

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'डी' अहमदाबाद।
IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD

BEFORE SHRI R.P. TOLANI, JUDICIAL MEMBER AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No. 1442/Ahd/2013 &
CO No. 209/Ahd/2013

निर्धारण वर्ष/ Assessment Year : 2005-06

ACIT, Circle-7, Ahmedabad	Vs	Vineet Sureshchandra Agarwal, 12, "Ratnam", Royal Crescent Bungalows, Opp. New York Tower, Thaltej, Sarkhej- Gandhinagar, Ahmedabad-58 PAN : AAZPA 8396 C
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent) & Cross Objector
Revenue by :		Shri James Kurian, Sr DR
Assessee by :		Shri G.C. Pipara, AR

सुनवाई की तारीख/Date of Hearing : 30/11/2016

घोषणा की तारीख /Date of Pronouncement: 06/01/2017

आदेश/O R D E R

PER R.P. TOLANI, JUDICIAL MEMBER:-

This appeal by the Revenue and the Cross-objection thereof filed by the assessee are directed against the order of the Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad dated 21.03.2012 for AY 2005-2006.

2. Before us, at the outset, assessee's side did not press the cross-objection; accordingly the cross-objection filed by the assessee is dismissed as not pressed.

3. The solitary ground raised by the Revenue reads as under:-

The ld. CIT(A) has erred in law and on facts in deleting the addition made u/s 68 of the Act by the AO on account of credits of Rs.94,49,384/- as LTCG and Rs.19,76,810/- as STCG, even though the share transactions were not recorded in the name of assessee on the floor of stock exchange and transactions were proved bogus

4. Brief facts are – in the return of income, the assessee qua the sale of shares of Prranet Indu declared income from Short Term Capital Gain of Rs.32,94,684/- and Long Term Capital Gain of Rs.94,49,383/- on sales of shares of Telent Infoways Limited. In respect thereof, assessee furnished the relevant details and bills issued by M/s. Goldstar Finvest Pvt. Ltd. [GFPL for short] (for purchase) and by M/s. Mahasagar Securities Pvt. Ltd. [MSPL for short] (for sales). The bills reflected that:-

- (i) The broker Goldstar Finvest Pvt. Ltd. was was mentioned as "dealer of Inter-connected Stock Exchange of India Limited (ISE)/ Sub-broker of National Stock Exchange India Limited member - ISE Securities and Services Limited, SEBI Reg. no.INB-230932431/23-10777.
- (ii) While M/s. Mahasagar Securities Pvt. Ltd. was mentioned as "dealer of Inter-connected Stock Exchange of India Limited / Sub-broker of National Stock Exchange India Limited member - ISE Securities and Services Limited, SEBI Reg. no.INB-230683331/23-10777.

4.1 Ld. AO sent letters u/s 133(6) in response thereto the NSE furnished a reply dated 22.11.2011 revealing that:

(i) M/s. Goldstar Finvest Pvt Ltd was registered with it as a sub-broker; however, ISE replied that it was a registered trading member but expelled and a sub-broker still registered but expelled.

(ii) M/s. Mahasagar Securities Pvt Ltd was found as a member from database. ISE replied that it was not registered with it.

The Id. Assessing Officer again issued letters u/s 133(6) of the I.T. Act to the NSE, BSE & ISE to verify the share transactions in the assessee name during the year. In reply, ISE stated that "*as per our record no trades were executed on our exchange in the name of Vineet S. Agarwal during F.Y. 2004-05.*" NSE stated that "*based on the PAN provided in your letter, record having matching pattern with data uploaded by trading members to the exchange as on date for the client Vineet S. Agarwal (PAN: AAZPA 8396 C) for the capital market segment are being enclosed as annexure -A. Kindly note that as per the records available with exchange, no trade were found to be executed for the combination of member and client code for the period 01 April 2003 to 31 March 2004 in the capital market segment hence not furnished.*"

