,755	290,027 15,41,021	1,27,04,970	51,16,734	
2006-07	1,42,51,320 17,61,336	3,31,234 5,83,204	1,39,20,086	11,78,132	

14.8. Assessment made u/s. 153A in the present case show that the computation of income filed by the assessee in the original return as well as in the returns filed u/s. 153A showing the inclusion of the day trading profit in the total taxable income for the relevant year which has been accepted by the Assessing Officer. This establishes the source of investment in purchases of the relevant year whereas in the discussions on the issue of capital gain the Assessing Officer has expressed his reservation and has doubted these very transactions without justifying the same. This point will be dealt with in succeeding paras.

14.9. The Assessing Officer has added the entire sale proceeds of shares as undisclosed income of the assessee in assessment u/s.153A of the Act. When the Long Term Capital Gains and Short Term Capital Gains emanating from the said sale proceeds have been offered for taxation, the entire sale proceeds in our opinion cannot be added again to the returned income since the same is not justified on fact of it.

14.10. During the course of assessment, various notices and questionnaires were issued to the assessee. Same were replied. The details of the correspondences between the assessee and the Department are as under:

- a) In response to a notice u/s. 142(1) dated 10.08.2007, the assessee vide his reply dated 24.08.2007 gave the year-wise details of shares and deposits held by him for all the years under consideration. Copies of bank statements, Contract

notes/Broker notes, Purchase Bills of shares were also submitted. A copy of the letter dated 24.08.2007 is attached as Pages 1-3 of the Paper Book-II.

- b) In reply to notice dated 5.09.2007, details of purchase and sale of shares held on long term basis were submitted. A copy of the statement is attached as Pages 32, 61, 173, 203, 256, 277, 263, 292, 333, 390, 461 & 509 of the Paper Book-I.
- c) In reply to notice dated 15.10.2007, details of Long term Capital gains and Short Term Capital Gain earned by the assessee for the various assessment years was submitted. A copy of the statement of Long term Capital gains for each of the year is attached as Pages 31, 172, 255, 332 & 460 and of Short term Capital gains is attached as Pages 417 & 521 of the Paper Book-I.
- d) In reply to notice dated 2.11.2007, details of purchase and sale of shares held on short term basis were submitted. A copy of the statement is attached as Pages 418, 441, 522 & 529 of the Paper Book-I.
- e) The Demat statements of various banks were submitted on 10.12.2007.
- f) In reply to the notice dated 10.12.2007, the assessee submitted its reply on 17.12.2007 explaining his share transactions. A copy of the letter dated 17.12.2007 is attached as Pages 4-11 of the Paper Book-II.

14.11. The assessment was completed on 31.12.2007 after treating the share transactions disclosed in the regular return of income as bogus and as undisclosed income of the respondent u/s 69A of the Act. While completing the assessment, the Assessing Officer has totally ignored the documentary evidences placed on record and those produced by assessee without assigning any reason for same. While arriving at the above conclusion, the Assessing Officer mainly relied on the following evidences:

- a) The statement recorded u/s. 132(4) of Sri Surendra Peety on the date of the search offering the income shown in the regular return under the head LTCG as undisclosed income in various hands which was subsequently retracted at the time of filing the return.
- b) The statements recorded by the Department from certain brokers namely Vishal Bhagwandas of Vijay Bhagwandas & Co., Pratik Shah of DPS Shares and Securities after the date of search in which they had alleged that the transactions of purchases and sales of shares by various members of the Peety family do not represent the correct position.
- c) The alternative course adopted by the A.O. in treating the transactions as adventure in the nature of trade.

14.12. Aggrieved by the said order of the Assessing Officer, the assessee filed an appeal before the concerned CIT(A) on the following lines:

- a) That the AO. erred in placing undue weight on the admission made by the appellant under section 132(4) of the Income tax Act, 1961, totally ignoring the appellant's repeated submissions that the statements were made in a hurry, in a confused state of mind and without having the benefit of referring to the various documents which conclusively proved the genuineness of the transactions.
- b) That the A.O. was not justified in making the addition of Rs 25,63,205/-, Rs. 45,32,334/-, Rs. 35,79,802/-, Rs.1,29,94,996/- and Rs. 1,42,51,3201- for AY.'s 2002-03 to 2006-07 respectively by treating the sum as unexplained money under section 69A of the Income-tax Act.
- c) That the AO. was not justified in observing that the above sums would be taxed as business income/adventure in the nature of trade if at any point of time the transactions were found to be genuine.
- d) That the A.O. was not justified in treating the purchases of shares of Fast Track and Pranneta Industries Ltd. as not genuine.
- e) That the A.O. was not justified in rejecting the claim of the assessee in respect of capital gains.
- f) That the A.O. was not justified in charging interest under section 234A, 234B and 234C of the Income tax Act, 1961.
- g) That the A.O. was not justified in initiating penalty proceedings under section 271(1)(c) of the Income tax Act, 1961.

14.13. In appeal, the concerned CIT(A)-I, Nagpur, vide his Appellate Order dated 18.06.2008 allowed the appeal of the respondent for all the years under consideration, thus reversing the Assessing Officer's findings on the issue. The same has been agitated before us on behalf of the Revenue. The various issues have been argued before us. Each of the grounds taken by the Department and the respondents arguments in respect thereto are dealt as under:

14.13.1. Let us first analyse whether the provisions of section 153A of the Act has been properly applied to the facts of the present case. A search assessment u/s. 153A should be evidence based. A search is authorized to unearth undisclosed assets or transactions

resulting in income which are not recorded in the books of account of a person. Therefore, a search puts in motion the process of assessment of the undisclosed income of a tax payer which is not disclosed to the department. This is the reason why separate and special provisions have been made to complete search related assessments. An assessment u/s. 153A is not meant to unsettle the income shown in the regular return in the absence of evidence found as a result of search. It is not meant to make a roving and fishing enquiry. This notice is meant to assess the undisclosed income, if any, discovered in course of search based on the materials found.

14.13.2. When nothing incriminating is found in the course of search relating to any assessment years, the assessments for such years should not be disturbed as such. Items of regular assessment should not be added back in the proceedings u/s. 153A when no incriminating documents were found in respect of the disallowed amounts in the search proceedings. Assessments or reassessments made pursuant to notice u/s. 153A are not de novo assessments and therefore no new claim of deduction or allowance can be made by assessee where admittedly the regular assessments are shown as completed assessments on the date of initiation of action u/s. 132.

14.13.3. In the present case, the search was initiated on 17.03.2006 in the residential and business premises of SRJ Peety Group, Jalna covering all the individuals and HUFs of the group as well. Prior to the search, the returns of income for the Assessment years 2000-01 to 2005-06 had already been filed u/s. 139(1) of the Act, accompanied by requisite documents and processing u/s. 143(1) of the Act, stood completed. During the course of search no incriminating material were found relating to these years which could have been added back in the proceedings u/s. 153A. All the details regarding the Long Term Capital Gain earned on sale of shares by each of the assesseees for each of the years under

consideration were already available on record before concerned Revenue authorities which was accepted year after year along with the returns.

14.13.4. The statements recorded during the course of search could not be said to be evidence "found as a result of search", though the same may be "obtained during the search". In case an addition is intended to be made as the undisclosed income on the basis of such statements, it has to be first proved that these statements are relatable to "such evidence." The only evidence relied upon by the Assessing Officer is the statement of Sri Surendra S Peety recorded in the course of search. There is nothing on record to suggest that any incriminating document or material was discovered as a result of search. Above statement was made without having the benefit of referring to any document in certain state of mind and was made on the assertion of the department that they have evidence against the assessee by way of some statements of brokers which were not made available to the assessee. Therefore, the respondent could not be held liable on the basis of a mere statement which was made under exceptional circumstance as mentioned above. As such, the validity of such statement, which is in no manner related to any evidence or materials found in the course of search in assessee's premises, is in itself not justified.

14.13.5. Any statement made during the search in our opinion should be corroborated by documentary evidence and should not be devoid of the same. Simply the statement of Shri Surendra S. Peety without corroborating by any evidence or material found during the course of search cannot be the sole basis for making the addition in question.

14.13.6. It has been held in the following cases that a statement made on the date of the search under difficult circumstances, does not have much evidentiary value and mere confessional statement

without there being any documentary proof shall not be used as evidence against the person who made the statement:

- a) ITAT Ahmedabad Bench in the case of Smt.Sushiladevi S. Agarwal [1994] 50 ITD 524 (Ahmedabad) - it was held that all that is stated by any deponent on the search day should not be taken as truth, the whole truth and nothing but truth. Such statements undoubtedly have evidentiary value and credibility in law, but the same should be viewed with great caution, particularly when, the same is denied, varied or retracted or established by the defendant to have been obtained or given under mental stress, coercion, undue influence, or due to any other abnormal condition and circumstances when such statement was given.
- b) Hon'ble ITAT Jodpur SMC Bench, in Maheshwari Industries 81 TTJ 914 (ITAT, Jodhpur, SMC Bench), held that it was open to the assessee at the stage of assessment to establish that the surrender made by him at the time of search was under compulsion and not with free mind or that the addition is not warranted on the basis of available material..... Addition should be considered on merits rather on the basis of fact that the amount was surrendered by the assessee.
- c) Hon'ble Andhra Pradesh High Court in the case of CIT vs. Shri Ramdas Motor Transport [1999] 238 ITR 177 (AP) held that under the provisions of section 132(4) as it existed at the relevant time the question of examining any person by the authorised officer would arise only when he found such person to be in possession of any undisclosed money or books of account. But, in this case, it was admitted by the Revenue that on the dates of search, the Department was not able to find any unaccounted money, unaccounted bullion nor any other valuable articles or things, nor any unaccounted documents nor any such incriminating material either from the premises of the company or from the residential houses of the managing director and other directors. In such a case, when the managing director or any

other persons were not found to be in possession of any incriminating material, the question of examining them by the authorised officer during the course of search and recording any statement from them by invoking the powers under section 132(4) did not arise. The Explanation to section 132(4) permitting such examination came into effect only from April 1, 1989. Even if it were held that the statement of the managing director fell under the Explanation to section 132(4), the Tribunal had recorded a finding of fact to the effect that the statement of the managing director or that of other partners had no evidentiary value as they were not supported by any documentary proof. No question of law arose from the order of the Tribunal.