Ld. AO observed that as per BSE assessee has sold only 30,000 shares of Prraneta Industries while he is claiming that, he has sold 50,000 shares during the concerned F.Y. It was further observed that a search was carried out on a group of concerns viz Mahasagar Securities Pvt Ltd (MSPL), Shri Mukesh Choksi and M/s. Goldstar Finvest Pvt Ltd which were allegedly providing accommodation entries and the assessee was found to be one of the beneficiaries. The assessee was asked to clarify as to why the sale proceedings of the shares should not be treated as unexplained cash credit u/s 68 of the

Act. The relevant reply of the assessee dated 05.12.2011 reads as under:-

"4) Coming to the exact transaction, it is respectfully submitted that for the assessment year 2005-06 vide letter dated 20/09/2011, I have filed the statement of details of purchases as well as details of sales relating to 2,00,000 shares of Talent Infoway Limited I have also submitted copies of purchase memo, contract note relating to purchases. Accordingly, the entire purchases are through Goldstar Fininvest (P) Ltd. I have also furnished the details relating to the sale of 2,00,000 shares to Talent Infoway Limited which has been sold through Mahasagar Securities Pvt. Ltd. vide bills dated 20/8/2004, 24/08/2004, 01/09/2004, 08/09/2004 and 09/09/2004. The copies of invoices, contract note, etc. has already been submitted and these copies and contract note includes complete details showing order number, trade number, trade time, quantity, sale rate, brokerage, net rate and amount. The entire amount has been received by Account Payee cheque and from Mahasagar Securities Pvt. Ltd. The transaction has taken place in the normal course of the business and I have nothing to do with the search carried out in the case of Mahasagar Securities Pvt. Ltd. as the reasons mentioned for reopening of the assessment that the group was found to be engaged in fraudulent billing activities. Please note that the said invoice as well as contract note includes the complete details such as quantity, rate, order number, trade number, trade time, sale rate, brokerage, net rate and amount with respect of each sale, etc.

5) Accordingly, the entire purchase as well as sale relating to 2,00,000 shares of Talent Infoway Limited is genuine. The sale transaction has taken place through Mahasagar Securities Pvt. Ltd. the copy of memo, etc. has already been submitted by me, the payment has been received by me through Account Payee cheque from Mahasagar Securities Pvt. Ltd. and why the said transaction is not reported in ISE/BSE/NSE cannot be commented by me. As per the contract note given to me the transaction has taken place in bolt and therefore, I have no reasons of not being reported. Therefore, so far as the gain which has been shown by me is concerned, the same is genuine, correct, supported by documentary evidence and if something is wrong, it may be either due to incorrect inquiry or may be in the hands of Mahasagar Securities Pvt. Ltd.

6) Moreover, the entire 2,00,000 shares of Talent Infoway Limited were held by me in demat account and I am submitting herewith the

transaction statement issued by Shah Investor's Home Ltd. in my name wherein the shares of Talent Infoway Limited has been dematerialized, the receipt is also enclosed along with the demat statement, from the perusal of which, your Honour will find that on 09/08/2004 the shares have been dematerialized. Accordingly, the shares have been sold after being dematerialized.

7) Therefore, in view of above facts, submissions and evidences already submitted as well as enclosed herewith, the entire gain on sale of shares is genuine, the same has taken place in the normal course of business. There may be something wrong in the hands of Mahasagar Securities Pvt. Ltd. but so far as I am concerned, these shares were held by me, the same has been sold in the open market. The transaction has taken place and therefore, the gain on the same has rightly been shown as capital gain.

8) Under the circumstances, your Honour's proposed action requires to be dropped."

4.2 The Id. Assessing Officer, however, disallowed the claim of Long Term Capital Gains qua share transactions and the impugned addition u/s 68 of the Act was made as income from other sources by following observations:-

"After carefully perusal upon the reply of the assessee it is not tenable because the assessee has submitted the copy of bills from M/s. Goldstar Finvest Pvt. Ltd. and from M/s. Mahasagar Securities Pvt. Ltd. :