- d) Mumbai Bench in the case of Deepchand & Co. vs. ACIT [1995] 51 TTJ 421 held that statements recorded during course of search proceeding which continued for an unduly long period could not be considered to be free, fearless and voluntary. Additions cannot be sustained on the basis of statements of partners recorded at the time of prolonged search operation which were retracted later on.
- e) Hon'ble Supreme Court in the case of Pullangode Rubber Produce Co. Ltd. Vs. State of Kerala 91 ITR 18 (SC) held that an admission made by a person is relevant but not conclusive. It is always open to a person, who admitted a fact, to explain or clarify that what was stated was untrue.
- f) Even the Government had reason to believe that there is wide spread practice of obtaining confession from the search party in the course of search. In the Budget speech for 2003-04, the Finance Minister informed the Parliament that no confessional statement shall be obtained during search and seizure operation. (P 29 of 260 ITR AT 29). In this regard, the attention was drawn to Departmental Instruction issued by the CBDT to its officers in manner of acting on basis of so called confessional statements of assesseees made during the course of the search. The Board's letter issued from F.No.286/2/2003/IT(Inv) dated 11.03.2003 is extracted below:

"Instances have come to the notice of the Board where the assesses have claimed that they have been forced to confess the undisclosed income during course of search and seizure and survey. Such confession, if not based on credible evidence, are altered/retracted by the concerned assesses while filing returns of income. In such circumstances, confessions in the course of search and seizure and survey operations do not serve any useful purpose. It is therefore advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before income tax department. Similarly while recording statements during course of search and seizures and survey operations, no attempt should be made to obtain confession as to undisclosed income."

The above circular goes into the purpose and scope of search and emphasizes following aspects:

- a) The purpose of search is evidence gathering with regard to undisclosed income.
- b) It is not for obtaining confession as to the undisclosed income and adopting the same in the assessment without any corroborative evidence.
- c) The evidence should be in the realm of demonstrable evidence to sustain assessment.
- d) In the absence of corroborative evidence, there is a possibility of valid retraction in the return of income filed subsequent to search.
- e) It recognizes that a mere confession by an oral statement would not suffice unless there is enough evidence to corroborate such confession.

14.14. On the basis of the above factual discussion, not much reliance should be placed on statements made by the assessee during the course of search because no corresponding seized material was found in the course of search to justify the additions in question. The verbal statement of the assessee without any connection with the other materials found during the search cannot be considered to be materials found during the search. Relevant

income tax returns for the past years were filed prior to the search in the normal course suo moto disclosing the particulars of subject additions which stood accepted u/s 143(l) of the Act. Assessment as contemplated u/s 153A is not a de novo assessment and additions made therein, has to be necessarily restricted to undisclosed income unearthed during search. There is nothing on record to suggest that any corroborative evidence was found to justify the addition in question.

15. The next issue raised by the Revenue is regarding statement recorded u/s.132(4) of the Act. The Department alleges that the CIT(A) erred in deleting the addition made by the Assessing Officer by holding that the voluntary admission of the bogus Long Term Capital Gain by the assessee u/s. 132(4) of the Act, could not fasten any liability on the assessee as there was no incriminating material found during the course of search. During the course of search action, statement of Shri Surendra S. Peety was recorded u/s. 132(4) of the Act on 24.03.2006. He was confronted with the statement of certain brokers namely, Dhawal R. Shah, Director of Trimiti Investment and Financial Services Ltd., Pune, Milan R. Parikh, MD of Action Financial Services Pvt. Ltd. and Shri Vijay Bhagwandas of Vijay Bhagwandas & Co. In this regard it is pertinent to appreciate that while recording statement assessee did not have benefit of referring to the evidences available in their offices which were in the nature of documentary evidence like the contract notes, bills of the brokers for the purchase and sale of the alleged shares, bank statements etc., nor was he provided with the copies of the above statements.

15.1. The Assessing Officer laid undue emphasis on the admission made by Sri Surendra S. Peety during the course of the action u/s.132(4) pertaining to the genuineness of the share transaction. The Assessing Officer failed to appreciate the circumstances in which statements were obtained and totally ignored the respondents repeated submissions that the statements

was made peculiar circumstances in a particular state of mind and without having the benefit of referring to the various documents which conclusively proved the genuineness of the transactions. There is nothing on record to suggest that evidences were found in course of search in the office and residential premises of the group to establish that the transactions in shares were not genuine. Even there is no evidence to suggest flow of cash from the assessee to the brokers for indulging in such activities. On the contrary, there was evidence in the records of the department by way of returns and other supporting evidences to suggest that the transactions were genuine and matter of record at relevant point of time. On the face of these clinching evidences, the evidence in possession of the Assessing Officer relates to some oral statement of some brokers who alleged, without substantiating, that the purchases and sales were by way of accommodation entries. Thus, the statement given by the assessee should not bind him on the face of the overwhelming nature of evidences available in the record of the department and those produced by the assessee in the absence of any other adverse evidences produced by the department to supporting its stand. The measure of search is to unearth documents revealing concealed income and wealth. Since interrogation is not an object of the search, it is expected that a respondent is not put to pressure into making an admission and the statement should not go beyond what is discovered in course of search from the premises of the assessee. In the case of the assessee, there is nothing on record to suggest that any incriminating evidence was found in connection with the share transactions from the residential and office premises of the Peety group. The entire declaration pertaining to the shares transactions were arrived at only on the basis of the statements recorded of the brokers and the returns of incomes filed during the regular course. The circumstances in which third party statements were shown just on the date of search without making available copy of the same coupled with the mental condition of various members of assessee's family in course of prolonged search beyond normal hours would

suggest that the admission so made was not voluntary and has no evidentiary value.

15.2. It is well settled principle that an admission is not irrefutable evidence as to the truth of the matters stated therein. It is only a piece of evidence, the relevancy of which is required to be judged based on the material evidence and circumstances in which it is made. Although an admission may be a good evidence, but at the same time, it is not at all a conclusive evidence and the person making the admission can always retract the same if he can establish that the admission was made in abnormal circumstances or that the contents of the admission are not borne out by facts and materials available. In the instant case, it is evident from the facts as discussed above that the so-called disclosure of Shri Surendra Peety was extracted under exceptional circumstances based on helpless situation in which he was put at the time of making the disclosure and furthermore, it has not even been substantiated by linking it up with any proper materials found during the search. This unsubstantiated disclosure should not be acted upon for making addition in question.

15.3. In the statement recorded u/s. 132(4), the assessee Shri Surendra S Peety had stated that all the members of the family would come out with the correct position of the income from the shares investment/business after evaluating the evidences. They, however, after evaluating the evidence available with them and after obtaining the missing papers from the brokers, filed their returns in response to the notice u/s. 153A without including the income so offered in the course of search. Subsequently, on a statement recorded of assessee Shri Surendra S Peety u/s. 131 of the Act on 14.12.2007 as to why his acceptance of undisclosed income is not reflected in the return of income filed in pursuance to the notice u/s.153A, he stated that the same was made under pressure as he did not have access to the papers and documents lying at his factory premises to verify his claim.

15.3.1. Regarding retraction, Hon'ble Punjab and Haryana High Court in the case of Kishanlal Shivchand Rai 88 ITR 293 (P&H), has held that it is an established principle of law that a party is entitled to show and prove that an admission made by him previously was in fact not correct and true. It was incumbent upon the Inspecting Assistant Commissioner to have afforded the assessee full opportunity to prove his assertions. The Inspecting Assistant Commissioner proceeded to impose penalty solely on the basis of the fact that the amounts were surrendered by the assessee at the time of the assessment. Even treating the surrender as an admission of the concealment of undisclosed income, the Inspecting Assistant Commissioner could not deny the assessee its right to prove that the fact of surrender was not such admission and that the so-called admission was in fact wrong and the surrender was made solely to avoid botheration as stated by the assessee. Similar view has been taken in Pullangode Rubber Produce Co. Ltd. (supra) and Deepchand & Co. (supra). We also find that ITAT Mumbai Bench in Pushpa Vihar vs. ACIT (1994) 48 TTJ 389 (Bom), held that in surrounding circumstances, it cannot be concluded that what the assessee said originally was sacrosanct and the assessee is not at a liberty to correct the error, originally committed by giving a different version of truth. In the absence of any other material except the original admission there is nothing to support the addition. In the present case also the alleged statement was retracted by Shri Surendra S Peety. As regards retraction, the principle is that it should be retracted before the concerned authority decides the matter. In other words, the respondent should not place the authorities in such a position so as to thwart the process of investigation. In the case of the assessee, the retraction was well evident from the returns filed in response to notice u/s. 153A and respondent's letters addressed to the department. This gave the authorities sufficient time to collect corroborative evidence which they have failed to do as explained above.

15.4. The retraction can be made before filing the return is accepted in principle in the case of R.P.Monga vs DCIT (2004) 269 ITR(AT) 1 (Delhi). According to us the first appellate authority in its order dated 18.06.2008 has rightly accepted the retraction of the assessee and has stated as follows on page 15 in para 5.3 as under:

"I have carefully studied and analyzed factual position as stated above which cannot be disputed and is a matter of record; I have also examined various case laws, relied on by the AO, on the issue of admission / retraction. On the issue of retraction, the AO relied on the following case laws all of which are distinguishable on facts and therefore, not applicable to the case of the respondent ...

Therefore, it is held that the issue of genuineness of claim of LTCG & STCG of the respondent group shall be judged independently on the strength and merit of documentary and other third party contemporaneous evidences, irrespective of the admission / retraction of the assessee ..."

This factual reasoned finding of first appellate authority need no interference from our side.

16. Regarding statement of Broker we find that the Assessing Officer has heavily relied on the statements of various stock/share brokers which were recorded behind the back of the respondent and was not provided to assessee till the concluding stage of the proceeding. A request was made by the assessee vide letter dated 19.12.2007 and these statements were made available to the assessee on 25.12.2007 which happened to be a public holiday. The opportunity for cross examination was afforded to the respondent on 26.12.2007 and assessee was directed to be present at the office of the Director of Investigation at Scindia House, Ballard Estate, Bombay. Despite all inconveniences caused due to constraints of time, the respondent along with his Authorized Representatives were present but the department failed to produce their witnesses. Another opportunity was given on 31.12.2007 at the same premises and yet again the department failed to produce the witnesses. Thereafter an e-mail was sent to the concern Assessing Officer requesting him not to rely on these ex-parte statements while

framing the order and determining the income of various members in the group.

16.1 Thus affording of opportunity for cross examination was an empty formality and only to technically comply with the respondent's request which could never materialize. However, there was no whisper in the said order as to the request of the assessee for cross examination and its results which was crucial for fastening a liability against the assessee. It reveals that the authorities worked with predetermined mind on the issue. Non providing of due opportunity of hearing was denied in this case which is in violation of principles of natural justice.

16.2. It is important that statements given by a third party should be relied vis-a-vis evidence available on record. A person may make any statement but there should be evidence available to establish the same. Assessee is in no way concerned with what a person has stated as long as his books and records are in order and since the person making the statement did not come forward to confront him, he is not in a position to decide in what context the statements have been made.

16.3. The Assessing Officer has acted solely on the statement of a third party without conducting any valid inquiry of its own to counter the statements made. The Assessing Officer has not brought on record any evidence to falsify the claim of the assessee or that the share transactions were bogus. The Assessing Officer has acted wholly on the alleged statement of a third person behind the back of the assessee without bringing on record any evidence in support of such suspicion and without affording any opportunity to cross-examine him. Such statement cannot be held as reliable evidence for making additions/disallowances. Hon'ble Bombay High Court in case of CIT vs. Omprakash Jain reported in 24 DTR 157 observed that the test of evidentiary value of the oral evidence has to be borne in mind and documentary evidence if genuine must

prevail over the oral statement. In the case of the assessee, the Department has disbelieved the transaction only on the basis of the oral statement of the broker without testing its correctness. Further the Assessing Officer has not placed any material on record to question the genuineness of the documentary evidences furnished on behalf of the assessee. The ITAT, Mumbai Bench in the case of DCIT vs. Premsons reported in 130 TTJ 159 held that the statement recorded had no evidentiary value until it has some corroborative material/evidence. The relevant extract of the same is reproduced as under:

“Going by the verdict of the High Courts and the position reaffirmed by the CBDT through its circular, it becomes abundantly clear that no addition can be made or sustained simply on the basis of statement recorded at the time of survey/search. In order to make an addition on the basis of surrender during search or survey, it is sine qua non that there should be some other material to correlate the undisclosed income with such statement. Adverting to the facts of the instant case, only to the extent of Rs.21.14 lakhs there is a material to co-relate with the admission, representing the excess stock found at the time of survey. Evidently the surrender made by the assessee at the time of survey to that extent and offered for taxation in the return of income is in order. But insofar as the amount in dispute to the tune of Rs. 28. 85 lakhs is concerned, such surrender was specifically made "towards any other discrepancy". There is no mention in the assessment order of any such discrepancy found as a result of survey throwing light on the undisclosed income. Even the Departmental Representative could not point out any material showing the existence of undisclosed income earned by the assessee which was unearthed during the course of survey. There is nothing on record which could correlate such additional income offered by the assessee during the course of survey with any other discrepancy. There is no basis for sustaining the addition in question.”

We also find that the ITAT Mumbai Bench in the case of Mukesh R. Marolia vs. Addl. CIT, Range-15(2) (2006) 6 SOT 247 (Mum), held that an assessment has to be completed, on the basis of records and material available before the assessing authority. Personal knowledge and excitement on events should not lead the Assessing Officer to a state of affairs where salient evidences are overlooked. In case the testimony of a witness, the assessee is required to be

afforded an opportunity to cross examine him failing which the testimony cannot be utilized against the assessee. If this procedure is not followed, then there would be a case of denial of natural justice to the assessee as held by Hon'ble Delhi High Court in CIT vs. SMC Share Brokers Ltd. (2007) 288 ITR 345 (Del.). Similar view has been taken in Bangodaya Cotton Mills Ltd. vs. CIT (2009) 21 DTR 200 (Cal.) and Eastern Commercial Enterprise (1994) 210 ITR 103 (Cal).

16.4. We find that Hon'ble Kerala High Court in case of P.S.Abdul Majeed (1994) 209 ITR 821 (Ker) observed as under:

"He had also prayed for an opportunity to cross-examine the auctioneers. When such a request was made it was incumbent on the officer to afford opportunity to the assessee to cross examine the authors of those books. The petitioner had been denied the reasonable opportunity which was due in law, in relation to the assessment, and that was sufficient to vitiate the order. The order of reassessment was not valid and was liable to be quashed."

16.5. We find Hon'ble Bombay High Court in the case of C.I.T. vs. Shri Sandeep Shorewala(HUF) in ITA No. 2010 of 2009, dismissed the appeal of the Revenue vide its order dated 18.09.2009 and upheld the order of the Tribunal by holding as under:

"Ld. CIT(A) has relied on the decision of this Tribunal in the case of Shri Mukesh R Marolia. The concerned broker there was M/s.Richmond Services Pvt. Ltd. represented by its director, which is also one among the two brokers through which the assessee had allegedly dealt with. Assessee had also filed an affidavit whereby Shri Mukesh Choksi had, against the earlier statements given by him, confirmed the transactions. It is also seen that the assessee was not given a chance to examine Shri Mukesh Choksi despite request. Hon'ble Supreme Court has in the case of Mehta Parikh vs. CIT (30 ITR 181) laid down the law that where a person who has given an affidavit was not cross examined, it would not be open to challenge the correctness of the statements therein. Here, Shri Mukesh Choksi was not allowed to be cross examined despite assessee's request nor was he cross examined by the A.O. vis-a-vis the affidavit. Therefore, in our opinion, the A.O. could not have brushed aside such affidavit. Hence no mistake can be

seen in the order of the Ld CIT(A) in following the decision of this Tribunal in the case of Mukesh R Marolia(supra)."

16.6. In the case before us, the transactions in question routed through authorized channel, carried out at prevalent market rates and supported by proper bills and documents. The assessee has discharged the onus cast upon him by furnishing before the Assessing Officer all necessary documents, being bills and contract notes, in support of the purchases and sales made by him. The Assessing Officer is supposed to negate the documentary evidence produced in favour of the transactions of purchase and sale of shares which has not been done by the Assessing Officer. The Assessing Officer is not supposed to wash away on assumptions and arbitrary conclusions. As stated above, the assessee group had purchased the alleged scrips on which LTCG has been claimed from only three brokers, namely, (1) Trimiti Investments and Financial Services, Pune, (2) DPS Shares and Securities, Mumbai, (3) M/s.VRP Financial Services Pvt. Ltd. In response to notice dated 05.09.2007, details of purchase and sale of shares held on long term basis were submitted. Same is attached at pages 32, 61, 173, 203, 256, 277, 263, 292, 333, 390, 461 & 509 of the Paper Book-I which is evident from the fact that majority of the purchases of the members of the Peety family were from Trimiti Investments and Financial Services. Purchase of scrips of Prannet Industries and part purchases of Fast Track Entertainment are from DPS Shares and Securities.

16.7. The Assessing Officer failed to evaluate the transaction in shares in its entirety and the evidences available in respect thereof and has relied primarily on some unsubstantiated allegations of some brokers while most of the statements favourable to the assessee were ignored by the Assessing Officer which is not justified. All the deponents have affirmed that they were involved in share broking business and that they either did not maintain any books of accounts or their books of accounts and relevant records were lost or misplaced or did not record in their books of account

any record of the accommodation bills for the purchase of the shares of a particular company issued by them to parties seeking such accommodation. They also confirmed of having had transactions with the members of the Peety family. They have also not disputed the payment of purchase and sale consideration either through running settlement or by cheques/demand drafts.

16.8. Further Action Financial Services has confirmed that the members of the Peety family are his registered clients and that he has done genuine sales on behalf of them. Since no purchases were made from the Action Financial Services, his contention that he has not purchased shares for the Peety Family has not been disputed by the assessee. DPS Shares and Securities confirmed that they have done genuine sales of scrips of Fast Track, Prannet Industries on behalf of Peety Family. The Assessing Officer himself has accepted that the brokers have confirmed that the sale of the impugned shares were undertaken by them but has gone on to draw a conclusion that since there were no purchases, the sale of the shares made through them were not genuine. Any document has to be taken as a whole and the Assessing Officer should not pick and choose those parts of the statements which suits him and totally reject those parts of the same statements which are in support of the assessee. Therefore, either the Assessing Officer should not rely on the statements at all or if he uses these statements as evidence against the assessee then he should read it as a whole and also accept those parts of the statements which support the assessee. One of the most significant evidence which has been conveniently ignored in the assessment order relates to transaction with Trimiti Investment from whom bulk of shares pertaining to G Tech Info, Highland Industries, Fast Track Entertainment and Database Finance were purchased. Prior to search, statement of Dhaval Shah and during the course of post search enquiries, the statement of its Director Shri Sourin Mehta were recorded by the department and its books were a subject matter of scrutiny. They have confirmed all the transactions with the Peety Family and have also confirmed that

the payments for these purchases were made by DD/Cheques or settled against day Trading Profits also done through them. Shri Sourin Mehta has unequivocally stated that the transactions with the Peety family are genuine. This shows the assertion of the assessee. For ready reference relevant portion of his statement dated 28.11.2007 is reproduced below:

Q. No.5: Please mention whether you have traded the shares of Fast Track Entertainment, High land Industries, data base Fin and G Tech Info Trading in last 6 years.