- It is confirmed by the NSE / ISE that no trades have been executed in the name of the assessee during the concern financial year. Since, no trades were executed in the name of the assessee so it can be presume that assessee took only accommodation entries to claim the speculation profit for that he has submitted the bills issued by the M/s. Goldstar Finvest Pvt. Ltd. and from M/s. Mahasagar Securities Pvt. Ltd.*
- Since, M/s. Mahasagar Securities Pvt. Ltd. is no more in existence so how it is possible give credit of any claim based upon the bills issued by the M/s. Mahasagar Securities Pvt. Ltd. similarly, M/s. Goldstar Finvest Pvt. Ltd. is no more member / sub-broker in ISE.*

- Further, the key person of the M/s. Mahasagar Securities Pvt. Ltd., Shri Mukesh Choksi has also admitted in his statement during the search operation u/s.132 of the I. T. Act, 1961 that the group were engaged in fraudulent billing activities in the business of providing bogus speculation profit / loss, short term / long term capital gain / loss, commodities profit / loss on commodity trading (through MCX).

However, on request of the assessee, the information received from the respective stock exchanges has been supplied to the assessee."

5. Aggrieved, the assessee preferred first appeal where all the facts were reiterated and following explanations and written submissions dated 10.12.2011 were made :-

"1) Regarding copies of purchase invoice relating to 2,00,000 shares of Talent Infoway Limited. The shares have been purchased for an amount of Rs. 2,60,691/- against the profit which I have gained from intra day trading of certain shares of Goldstar Fininvest Pvt. Ltd. The details thereof has already been submitted vide reply dated 5/12/2011 relating to Assessment Year 2004-05 as shares were acquired in financial year 2003-04 accordingly shown in the balance sheet of financial year 2003-04. I am submitting herewith the Return of Income for A.Y. 2004-05 showing gain of Rs.2,57,151/- which is the net profit I have earned which has been utilized for acquiring the said shares after payment of cash of Rs. 3,539/-on 08/05/2003.

2) Regarding invoice of the sales and contract note, etc., same has already been submitted by me vide my submission dated 20/09/2011. Accordingly, the entire sales are through Mahasagar Securities Pvt. Ltd., the details of which has also been submitted by me alongwith my submission dated 05/12/2011.

3) I am submitting herewith the copy of the Bank statement/Bank Passbook relevant to F.Y. 2004-05 wherein the sale proceeds of Talent Infoway Limited has been credited.

4) Regarding copy of the Demat Statement, I have also submitted the same along with my earlier reply dated 05/12/2011, the copy of the Demat Statement where 2,00,000 shares of Talent Infoway Limited are admitted and upon sale, the same has been debited leaving a 'Nil' balance as on 10/09/2004. The said DP account is with Shah Investor's

Home Ltd. and complete documentary evidence thereof has already been submitted. However, copy is once again enclosed herewith.

5) I have also now carefully gone through the copies of the three letters of BSE, Inter-connected Stock Exchange of India Ltd. and NSE which has been provided to my authorized representative on 6th December 2011 and would like to clarify that BSE clearly stated that PAN based transaction have become mandatory with effect from 01/01/2007. Further Interconnected Stock Exchange of India Ltd. has stated that no records of trade were executed and further NSE has stated that information relating to Vineet Sureshchandra Agarwal are being enclosed as Annexure A.

6) Further, from the perusal of the copies of the bills already-submitted, your Honour will find that the shares were in demat form and have been sold through the broker. The bill clearly mention of the delivery, trade number, trade order, trade time, quantity, etc. are clearly mentioned. Further, bill states that he is dealer of Inter-connected Stock Exchange of India Ltd. as well as sub-broker of NSE Member along with SEBI registration number. The contract note also mention that he is the sub-broker of NSE Member, therefore, I do not know in which exchange the trade has been executed as normally it is not being looked into by any investor; as I was interested to sell and the rate was intimated to me which has been confirmed by me and accordingly, shares were delivered, same were sold and payment has been received through Account Payee cheque.

7) Further, BSE has clearly reported the transaction pertaining to Prraneta Industries."

The copy of letter dated 10/12/2011 along with enclosures is attached herewith vide Annexure-8.

8. In view of above facts and comprehensive evidences, the LTCG and STCG on sale of shares of various companies being genuine and duly supported by independent evidences, the same requires to be accepted. It is thus contended that the AO's allegation that the appellant has entered into accommodation entries with Mahasagar Securities Pvt. Ltd. (Now Alag Securities Pvt. Ltd.) merely on the basis of certain material gathered behind the back of the appellant is not sufficient to disprove the comprehensive evidences filed by the appellant.