A. I have purchased shares from different brokers of Mumbai for my clients and sold to them.

Q.10. Have you traded the shares mentioned in Q.No.5 with Peety family of Jalna in last 6 years.

A. Yes I had sold shares in physical format to them. The payment was received from them through cheques as well as speculative profit earned by them.

Q.No.11: During the enquiry of the broker like Vijay Bhagwandas, DPS, T.H.Vakil etc., they stated before officials of IT Dept. that the transaction in these share actually did not happen. They had issued bogus purchase bills to the needy people without any real transaction & these bills were back dated you have stated that you have purchased these shares from the above mentioned brokers. Considering this why it shall not be assumed that you had also issued bogus purchase bill to Peety family of Jalna for these shares.

A. I had purchased the share from broker at Mumbai & sold to Peety family.

Q.12. Do you mean to say that you had purchased these shares as per the bills issued to you & also sale was made on the date to Peety family as per your bills. The copy of bills regarding shares of the said company to Peety family by your company I am showing you, please examine & confirm whether these bills were issued on the same date?

A. Yes, I purchased these share from broker & sold to Peety family.

Further Statement dated 30.11.07

Q.7. As mentioned by you in your statement on 28.11.07 that you have purchased these shares in physical format from T.H.Vakil, Vijay Bhagwandas, DPS for Peety family. It was

found that all these purchase bills issued by the brokers were bogus, this was also communicated to you on 28.11.07. These brokers of Bombay admitted that these Bills are backdated i.e. these had been prepared just before the sale of these shares through D-mat? As you were sub-broker & had arranged these shares for Peety family from these brokers. Hence why it shall not be presumed that the bills issued by your concern Trimiti Inv. & Fin. Services Pvt. Ltd., cannot be treated as back dated & bogus.

A. Our concern has not issued bogus bills.

16.9. The extract of the above statement shows that the transactions with Trimiti Investment were not bogus. Therefore, any documents with this concern should not be suspected unless there is anything otherwise on record. Moreover, during the course of assessment proceeding, the statement of Shri Sourin Mehta was before the Assessing Officer which was accepted as no adverse inference has been drawn with regard to this transaction in the assessment order. As stated above M/s.Trimiti Investments through whom majority of transactions of purchases were effected has stated that the transactions are genuine. There is no discussion about the statement of this broker in the assessment order. Thus, the selective use of evidence by the Assessing Officer is not justified.

16.10. The assessee is not concerned with the modus operandi of the broker's trading with its other clients. As long as he had purchased and sold the shares of the assessee through known and accepted procedure, the broker's misdealing with others should not be a criteria to suspect the appellant's genuine share transactions and capital gain thereupon. If these brokers were suspended by SEBI subsequent to the assessee's company's dealing with them, it is the matter between SEBI and the broker and the assessee company is not concerned in any way unless action is based on transactions including assessee's transactions. There is nothing on record to suggest that transactions with assessee are also basis for SEBI's action against alleged brokers. The Hon'ble Kolkata High Court in the case of CIT vs. Korlay Trading Co. Ltd. (1998) 232 ITR 820 (Kol) held that once the assessee has furnished the name of the

company, number of shares purchased, date of sale, amount of purchase money, amount of sale money, etc., the assessee had discharged its initial burden and if the broker did not maintain any accounts, the transaction could not be doubted for no fault of the assessee.

16.10.1. The Kolkata Bench of the ITAT in the case of Anup Kumar Jayaswal in ITA Nos.1678/Kol/2004 & 1679/Kol/2004 for A.Y. 2001-02, has decided the case wherein the assessee had acquired shares of M/s. Coronet Industries Ltd., through a broker M/s. Jajodia & Co. Subsequently the said shares were sold and exemption u/s. 54F was sought from long term capital gain earned on the transaction. The purchase and sale of shares were duly supported by bills and contract notes. Further, the share broker accepted having undertaken the sale and purchase transaction on behalf of the assessee. The share issuing company i.e., Coronet Industries Ltd., however stated that as per their records, no shares were transferred in the name of the assessee and further stated that the folio No. written on the share scrip did not exist. The Hon'ble Kolkata Bench of the ITAT held that the fact remains that at no point of time the assessee had an opportunity to interact with the share issuing company as the assessee had not purchased shares directly from the company and that the alleged denial by the shares issuing company about the transfer of the shares is better known to them and not to the assessee. As far as the assessee is concerned, the transaction of purchase and sale of 20,000 shares through the registered broker is proved by documentary evidence filed on record. The payments of sale proceeds of 20,000 shares were received by the assessee by account payee cheques. It was found that the transaction has been entered into through a registered broker at prevalent market price and was supported by documentary evidence. The transaction of sale and purchase of shares had been confirmed by the share broker both in his statement recorded u/s.131 of the Act and also by an affidavit filed before the Assessing Officer. In these facts, the Tribunal held that

no case of addition u/s.68 of the Act is made by Revenue against the assessee and the fact of purchase and sale is proved by documentary evidence filed before Assessing Officer.

16.11. In case of Shri Acchyalal Shaw ITA No.1977/KoI/2008, the ITAT Kolkata Bench has held as under:

"In our considered opinion, suspicion cannot replace the real evidential document. Simply by arguing it to be a case of manipulation the Revenue is not supposed to succeed in their contention without proper evidence. Holding this view of the matter on the factual matrix and respectfully following the case laws cited above, we allow the assessee's second appeal."

16.12. Again in the case of ACIT vs. Claridges Investment & Finances (P) Ltd. (2007) 18 SOT 390 (Mum), ITAT held as under:

"As the matter stands we find that the assessee's transactions are supported by the movement of shares as reflected in demat account, movement of money as reflected in the bank account, entries in the books of accounts of the assessee, prevalent market quotations of the CSE, contract notes and delivery bills issued by the Kolkata brokers and their statements in response to the inquiries made by the AO. Last but not the least the assessee has shown net profit of Rs. 16.16 crores. As against theses the case of Revenue is that certain material information was not given in the contract note and columns in that respect were left blank. Copy of Form B was in filed in CSE. For these reasons it is not verifiable as to whether the trades in question were done through the trading system of the exchange or not. The answer of the assessee to these deficiencies and irregularities is that he could not be held responsible for the same. It was not the assessee but the three Kolkata brokers who were members of the CSE The AO does not have support from the Special auditors, CSE or any other quarter to that effect whereas the assessee has relied upon cogent evidence and material. We hold that the AO has acted upon grossly inadequate materials and his conclusions are in the realm of suspicion, conjectures and surmises ..."

17. In view of the above legal decisions, it can be inferred that the transactions of sale and purchase undertaken by the assessee should not be rejected simply on the basis of some uncorroborated statements of a few of the brokers without producing any evidence to prove the same. No addition should be made in an assessment

u/s.153A without any material being found during search but simply on presumptions. This is a case in which there is no evidence against the respondent except some vague, confusing, contradictory, self serving unsubstantiated statement of witnesses from which the Assessing Officer has inferred the conclusion against the assessee. Hon'ble Supreme Court In Dhakeshwari Cotton Mills Ltd. vs. CIT (1954) 261TR 775 (SC), has held that the Income Tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence and material at all. There must be something more than suspicion to support the assessment. It was held that a suspicion however strong may not take the place of proof. Therefore the assessment made by the Assessing Officer which is predominantly influenced by uncorroborated evidence deserves to be set aside. In case before us as against the evidence and material available with the assessee to prove the transactions of Long Term Capital Gain, the Assessing Officer tried to analyze the transactions of only two scrips namely Fast Track Entertainment (paras 13 to 24 of the assessment order) and Prannet Industries (paras 26 to 28) and concluded that the transactions of all scrips of all the assessees and for all the years were not genuine which is not justified.

18. A search assessment u/s. 153A should be evidence based. A search is authorized to unearth undisclosed assets or transactions resulting in income which are not recorded in the books of account of a person. Therefore, a search puts in motion the process of assessment of the undisclosed income of a tax payer which is not disclosed to the department. In other words, items of regular assessment normally should not form a part of a search assessment u/s. 153A unless there is otherwise contrary on the record. Vide its submission dated 04.03.2008/ 24.03.2008 placed at pages 69 to 82 of the Paper book-II, the assessee gave the details of all the brokers, the shares purchased or sold through them and the Long Term Capital Gains or Short Term Capital Gains as the case may be earned in respect thereof. The sale proceeds of shares have been

recorded in the books of accounts maintained by the assessee and capital gain arising on the same has been shown for all the years in their respective Income Tax Returns on which appropriate taxes were also paid. The charging section 69A provides for addition of unrecorded income and wealth when either no explanation is given by the assessee or the explanation given is not up to the satisfaction of the Assessing Officer. In the present case, the assessee has explained its nature and source of acquisition and has sold the shares through known registered brokers, received money from them through appropriate banking channels and received confirmations from them as well. Thus, the addition made by treating the sale proceeds of shares as unexplained income u/s.69A of the Act is not justified. Agreeing with the contention of the assessee, the CIT(A) vide its appellate order dated 18.06.2008, has rightly stated in para 18.1 and 18.2 as under (page 74 & 75 of the order):

"18.1. Thus there is an inherent contradiction in the impugned assessments as far as the applicability of Section 69A is concerned. A plain and simple reading of Section 69A makes it abundantly clear that the provisions of this section cannot be applied in a case where the money, bullion or jewellery or any other receipt has already been recorded by the assessee in his/her books of accounts. The fact of capital gain - whether long or short is already recorded by the assessee and the same does not fall in the category of items described in Section 69A. Picking up the entire sale proceeds on account of share transactions separately and adding it u/s 69A would mean that the assessee was found in possession of this amount which was not disclosed in his books of accounts; during search in assessee's premises and in the subsequent proceedings as well, no such undisclosed receipts have been found. Thus, applicability of Section 69A becomes null and void, ab-initio. This also implies that assessee's claim with regard to capital gain in each year remains unaltered as per the computation filed along with the return.

18.2. Moreover, the computation of income filed by the assessee in the original return as well as in the returns filed u/s 153A shows that the day trading profit has been included in the total taxable income for the relevant year. The same has been accepted by the AO while making his own computation in the impugned orders. This clearly establishes the source of investment in purchases of the relevant year as claimed by the

assessee whereas in the discussions on the issue of capital gain the AO has expressed his reservation about the original date of purchase and has doubted these very transactions which are financed through day trading profit only, as stated above day trading profits are declared in each year when the same accrued to the assessee. In this manner the AO blows hot and cold at the same time which cannot be accepted."

Picking up the entire sale proceeds on account of share transactions separately and adding it u/s.69A would establish that the assessee was found in possession of this amount which was not disclosed in his books of account while the fact remains that the capital gains, short term as well as long term, has already been recorded by the assessee in its books of accounts. Thus the provisions of section 69A of the Act has not been judicially applied.

18.1. As stated above, the computation of income filed by the assessee in the original return as well as in the returns filed u/s.153A reveals that the day trading profit has been included in the total taxable income for the assessment years under consideration. This day trading profit has been accepted by the Assessing Officer year after year and no reservation has ever been made by the Assessing Officer regarding this profit. This day trading profit clearly establishes the source of purchases of investments of each of the relevant year as claimed by the assessee. In discussions on the issue of capital gain the Assessing Officer has expressed his reservation about the same and has doubted these very transactions which are financed through day trading profit only. In this manner the Assessing Officer takes stand which is contrary to the material on record. All the documents supporting the purchase and sales of shares as claimed by the assessee in its return of income whether pertaining to capital gains or to income from other sources, share dealing profit, were submitted before the Department which should have been read and accepted as a whole. The assessee has filed voluminous evidences before the Assessing Officer such as Broker Contract Notes, letters received from the companies intimating the transfer of share certificates, Bank Accounts evidencing the payments to the broker, day trading profit

bills evidencing the payments settled against the day trading profits, Demat Accounts. Copies of the Bills of Day Trading Profit shown as Income from other sources for various years were attached at pages 80 to 171, 225 to 254 and 307 to 331 of the Paper Book-I.

18.2. Few of the brokers employed for the day trading of shares were the same as the ones who bought and sold the shares held as investment. The Assessing Officer was not justified in placing part reliance on the same and adopting pick and choose policy to make additions of the amount of sale proceeds realized on account of transaction in shares leading to capital gains in the absence of cogent material in support of undertaking such an exercise. Where the share dealing profit were held as genuine by the Assessing Officer, he should have also accepted the capital gains reflected in the very same books of accounts. While arriving at an adverse conclusion against the assessee, the Assessing Officer seems to be deliberately relied only on those evidences and enquiry results which were against the assessee while diluting the significance of other evidences which were in favour of the assessee.

18.3. It is settled legal position that seized material has to be read and accepted as a whole and it is not permissible to pick and choose or make further estimate therefrom unless and until there is cogent evidence in support of undertaking such an exercise. The settled principle is that documents found in search should be treated as genuine with respect to all entries recorded therein. The Revenue is not justified in taking a view that only part of the contents is correct. Entire document should be read as a whole and contents of the documents should be treated as correct or rejected as a whole. Therefore, when the department can accept transactions relating to share trading profit, there is no reason as to why it should not accept the transactions relating to capital gains. The ITAT Mumbai Bench in the case of Shri Bhagvandas Gordhandas vs. DCIT in ITA.No.5201/Mum/96 has held that a bare

statement of a deponent may not justifiably be treated as sufficient enough to fasten a liability on another person, say assessee, when that another person is denying the facts contained in that statement and is alleging the same to be incorrect and that a satisfactory/convincing corroboration of the said statement, by a reliable evidence, is essentially needed to justifiably base the addition thereon. This testimony of a witness cannot be relied upon independent of any another corroborative evidence, which is not justified. Unless statements are countered or they have been put to cross examination and their statements have been substantiated with documentary evidence, it would be unreasonable to place reliance on such statements. The Assessing Officer has placed undue reliance on the statements of the brokers which were recorded behind the back of the assessee without allowing them to cross examine them.

18.4. In view of the above, the CIT(A) has rightly concluded that the Assessing Officer has arbitrarily adopted a pick and choose policy in respect of both the statements recorded of the brokers as well as in treating the share trading profit as genuine while not accepting the capital gains earned by the assessee in respect of the investment made in shares.

18.5. The Assessing Officer has added the entire sale proceeds of shares as undisclosed income of the assessee. When the Long Term Capital Gains emanating from the said sale proceeds have been offered for taxation, how can the entire sale proceeds be added again to the returned income. This would result in double taxation of the amount of tax on the Long Term Capital Gains. Thus, what can be treated as undisclosed income of an assessee is not the entire sale proceeds but only to the extent of the estimated profits embedded in the sales. The sale proceeds of shares has been recorded in the books of accounts maintained by the assessees. The capital gain arising on the same has been shown for all the years in their respective Income Tax Returns and appropriate taxes were

paid on the same. The charging section 69A provides for addition of only unrecorded income and wealth and when no explanation is given by the appellant or the explanation given by assessee is not up to the satisfaction of the Assessing Officer regarding its nature and source of acquisition. The assessee has recorded the sale proceeds and purchase consideration in their books of accounts and very well explained its nature and source of acquisition. Assessee group have sold the shares through registered brokers who are known and identifiable income tax payee, received money from them through appropriate banking channels which are duly confirmed by them. Such additions made by treating the sale proceeds of shares as unexplained income and not recorded in books of accounts and adding it u/s. 69A of the Act is not justified.

18.6. The Hon'ble MP High Court in the case of Man Mohan Sadani vs. CIT (2008) 304 ITR 52 (MP) has held that the entire sale proceeds cannot be regarded as profit or treated as undisclosed income of the assessee. On the contrary, it is the net profit rate which has to be adopted in such cases. Further Hon'ble MP High Court in CIT vs. Balchand Ajit Kumar (2003) 263 ITR 610 (MP) has taken similar view. The Hon'ble Gujarat High Court in CIT vs. President Industries (2002) 258 ITR 654 (Guj) held that the amount of sales could not represent the income of the assessee who had not disclosed the sales. The sales only represented the price received by the seller of the goods; only the realisation of the excess over the cost incurred could form part of the profit included in the consideration for the sales. Since there was no finding to the effect that investment by way of incurring the cost in acquiring the goods which were sold had been made by the assessee and that that investment was also not disclosed, only the excess over the cost incurred could be treated as profit.

In view of the above discussion and the case laws relied upon, it can be inferred that the approach adopted by the Assessing

Officer in adding the entire sale proceeds of shares as undisclosed income of the assessee is not justified.

19. An alternative attempt has been made by the Assessing Officer to tax the profit arising out of sale of shares as an adventure in the nature of trade which is based on wrong assumption of facts and contrary to the principles laid down on the issue. Initially the department was fully satisfied with the treatment of these alleged transactions as capital gain in the original assessments prior to search. Further, search per se in the premises of the assessee group did not reveal anything to justify viewing of these transactions with suspicion. The Assessing Officer's entire endeavour was directed towards the issue of capital gain although he subjected the same to tax u/s.69A by treating the share transactions as bogus relying on the statements made by the brokers which have been discussed earlier. All this exercise of verification of share transactions was undertaken with an approach to bring the capital gain under a particular head that is liable to be taxed at the maximum rate. The alternate proposition made by the Assessing Officer to now treat the same as adventure in the nature of trade shows absolute lack of conviction on his part. The assessee vide his submission dated 07.05.2008, attached as pages 86 to 97 of the Paperbook-II, explained the concept of adventure in the nature of trade and how it is not applicable to the assesses of the group as under:

- a) The appellants in this group are individuals comprising also of the lady members of the family and Hindu Undivided Families of various members.
- b) None of the family members are dealers in shares.
- c) The activity is not in the usual line of business of the group.
- d) The investment was made out of their respective capital accounts.
- e) The investments were made by them as ordinary investors.
- f) In all cases delivery of shares were taken and transactions were not speculative in nature.
- g) The holdings had continued for a fairly long time.
- h) In the books and returns filed, the shares were shown as investment and not as stock in trade which was accepted by the department for a long period of time. Since the

amounts received were realization of capital, it was clearly a capital receipt.

- i) There was no concept of venture or organized trade attached with the activity. There was no organization associated with trade. A business requires greater activity and a greater organization which were conspicuously absent in these cases.
- j) There is no element of adventure or trade in the shares transaction.
- k) Although the department carried out search, no evidence was found to indicate that the transactions were carried out in the capacity of a trader.

19.1. All these factors have to be cumulatively taken into consideration in order to decide whether the nature of transactions were such that it would fall under the head of adventure in the nature of trade. The Hon'ble Supreme Court in the case of *Karnani Properties Ltd. (1971) 82 ITR 547* has held that activities carried on continuously in an organized manner, with a set purpose and with a view to earn profits have to be considered as business activities. Therefore the four elements which must be present in order to classify an activity as a business activity are

- (a) it must be continuous
- (b) It must be carried out in an organized manner
- (c) with a set purpose and
- (d) to earn profits.