That apart, it is contended that in absence of any cross-examination of Shri Mukesh Chokshi having been granted, whose statement has been

heavily relied upon for drawing adverse inference in case of the appellant, the impugned addition and the reassessment order passed is in violation of the principles of natural justice and equity. Hence, even otherwise, the impugned addition suffers from the vice of arbitrariness and thus requires to be deleted.

9. *It is by now trite law that in absence of an opportunity of cross examination of a party whose statement is proposed to be relied upon, no addition is warranted based on such statement.*

That since the A.O. has placed heavy reliance on the statement of a third party as well as material found and seized from such third party, the appellant relies upon the following decisions in support of the proposition of law that no addition is warranted on the basis of material seized from the third party and the statement of such third party not corroborated by any evidence.

Prarthana Construction (P.) Ltd. vs. Dy. CIT (2001) 70 TTJ 122 (Ahd.)

"It is a settled proposition, as held by various judicial authorities, that rigours of the rules of evidence contained in the Evidence Act are not applicable to income tax proceedings. However, the principals contained in the Evidence Act, incorporated from rules of natural justice forming part of the common law would naturally be applicable to income tax proceedings. It is amply clear that the loose papers and documents cannot possibly be construed as books of accounts regularly kept in the course of business. Such evidence would, therefore, be outside the purview of s.34 of the Evidence Act, 1872. Therefore, the Revenue would not be justified in resting its case on the loose papers and documents found from the residence of a third party even if such documents contain narrations of transactions with the assessee company - CBI vs. V.C. Shukla & Ors. (1998) 3 SCC 410 and Chuharmal vs. CIT (1988) 70 CTR (SC) 88: (1988) 172 JTR 250 (SC) applied.

The presumption under the provisions of s. 132 (4A) would in any case not be applicable to a third party from whose possession such papers and documents have not been found by the Revenue. Statements recorded at the back of the assessee would not ipso facto include the case against the assessee particularly when the makers of the statements have not been allowed be interrogated by the assessee company.

On factual merits also statements of R and S recorded at the back of the assessee cannot be relied upon for fastening tax liability against the assessee particularly when the assessee has not been allowed

opportunity of cross examination and no supporting evidence has been brought on record by the A.O.

Amariit Sinsh Bakshti (HUF) Vs. Asst. CIT (2003) 263 ITR 75 (A.T) (Delhi)

"wherein it is held that the provisions of the Indian Evidence Act are not strictly applicable to the proceedings under the Income-tax Act, but the broad principles of the law of evidence apply to such proceedings. Further an entry in the books of account maintained in the regular course of business is relevant for purposes of considering the nature and impact of a transaction, but noting on slips of paper or loose sheets of paper cannot fall in this category. Noting on loose sheets of paper are required to be supported/corroborated by other evidence which may include the statement of a person, who admittedly is a party to the noting. A further distinction had to be drawn between slips of paper or loose sheets found from the possession of the assessee and similar documents found from a third person. In case the statement of the third person is recorded with reference to the noting, then such a statement undoubtedly has to be confronted to the assessee and he is to be allowed an opportunity of cross examination. In the present reference the document in question had not been found from the assessee's possession, but from the possession of A and undoubtedly no opportunity of cross examination had been allowed to 'the assessee and it had clearly emerged from the record that the testimony of A was not credible at all since in three separate statements he had indicated different figures, his secretary, G, had given yet another figure and in proceedings before the two different court at Delhi and Dhanbad, he had given a different picture altogether and, lastly, in his income-tax assessment he had retracted from all his earlier statement and had categorically stated that the document which had been signed both by him and by the assessee contained only projections and purported figures in respect of the property in question. In other words, the entire addition in the hands of the assessee was based on the document found, but there was no evidence to support the Revenue's case that a huge figure whatever be its quantum over and above the figure booked in the records and accounts changed hands between the parties. No addition could therefore be made to the income of the assessee ".