19.2. The Hon'ble Bombay High Court in the case of *Tushar Tanna vs. CIT (2006) 284 ITR 453 (Bom)* has laid down certain principles to find out whether or not the transaction in question is an adventure in the nature of trade. These principles are as follows:

- (i) no principle can be laid down in deciding whether a person is indulging in business in the nature of trade,
- (ii) whether the transaction is an isolated one or forms part of a series of transactions showing the transaction to be in the nature of adventure in trade,
- (iii) the fact that the property was sold within a short time by itself does not indicate that the transaction was in the nature of trade,
- (iv) whether property was purchased with the intention of investment and not an adventure in the nature of trade, and

- (v) it is not a case merely on the facts and circumstances of the case but to consider their distinctive character in each case.

19.3. In view of the above principles it can be said that in the present case the shares acquired by the assessee were shown as investment and he was treated as an investor in the past. The transactions involved in shares were isolated ones, did not show any continuity and did not form part of a series of transactions. None of the share transactions formed a part of the line of business pursued by the assessee. The intention was purely of investment and the fact that the shares were sold within a short time did not indicate that the transaction was in the nature of trade. There was no material to suggest that the motive was to sell the shares and earn some quick profit. Therefore, the transactions were not an adventure in the nature of trade and the profit arising from sale of the shares was not assessable as income from business.

19.4. In this background, it is clear that the Assessing Officer was not able to establish that the assessee was engaged in adventure in the nature of trade. The CIT(A) while rejecting the propositions made by the Assessing Officer, to treat the share transactions as an adventure in the nature of trade has stated in para 19.3 of his order as under (pages 85 & 86):

"I would reiterate that the AO, in the instant case, was unduly governed by his wish to bring the entire sale receipts of shares under the maximum rate of tax. In the process he has ignored the fact that the Income Tax Act lays down specific laws/method to compute different heads of income with varying tax slabs/rates. Once the AO decided to approach the issue with this mind set he started looking for various methods to achieve this purpose. Originally in the assessment he taxed the entire receipts as unexplained receipts u/s. 69A which is legally not tenable. Thereafter, he came up with a new theory of assessment so that if his proposition to tax the receipt at maximum rate u/s. 69A fails he can still retrieve the assessment at maximum rate by resorting to the alternate method of taxing the same as business income arising from adventure in the nature of trade. Looking to the huge amount of capital gains shown by the assessee of this group he was

tempted to bring it to the maximum tax by treating the whole amount as not genuine. But this exercise, as demonstrated above while discussing factual aspects of the same, is based on incomplete and incorrect appreciation of facts and documentary evidence and fails miserably. AO's attempts to examine the matter afresh at appellate stage from an entirely new angle is beyond permissible limits under the Act. The AO making original addition u/s 69A made a technical and legal mistake. His alternative proposition for taxing the same as business income. This shows that the AO is not confident of either of his moves making them self-effacing and mutually destructive.

I may also add, though at the cost of repetition, that initially the Department was fully satisfied with the assessee's treatment of these transactions as capital gain as it had accepted its very claim with regard to same in the original assessments prior to search in appellant-group. The original assessments were framed u/s 143(1) of the Act. Even if no scrutiny was made in these cases there was no bar on the Department to scrutinise the same if it was not found in order. This shows that the very claim of the entire group with regard to huge LTCG had the approval of the IT Department and it was never frowned upon. Moreover, search per se in appellant-group did not reveal anything to justify viewing of these transactions with suspicion. All this exercise of verification of share transactions was undertaken with a different approach, i.e. to bring the whopping amount of capital gain under a particular head that is liable to be taxed at the maximum rate. In the facts of the case as brought out above and in view of legal position sufficiently discussed by me this approach of the AO cannot be accepted."

19.5. We find the various issues raised by the Revenue have also been decided in favour of the assessee in the following decisions relied on by the Ld. Authorised Representative. We find the Hon'ble Bombay High Court in the case of CIT vs. Smt.Jamnadevi Agrawal reported in (2010) 328 ITR 656 (Bom.), has held as under:

"The assessee purchased 30,000 shares on April 8, 1999 and sold them on July 7, 14, 21, 2000. The assessee offered long-term capital gains on sale of shares which was accepted by the Assessing Officer in the respective assessments. Subsequently, there was a search action in the case of various assessee's belonging to a group and the group offered additional income of Rs.2 crores, out of which Rs.3 lakhs were offered in the hands of the assessee for the assessment year 2004-05 and Rs.7 lakhs in the assessment year 2005-06. The Assessing Officer

on the basis of the seized material issued notice under section 153A of the Income Tax Act, 1961, for assessment year 2001-02 and subsequently passed an assessment order under section 153A read with section 143(3) computing the total income disallowing the long-term capital gain and adding the entire sale proceeds received on sale of shares amounting to Rs.10,14,324 as income from undisclosed sources under section 68 of the Act. The Commissioner(Appeals) held that section 68 of the Act was not applicable to the facts of the case and accordingly deleted the addition. The appeal filed against this order was dismissed by the Tribunal. On appeal:

Held, dismissing the appeals, that the fact that the assesseees in the group had purchased and sold shares of similar companies through the same broker could not be a ground to hold that the transactions were sham and bogus, especially when documentary evidence was produced to establish the genuineness of the claim. The shares were purchased by the assesseees on the respective dates and the company had confirmed to have handed over the shares purchased by the assesseees. Similarly, the sale of the shares to the respective buyers was also established by producing documentary evidence. It was true that some of the transactions were off-market transactions. However, the purchase and sale price of the shares declared by the assesseees were in conformity with the market rates prevailing on the respective dates as was seen from the documents furnished by the assesseees. Therefore, the fact that some of the transactions were off-market transactions could not be a ground to treat the transactions as sham transactions. On a perusal of the documentary evidence, the Tribunal had arrived at a finding of fact that the transactions were genuine. The Tribunal had further recorded a finding of fact that the cash credits in the bank accounts of some of the buyers of shares could not be linked to the assesseees. There was no substantial question of law.”

19.5.1. We find the Hon'ble Jharkhand High Court in the case of CIT vs. Arun Kumar Agarwal & Ors., reported in 2012-TIOL-603-HC-JHARKHAND-IT, has held as under:

“10. We have considered the submissions of the learned counsel for the parties and we are of the considered opinion that the learned Assessing Officer was much influenced by the enquiry report which may have been brought on record by the efforts of the Assessing Officer and that enquiry report was prepared by the SEBI and from the observations made by the Tax Appeal No.4 of 2011 with analogous case Assessing Officer himself, it is clear that after getting that enquiry report, the SEBI prima facie found involvement of some of the share brokers in unfair trade practices. Even in a case where the share broker was found involved in unfair trade practice and was involved in

lowering and rising of the share price, and any person, who himself is not involved in that type of transaction, if purchased the share from that broker innocently and bonafidely and if he show his bonafide in transaction by showing relevant material, facts and circumstances and documents, then merely on the basis of the reason that share broker was involved in dealing in the share of a particular company in collusion with others or in the manner of unfair trade practices against the norms of S.E.B.I. and Stock Exchange, then merely because of that fact a person who bonafidely entered into share transaction of that company through such broker then only by mere assumption such transactions cannot be held to be a sham transaction. Fact of tinted broker may be relevant for suspicion but it alone necessarily does lead to conclusion of all transaction of that broker as tinted. In such circumstances, further enquiry is needed and that is for individual case. Such further enquiry was not conducted in that case.

11. At this junction, it would be relevant to mention here that it is not disputed by the Revenue before us that the shares of these assesseees were already shown in the earlier Balance Sheet submitted by the assesseees, and therefore, in that situation, how the revenue condemned the transaction even on the ground of steep rise in the share. ...”

19.5.2. Similarly, we find that Pune Bench of ITAT in the case of ITO vs. Ajay Shantilal Lalwani reported in (2012) 145 TTJ 511, has held as under:

“Admittedly, in the present case, the assessee has purchased the shares outside stock exchange directly from the broker in physical form though D-mat account was opened on belated date with this explanation that at the time of purchase of shares, he was not having D-mat account and on opening of D-mat account, the shares were transferred to the same. Before the AO copies of the share certificates held by assessee in physical form were provided which contained complete relevant details such as address of registered office of the company, signatures of the authorized signatory along with two directors’ signatures, value of shares with paid-up amount of shares purchased in each company, date of issue of certificate, certificate number, registered folio, number of shares with their distinctive numbers, date of transfer of shares in the name of assessee and also copies of contract notes along with bills issued by share broker. The assessee also furnished returns of income along with balance sheet for the asst. yrs. 2004-05 and 2005-06 during which period, assessee claimed to have purchased those shares in question, copy of contract notes issued by the broker and confirmations given by S.Ltd. and by broker. Merely because there was substantial delay in transferring the shares into D-mat account from the date of

purchase and the transactions not routed through Calcutta stock exchange, the AO was not justified in doubting the declared date of purchase of the shares ignoring the above evidences. In off market transaction in shares, any enquiry from the stock exchange will not yield result in favour of Revenue. Revenue has to see whether the sale has been effected or not as per the acceptance and admission of the respective stock broker. Under these circumstances, the first appellate order is set aside to this extent that shares in question were not purchased on the declared dates and the AO is directed to allow the claimed exemption under s.10(38) on the long-term capital gain shown by the assessee on those shares. Likewise no infirmity is found in the first appellate order whereby the CIT(A) has rightly accepted the cost of purchase/acquisition of shares as stated by the assessee. The same is upheld.”

19.5.3. We find the Mumbai Bench of the Tribunal in the case of Shri Jafferli K Rattonsey vs. DCIT reported in 2012-TIOL-236-ITAT-MUM, has held as under:

“9. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. In the instant case the A.O. made addition of Rs.5,09,25,802/- as unexplained cash credit holding the sale of shares by the assessee as bogus. While doing so he relied heavily on the statement given by Mr. Mukesh Choksi wherein he has stated that the transactions of purchase of shares are not carried out through them and the name of his company has been wrongly used and no transaction mentioned in the ledger has been carried out through them. The A.O. had also another proposition that the total purchase price on the date of dematerialisation comes to Rs.44110775/- which becomes unexplained investment in shares. After deducting the investment in shares from sale price the short term capital gain comes to Rs. 80,03,027/-. However, since he considered the entire receipt on the sale of shares as un- accounted income and added the same to the total income of the assessee u/s 68 of the I.T. Act he did not make any separate addition under the head “unexplained investment and short term capital gain.

9.1 We find the ld. CIT(A) deleted the addition u/s 68 on the ground that the sale of shares has not been doubted by the A.O. in the assessment proceedings as well as during remand proceedings and the assessee has proved the genuineness of the sale of shares, therefore, no addition can be made u/s 68 of the Act. The Revenue is not in appeal before us against the said observation of the ld. CIT(A). However, the ld. CIT(A) upheld the

alternate proposition of the A.O. that the purchase price on the date of dematerialisation of shares become unexplained investment in the hands of the assessee and the difference between in sale and purchase of shares has to be treated as short term capital gain since the assessee could not substantiate the purchases. Therefore, the question that has to be answered in the grounds raised by the assessee is as to whether the purchase of shares by the assessee are genuine or not and whether the holding period is more than 12 months or not.

9.2 We find the assessee before the A.O. has filed the copies of contract notes and purchase bills of all the shares purchased from MSPL (copies of which are placed at paper book page 18 to 43). Similarly the bank statement maintained with HDFC bank shows evidence of payment to MSPL. The Xerox copy of the account payee cheque issued to MSPL dtd. 1.12.05 for Rs.12,40,565/- is placed at paper book page 45 and was also filed before the A.O. and CIT(A). The copy of ledger A/c of MSPL in the books of the assessee and the copy of the ledger account of the assessee in books of MSPL were also filed before the A.O. Similarly the copies of contract notes and sale bills of all the shares transferred to Techno Shares & Stocks Ltd. with copy of D-Mat account and copy of confirmation letter dtd. 28.10.2005 from Sunchem Securities P. Ltd. were also filed before the A.O. Nothing was brought by the A.O. to prove that any of these evidences filed by the assessee is false or untrue. The Revenue has basically gone on the statement of Mr. Mukesh Choksi who denied to have known the assessee and denied to have made any transaction with the assessee on account of purchase of shares. The relevant questions and answers of Mr. Mukesh Choksi recorded by the A.O. on 24.12.2008, copy of which is placed at paper book page No. 19 to 23 are as under.

Q No. 7:- Do you know Shri Jafferli K. Rattonsey and Smt. Hamida Rattonsey?

Ans. No. I do not know them.

Q No. 8:- I am showing you the ledger account of Mahasagar Securities Pvt. Ltd. in the books of Shri J.K. Rattonsey and Smt. Hamida J. Rattonsey. From this account it is seen that the assessee have carried out regular transaction with Mahasagar Securities Pvt. Ltd. Pl. confirm the ledger account furnished by the assessee with the copy of ledger account of J.K. Rattonsey and Smt. Hamida J. Rattonsey appearing in the books of Mahasagar Securities Pvt. Ltd.

Ans.: I have seen the ledger and on the perusal of the same I found that the transactions are not carried out through us. It seems that our name has been used and no transaction mentioned in the ledger have been carried out through us. Mahasagar Securities have no relations with the J.K. Rattonsey and Smt. Hamida J. Rattonsey.

9.3. On the basis of the above statement of Mr. Mukesh Choksi the ld. CIT(A) upheld the alternate proposition of the A.O. that total purchase price on the date of dematerialisation of shares amounting to Rs.4,41,10,775/- becomes unexplained investment since the purchases are not recorded in the books of the assessee on that date and the difference between the sale price and the purchase price amounting to Rs. 80,03,027/- becomes short term capital gain since the holding period of the shares is less than 12 months.

9.4 However, we find during the course of cross examination by the assessee before the A.O. on 29.12.2008 Mr. Mukesh Choksi confirmed to have received the cheques from the assessee. The relevant question No. 2 and answer thereof is as under:-

Q.2. Question put up by Shri Digant Bhatt — We have issued a Cheque from Jafferalli K. Rattonsey, Hamida Rattonsey for Rs.12,40,565/- and Rs.11,91,378/- respectively, which you have received, kindly confirm.

Ans. I confirm the above cheques have been received by me. Similarly, reply given by Shri Mukesh Choksi to Question No. 3 to 5 are as under:-

Q.3 Question put up by Shri Digant Bhatt - We have received the shares in Demat Account of Shri Jafferalli K. Rattonsey and Hamida Rattonsey from Sunchan Securities Ltd. on your behalf, kindly confirm.

Ans. I have not given any instructions.

Q.4 Question put up by Dr. Mahesh Akhade * In the statement recorded u/s.131 of the IT. Act on 24.12.2008, you have denied in the answer to Question No.8, 9, 12 & 13 that Mahasagar Securities Pvt. Ltd. and Alliance Intermediaries Network Pvt. Ltd. has no relationship to the assessees J.K. Rattonsey, Hamida Rattonsey, Sunay Mehta and Samit Mehta. You have also denied you have any share transactions with these persons. Kindly confirm the same.

Ans. I am preparing accounts on receipt basis and the cheques received by me are accounted as a general receipts and on which the commission earned by me has been accounted fully. Here the shares have been delivered by Sunchan Securities, I have not given any instructions to Sunchan Securities.

Q.No.5 Question put up by Dr. Mahesh Akhade — Kindly furnish the statement of bank accounts of Mahasagar Securities Pvt. Ltd. in which the above mentioned two

cheques amounting to Rs.12,40,565/- and Rs.11,91,378/- have been deposited.

Ans. At present they are not available with me, I will furnish the same after receipt of the same.

9.5 From the above, it is clear that Mr. Mukesh Choksi is double speaking in his statements i.e. one given before the A.O. and the one during cross examination before the A.O. Under these circumstances one has to see the evidentiary value of a person making double speaking. We find the Hon'ble Calcutta High Court in the case of Eastern Commercial Enterprises (supra) has held that a man indulging in double speaking cannot be said by any means a truthful man at any stage and no Court can decide on which occasion he was truthful. We find the co-ordinate bench of the Tribunal in the case of Mrs. Uttara S. Shorewala (supra) (in which one of us – the Accountant Member is a party) following the decision of Hon'ble Calcutta High Court upheld the order of the Id. CIT(A) in holding that the A.O. cannot make any addition in the assessee's hands despite the assessee not having made any payment to the entities mentioned by Shri Choksi, whose statement is being relied upon by him. The CIT (A) also noted that Mr. Mukesh Choksi has been vacillating right through and has given different versions at different stages of the proceedings and therefore his evidence was unreliable.

9.6 In view of the above judicial decisions the statement of Mr. Mukesh Choksi cannot be a deciding factor for rejecting the genuineness of the purchase of shares by the assessee especially when all other supporting evidences filed by the assessee were neither proved to be false or untrue. We further find merit in the submission of the Id. counsel for the assessee that the dematerialization of shares from physical holding is a lengthy process and takes considerable time. Therefore, when there is no dispute to the dematerialization of shares before the date of sale, therefore, the shares were purchased much prior to the date of sale.

9.7 The CBDT Circular No. 704 dtd. 28.4.1995 states that it is the date of broker's note that should be treated as the date of transfer in cases of sale transactions of securities provided such transactions are followed up by delivery of shares and also the transfer deeds. Similarly, in respect of the purchasers of the securities, the holding period shall be reckoned from the date of the broker's note for purchase on behalf of the investors. The CBDT Circular No. 768 dtd. 24.6.1998 was issued to clarify the determination of date of transfer and the period of holding of securities held in demat form. It has been stated there in that earlier Circular No. 704 issued by the CBDT relating to the "date of transfer" and "period of holding" does not change even when securities are held in the dematerialized form. Therefore in view of the above two circulars of CBDT it is clear that in case of

securities the “date of purchase” has to be taken from the broker’s note/contract note and the period of holding is also to be reckoned from the “date of purchase” and not from the “date of dematerialization”. Since the holding period of the shares as per the broker’s note and its subsequent sale after dematerialization is more than 12 months, therefore, the shares become long term capital asset and the assessee’s claim of long term capital gain is correct. In this view of the matter we set aside the order of the ld. CIT(A) and direct the A.O. to accept the long term capital gain declared by the assessee. We hold and direct accordingly. The grounds raised by the assessee are accordingly allowed.