Kishanchand Chellaram v. CIT [1980] 125 ITR 713 (SC)

"Though the proceedings before the income-tax authorities are not governed by the strict rules of evidence, before the income-tax authorities could rely upon a piece of evidence, they were bound to produce it before the assessee so that the assessee could controvert the

statements contained in it by asking for an opportunity for cross-examination of the person with reference to the statements made by him. "

Smt Rajrani Givta vs. Dv. CIT (2000) 72ITD155 (Mum.)

"Even for the assessment years 1994-95 to 1996-97, the estimate had to be based only on the patient's forms. This was because the depositions taken from the four patients were never put to the appellant. Allowing the appellant to take photocopies of the seized materials was not the same thing as supplying the copies of the depositions and giving an opportunity of cross-examining those patients to the appellant. Simply because the depositions were taken before A, it could not be said that an opportunity, much less sufficient opportunity of cross-examining, was offered. Any material collected by the Assessing Officer has to be put to the assessee before an adverse inference on the basis of that material is drawn to the prejudice of the assessee. In respect of the four depositions relied upon by the Assessing Officer no such opportunity was given and accordingly, they could not be a basis for drawing any adverse inference to the prejudice of the appellant."

CIT vs. SMC Share Brokers Ltd, (2007) 288 ITR 345 (Delhi)

"Where block assessment proceedings were initiated against the assessee under section 158BD and though during the assessment proceedings, the assessee requested the A. O. time and again to permit him to cross-examine the person on the basis of whose statement proceedings had been launched and from whose possession the documents were recovered, so that the assessee could prove its case, but the request was not acceded to by the A. O. and the Tribunal found that that was in complete violation of the principles of natural justice, the Tribunal was justified in setting aside the assessment under section 158BD. "

10. On the basis of the above facts, your honour will appreciate that all the material and primary facts and evidences in respect of the issue under consideration in the reassessment proceedings were already disclosed in the return of income. Hence, it cannot be held that there was any nondisclosure of material and primary facts by the assessee and accordingly, reopening of the assessment u/s. 148 beyond four years is invalid and bad in law, the same being based merely on the basis of change of opinion which is not permitted under the Act as elaborately discussed hereinabove."

5.1 The Id. CIT(A), after considering the submissions, made following observations:-

“(i) I find that in this case, the appellant has shown identity of the person from whom sale consideration was received. The appellant has also proved the genuineness of the transaction by submitting Demat statement with Shah Investors Home Ltd., sale invoices of the broker, copy of Bank Statement through which transactions were routed.

(ii) The A.O. has on page No. 2, para. No. 3.2 has observed that the broker Goldstar Finvest Pvt. Ltd. at NSE was 'at present as M/s. Goldstar Fin vest Pvt. Ltd. is registered as a sub-broker'. Further, the ISE stated that 'M/s. Goldstar Finvest Pvt. Ltd. at present membership as a trading member - Trading member expelled and as a sub-broker still registered but expelled'.

I am of the view that the said broker was authorized broker with NSE and ISE at the time of transactions of these shares, though was expelled from ISE at the time of enquiries conducted by the A.O., nevertheless the transactions were routed through stock exchange supported by documentary evidences.

(iii) Coming to the observation of the AO in para No.3.3 of the Assessment order wherein AO has referred certain inquiry u/s 133(6) with respect to NSE, BSE and ISE, in response to this the appellant vide his letter dated 10.12.2011 which has been reproduced by the AO in the body of the Assessment Order itself in para No.3.6.

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(iv) The appellant has purchased 200000 shares of Telant Infoways Limited on April 2003 and sold the same on Aug/Sep 2004. The appellant -has submitted Xerox copies of purchase as well as sale invoices. The appellant has also submitted Xerox copies of Demat Statements. The appellant has also submitted Xerox copies of bank statement through which transactions were routed.

Considering the above documentary evidences of third party, as well as the fact that the said shares were purchased/sold through stock broker appearing in demat statement supported by invoices, the genuineness of the said transactions cannot be doubted.

The appellant has purchased and sold 50000 shares of Prraneta Industries Limited. The BSE has submitted evidences of sale of 30000 shares in response to notice issued by A.O. u/s 133(6) of the Act. The

sale of shares as reported by BSE are matching with Demat Statement. It also proves that the said broker was registered with BSE. However for 20000 shares the same is not appearing in annexure of BSE, Nevertheless since entries for 20000 is also appearing in demat statement and the appellant was holding 20000 shares on the date of sale, the appellant has also received cheques against the sale. Stock Brokers are under control of SEBI, therefore it cannot be denied that the appellant has not sold these shares, otherwise how amount was received and supported by sale bills of stock broker and sale was entered into through BSE. Any evidence has to be considered in its entirety and one cannot draw a conclusion based on part information.

The long term capital gain shown by the appellant in the return of income filed for the Assessment Year 2005-06 on 2/9/2005 which has been offered to tax @ 10%. The said Long Term Gain is pertaining to listed securities viz. Talent Infoway Ltd. wherein the appellant has sold 2,00,000 shares on 26/8/2004, 28/8/2004 and 13/9/2004 for an amount of Rs.97,10,074/-. The said shares were acquired by the appellant on 4/4/2003, 8/4/2003 and 11/4/2003 for an amount of Rs. 2,60,690/-. Considering the cost inflation index, long term capital gain of Rs. 94,49,384/- has been shown by the appellant in the return of income filed. A.O. in para 3.4 has referred to certain search and seizure u/s. 132 in the case of Alag Securities Pvt. Ltd. Vide letter dated 5/12/2011 the appellant has submitted the complete details as well as reply to the order sheet entry dated 29/11/11 on the basis of inquiry conducted by the A.O. relating to the trade executed in the name of appellant in NSE and ISE wherein it is stated that no trade has been executed in the name of appellant. As per careful examination of same reply which is reproduced by the A.O. in para 3.6 it is noted that copies of purchase memo, contract note relating to purchase, copies of invoice, contract note, order as per trade number, trade time, quantity, sale rate, brokerage, net rate and amount, etc. has already been submitted. It was further claimed that payment has been received through A/c. Payee cheques and as to why the transaction is not reflected in Inter connected Stock Exchange of India, BSE and NSE cannot be commented by the appellant but it is submitted that as per the contract note, the transaction has taken in bolt. Copy of Demat Account for Shah Investor's Home Ltd. has also been filed in brief that the shares were held in demat account. Further, in para 3.8 of the assessment order, A.O. has - -referred to reply dated 10/10/11 appended as Annexure - A of the submission. The perusal of the said letter reveals that the appellant has further submitted copy of the Bank Statement

indicating the sale proceeds and gone through the copies of the 3 letters of BSE, ISE and NSE and clarified that BSE has clearly stated that PAN based transaction have become mandatory with effect from 1/1/2007 and these transactions being relevant to financial year 2004-05 have not been reported by BSE. Further, Inter connected Stock Exchange of India has stated that the transactions were not with ISE and with respect to NSE, information was supplied to the A.O. therefore, even from the inquiry conducted by the A.O. it has not been proved that impugned transactions relating to the sale of the shares of Prraneta Industries are not genuine when BSE has clearly informed about the transaction relating to appellant in Annexure 'A'. This submission of the appellant though considered by the AO in para No. 3.8, but AO simply stated that in the said reply of appellant nothing was new and everything was already stated in the earlier submission dated 5/12/2011. Therefore, A.O. has not brought on record any evidences indicating that the said gain of Rs. 94,49,384/- is not genuine. Any transaction cannot become suomoto non-genuine simply because there has been search & seizure in some cases wherein contrary documentary evidences were found during the course of search in those cases. The issue to be considered is whether any adverse evidence was relating to appellant and if so whether it was given for explanation. There being no such link and in view of evidences filed and facts collected through inquiries, the sum of Rs.94,49,384/- being the long term gain on sale of shares cannot be considered definitely as unexplained for the purpose of addition u/s. 68 of the I. T. Act, 1961 and that too for A. Y. 2005-06. One cannot ignore plethora of documentary evidences containing particulars such as complete contract note, details of trade, verification of the trade, etc. and explanation of appellant which remained uncontroverted. The A.O. is directed to treat the same as Long Term Capital Gain of Rs.94,49,384/- as shown in the return of income. This ground of appeal is accordingly allowed.