10. In the result, appeal filed by the assessee is allowed.”

19.5.4. We find the Mumbai Bench of the Tribunal in the case of ITO vs. Mrs.Rasila N Gada & Ors., in the consolidated order dated 8th August, 2012, has held as under:

“5.1. After perusing the material available we are of the opinion that considering the facts and circumstances of the case, the order passed by the FAA does not suffer from any legal infirmity. Hon’ble Bombay High Court in the case of Sharada Credit and Mukesh R Marolia has upheld the orders of the ITAT, Mumbai. In those cases it has been held that shares purchased/sold in the off market cannot be considered illegal transactions. We find that the AO had not afforded opportunity of cross-examination of Shri Mukesh Choksi to the assessee. It is noteworthy that Sh. Choksi had not named the assessee in his statements as the beneficiary who had availed bogus entries. We have noticed that the assessee had shown the investment in shares in the balancesheet of the earlier assessment year and her return of income was accepted by the Department. We are of the opinion that once sales/purchase of shares is accompanied by this kind of evidences the genuineness of the said transactions cannot be doubted. Non-payment of STT cannot be and should not be basis for making addition of the section 68 of the Act. FAA has categorically held that all the necessary details about purchase and sale of shares were made available to the AO during assessment proceedings. We have perused the case laws relied upon by the AR. In the case of Mukesh R Marolia (supra) Hon’ble jurisdictional High Court has held as under:

“On further Appeal, the ITAT by the impugned order allowed the claim of the Assessee by recording that the purchase of shares during the year 1999-2000 and 2000-2001 were duly recorded in the books maintained by the Assessee. The ITAT has recorded a finding that the source of funds for acquisition of the shares was the agricultural

income which was duly offered and assessed to tax in those Assessment Years. The Assessee has produced certificates from the aforesaid four companies to the effect that the shares were in-fact transferred to the name of the Assessee. In these circumstances, the decision of the ITAT in holding that the Assessee had purchased shares out of the funds duly disclosed by the Assessee cannot be faulted.

Similarly, the sale of the said shares for Rs.1,41,08,484/- through two Brokers namely, M/s Richmond Securities Pvt. Ltd. and M/s. Scorpio Management Consultants Pvt. Ltd. cannot be disputed, because the fact that the Assessee has received the said amount is not in dispute. It is neither the case of the Revenue that the shares in question are still lying with the Assessee nor it is the case of the Revenue that the amounts received by the Assessee on sale of the shares is more than what is declared by the Assessee. Though there is some discrepancy in the statement of the Director of M/s. Richmand Securities Pvt. Ltd. regarding the sale transaction, the Tribunal relying on the statement of the employee of M/s. Richmand Securities Pvt. Ltd. held that the sale transaction was genuine.

In these circumstances, the decision of the ITAT in holding that the purchase and sale of shares are genuine and therefore, the Assessing Officer was not justified in holding that the amount of Rs. 1,41,08,484/- represented unexplained investment under Section 69 of the Income Tax Act, 1961 cannot be faulted.”

We are of the opinion that the facts of the case of Mukesh R Marolia are similar to the facts of the cases under consideration. Respectfully following the orders of the Hon’ble High Court and the coordinating benches of the Tribunal we hold that purchase and sale of shares by the assessee was a genuine transaction, and hence, addition made by the AO cannot be endorsed.

Upholding the orders of the FAA, we dismiss the appeals filed by the AO.”

19.5.5. We find the Nagpur Bench of the ITAT in the case of ACIT vs. Kamal Kumar S.Agrawal & Ors., reported in 133 TTJ 818, has held as under:

“The assessee earned capital gains during the period covered by s.153A proceedings. It is also noted that all such transactions have been taken into consideration while filing the

returns for these years in the normal course and the Department has also accepted the nature of such transactions. It is very important to note that no incriminating material has been found during the course of search which could have cast doubt on the genuineness of the transactions or could have indicated that it was a case of assessee's own undisclosed money utilized in the execution of such transactions. Voluminous documentary evidences have been filed by the assessee to prove its claim which support the genuineness of the transaction. However, the AO has utilized the statements of the persons who were not cross-examined by the assessee. Hence, as per the settled judicial principle, such statements cannot be given any weightage. When there arises a question of appreciation of documentary evidences, then a holistic view has to be taken and in the present case majority of the brokers have supported the claims of the assessee and surprisingly some of them have not been approached by the AO at all. Thus, on appreciation of documentary evidences submitted by the assessee, the genuineness of the transactions appears to be established. As regards the aspect of off market transactions, it is noted that neither these are illegal nor prohibited and only some of the compliances have to be made by the brokers. As regards the aspect of such compliances, it is not the case that all the off market transactions have not been reported by the concerned brokers to the stock exchange as per rules and even otherwise, any failure on the part of the brokers in doing such compliance cannot make the contract between the assessee and the broker illegal or void as the broker may face the consequences for his default under relevant statute. It is also noted that all the transactions are not off market transactions, hence, the AO's approach to pick and choose only such instances which are favourable to him cannot justify such addition. The Departmental Representative has also argued that there were differences in the information as per contract notes and as per information received from the stock exchange which fact is also not material because when some off market transactions have not been reported to the stock exchange, how such contract notes can be matched with the records of stock exchange. Economic consequences as a result of off market transactions or otherwise have taken place and, therefore, such transactions cannot be treated as sham merely for some discrepancies or for the view of the AO in regard to genuineness of these transactions. The Revenue has also relied on the decisions of SEBI involving some scrips. The role of SEBI is different and the orders passed by them have different objectives such as orderly conduct of share markets and investor protection and, therefore, such order cannot be conclusive as regards the genuineness of the transactions. In this regard, it would not be out of place to mention that stock market operations are subject to different regulations and the interest of general public is protected by prohibiting the market intermediaries from indulging in unfair trade practices. The order of the SEBI relied on by the Revenue is mainly on the

aspect of price rigging in such manner. Hence, the same cannot be of any assistance to the cause of the Revenue. Thus, on the basis of appreciation of facts and circumstances of the case as a whole and considering the documentary evidences on record, the share transactions cannot be considered as ingenuine/sham and, therefore, the sale proceeds of such share transactions cannot be taxed under s.68.

As regards the plea of the Revenue regarding treatment of share transactions as an adventure in the nature of trade taken during the course of appellate proceedings for the first time, in the course of assessment proceedings, the AO has taken a definite stand of such transactions being bogus or sham. Hence, such plea has rightly been rejected by the CIT(A) after examining the scope of the powers of the CIT(A) as well as role of the AO in the scheme of Act. Under the scheme of the Act, income is to be assessed under different heads depending upon the source/nature of such income and if the AO has assessed the same under a specific head which is subsequently deleted, then, it cannot be taxed under any other head merely for this reason. The stand of the assessee is of long-term capital gain which has also been accepted by the Department in assessment proceedings completed before the search and in the course of search, no incriminating material has been found to cast a shadow on the nature of such transactions and the AO in s. 153A proceedings has taken a different stand and, therefore, if such stand of the AO has not been accepted, then, the AO cannot take an alternate stand for taxing it under a different head in the course of appellate proceedings. Certain judicial decisions regarding the scope of powers of CIT(A) also support the claim of the assessee that no new source of income can be found in the course of appellate proceedings. However, the CIT(A) has examined the factual details of these transactions on the basis of various parameters like frequency, volume, line of trade in which the assessee is mainly engaged and the decision of the CIT(A) is correct in law on that count also.”

19.5.6. So far as the decision of the Pune Bench of ITAT relied on by the Revenue in the case of Smt. Surekha Bhagvatiprasad Mundada v. ITO & Ors. in ITA No. 1332/PN/2009, we find the same is not applicable to the facts of the present case. In this case, the Hon. Tribunal has deleted the addition u/ s. 68 on account of long term capital gains declared by the appellant, but accepted the gain as short term capital gain because of the following reasons -

- (i) In this case, assessee purchased shares on line and not off market.

- (ii) Settlement No. did not tally with the pool account of the broker.
- (iii) Shares are transferred to the demat account after completion of 18 months from the date of the contract notes.
- (iv) Share broker transferred shares to the assessee from the beneficiary account and not from the pool account.
- (v) Original contract notes were never produced by the assessee.
- (vi) There was no delivery to the assessee in the normal period prescribed in the SEBI Rules.
- (vii) The assessee made payment to the broker after a period of 18 months from the date of broker's note.
- (viii) Enquiry by SEBI was going on against broker R. P. Shah for price rigging of shares, who was suspended by SEBI.
- (ix) Broker's husband is a relative of the family.
- (x) Absence of relevant entries" in the records of Calcutta Stock Exchange.
- (xi) It was held that since the assessee received sale consideration and the same is against the sale of shares, addition cannot be made u/ s. 68 of the I. T. Act. It was further held that from the date of transfer of shares in the demat account of the assessee and its sale, period of holding is to be counted. The plea taken by the assessee that the assessee has purchased the shares off market was not accepted at this stage. Accordingly, the facts of this case are entirely different from the facts of the instant case. The various other decisions relied on by the Ld. Departmental Representative as well as the Assessing Officer also do not apply to the facts of the present case.

19.6. Considering the totality of the facts of the case and relying on various decisions cited supra and considering the elaborate discussion by the Ld. CIT(A) we find no infirmity in his order accepting the Long Term Capital Gains and Short Term Capital Gains declared by the assessee. Accordingly, the order of

the CIT(A) is upheld and the grounds raised by the Revenue are dismissed.

20. Since the grounds raised by the Revenue in all the other appeals are identical to the grounds raised in ITA.No.1157/PN/2008, therefore, following the same ratio we uphold the orders of the CIT(A) in accepting the Long Term Capital Gains and Short Term Capital Gains declared by the respective assesseees. The grounds raised by the Revenue are accordingly dismissed.

21. In the result, all the appeals filed by the Revenue are dismissed.

Pronounced in the open court on this the 28th day of September, 2012.

Sd/-
(R.K.PANDA)
ACCOUNTANT MEMBER

Sd/-
(SHAILENDRA KUMAR YADAV)
JUDICIAL MEMBER

gsps

Pune, dated the 28th September, 2012

Copy of the order is forwarded to:

1. The Assessee
2. The ACIT, Circle-1/Central Circle-1, Aurangabad.
3. The CIT(A), Aurangabad./CIT(A)-I, Nagpur.
4. The CIT, Aurangabad/CIT(Central), Nagpur.
5. The DR "B" Bench, Pune.
6. Guard File.

//TRUE COPY//

By Order

Private Secretary,
Income Tax Appellate Tribunal,
Pune.