With respect of ground relating to addition of Rs. 13,17,873/- being Short Term Capital Gain which has been added by the A.O. u/s. 68 of the I. T. Act, 1961, the issue is discussed by the A.O. in para No. 4 of the assessment order. The total short term capital gain of Rs. 32,94,684/- is relating to the sale of 50,000 shares. Proportionate amount relating to 30,000 shares has been allowed by the A.O. resulting into the addition of Rs.13,17,873/- relating to 20,000 shares. This is based on the information furnished by the BSE wherein 30,000 shares of Prraneta Industries Ltd. sold by the appellant has been

confirmed, A.O. has considered short term capital gain relating to the said shares as only genuine and STCG on account of remaining shares is added u/s. 68. From the perusal of para 4, it is seen that the transaction relating to Prraneta Industries Ltd. are not through Mahasagar Securities Pvt. Ltd. Also as per the inquiry letter, there is no reference to the 'shares of Prraneta Industries Ltd. I have also looked into the details of sales and purchases of shares relating to Prraneta Industries Ltd. and it is seen that total shares have been sold through Neptune Securities Pvt. Ltd. and Vimla Exims Pvt. Ltd. Total 30,000 shares have been sold through Neptune Securities Pvt. Ltd. through 3 difference invoices and 20,000 shares have been sold through Vimla Exim Pvt. Ltd. through 2 different invoices. A.O. has referred that as per the information furnished by BSE only 30,000 shares have been reported. Therefore, it seems that 30,000 shares sold through Neptune Securities Pvt. Ltd. who is the member of Ahmedabad Stock Exchange as well as BSE sub-broker have been confirmed and remaining 20,000 shares sold through Vimla Exim Pvt. Ltd. who is a sub-broker of ASE Capital Market Ltd. have not been properly inquired. Moreover, the invoices by Vimla Exim Pvt. Ltd. contain the order number, trade number, trade time, quantity sold, settlement number, settlement period as well as contract number, etc. Information provided in the invoice of Vimla Exim Pvt. Ltd. is similar to information provided by Neptune Securities Pvt. Ltd. and the period and rate is also almost same in both the cases. Therefore, having accepted the purchases as genuine, further sale of 30,000 shares having been accepted as genuine, no evidences have been brought on record by the A.O. about the remaining 20,000 shares to treat the same as non-genuine. No further inquiry has been conducted with any of the brokers and non-availability of exact information about the 20,000 shares has been considered for the purpose of addition u/s. 68 of the I.T. Act, 1961. The fact remains that total shares were held in demat form, copies of the demat transaction was submitted before the A.O. and even as per the transaction statement issued by NSDL, there is dear cut debit of 10,000 shares each, two times relating to transfer of shares through Vimla Exim Pvt. Ltd. rolling market lot No. 2004241 and 2004246. I note that for ASE Capital Market Pvt. Ltd. also there is some discrepancy of rolling market lot number. Therefore, I find no justification for treating capital gains relating to 20,000 shares for the purpose of addition u/s. 68 of the I. T. Act, 1961.

(i) when conditions stipulated u/s. 68 are not existing, &

(ii) short term capital gains are shown by the appellant in return of income.

The controversy has arisen as the AO was having information that M/s. Mahasagar Securities Ltd. and related group companies were engaged in arranging long term capital gain/short term capital gain through accommodation entries. In this regard, it is mentioned that arranged LTTCG/STTCG transactions are normally having short life. The arranged transactions are completed in the shortest possible time. In the organized transactions all evidences, which are available on record cannot be managed.

The whole issue is relating to the statement u/s. 131/132 of the I.T. Act, 1961 of Shri Mukesh Choksi in spite of all cogent evidences produced and kept on record. The fact that Shri Mukesh Choksi has not been cross-examined by appellant cannot be ignored as heavy reliance is placed on his statement by the AO. It is also noted that Shri Mukesh Choksi has given contrary statements in case of few assessees through affidavit that their transactions were genuine and the very issue has been examined by courts. I feel that the entire issue is covered by Hon'ble the Mumbai Tribunal in the case of Shri Jafferli K. Rattonsej vs. DCIT reported in 53 SOT 220 (Mum.)(URO). It is appropriate to reproduce the relevant extract of the finding portion of the Mumbai Tribunal order in the case of Jafferli as under:

"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 Shn Jafferli K. Rattonsej 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."

In addition to above, I have also gone through the following orders of the Mumbai Tribunal, wherein also, in respect of the "Shares scam" alleged to be involved by Shri Mukesh Choksi actions were taken against many persons disallowing their claim in respect of long term capital gain / short term capital gain and under the identical set of facts the been considered by the Tribunal has deleted addition made u/s. 68 / 69 of the I. T. Act, 1961:

- (a) Smt. Hamida J. Rattonsej vs. DCIT
- (b) ITO vs. Rasila N. Gada
- (c) Smt. Durgadevi Mundra vs. ITO
- (d) Sachin N. Morakhia vs. ITO
- (e) Mukesh R. Morolia vs. ACIT
- (f) CIT vs. Mukesh R. Marolia (Bombay HC)
- (g) ITO vs. Truptic Shah
- (h) ACIT vs. ShriRavindrakumar Toshniwal
- (I) ITO vs. Smt. Navneet Mehra

Now coming to the various orders of Jurisdictional ITAT, Ahmedabad, though in such cases alleged transactions with Shri Mukesh Choksi were not involved, but there also addition was made u/s. 68 / 69 of the I. T. Act, 1961 . on allegation of offering Short / Long Term Capital Gain on the basis of accommodation bills / contract notes provided by the different broker, wherein also the Tribunal after taking into consideration various evidences has held that addition cannot be made u/s. 68 / 69 of the I. T. Act, 1961:

- (a) ITO vs. Shri Prakashchand S. Sandh
- (b) ACIT vs. MaheshG. Vakil
- (c) ACIT vs. Himani M. Vakil

(d) Manojkumar Sarawangi HUF vs. ACIT

The proposition that, if purchase trades carried out through broker Mahasagar Securities Pvt. Ltd. are not recorded in the name of, the assessee on the floor of stock exchanges and therefore the purchase of such shares were not genuine, is concerned I am of the opinion that purchase and sale of shares outside the floor of stock exchange is not an unlawful activity as held by Mumbai ITAT in the case of Mukesh Moralia (supra) as under:

"10.3 Purchase and sale of shares outside the floor of Stock Exchange is not an unlawful activity. Off-market transactions are not illegal. It is always possible for the parties to enter into transactions even without the help of brokers. Therefore, it is not possible to hold that the transactions reported by the assessee were quite sham on the legal proposition arrived at by the CIT(A) that off-market transactions are not permissible. The assessee has stated that the transactions were made with the help of professional mediators who are experts in off-market transactions.

70.4 When the transactions were off-market transactions, there is no relevance in seeking details of share transactions from Stock Exchanges. Such attempts would be futile. Stock Exchanges cannot give details of transactions entered into between the parties outside their floor. Therefore, the reliance placed by the assessing authority on the communications received from the Stock Exchanges that the particulars of share transactions entered into by the assessee were not available in their records, is out of place. There is no evidential value for such reliance placed by the assessing authority. The assessee had made it very clear that the transactions were not concluded on the floor of the Stock Exchange. The matter being so, there is no probative value for the negative replies solicited by the assessing authority from the respective Stock Exchanges. We are of the considered view that the materials collected by the assessing authority from the Stock Exchanges are not valid to dispel or disbelieve the contentions of the assessee."

It is further seen that the Mumbai Tribunal order of Mukesh Moralia has been found to be correct and it is confirmed by the Bombay High Court in Tax Appeal No.456 of 2007. Therefore, respectfully following such orders, I hold that even if alleged shares purchased through off-market trade the same cannot be considered illegal and consequently non-genuine.

The CIT(A)-XI, Ahmedabad vide its Appeal order No. CIT(A)-XI/437/ACIL Cir. 6(5)/11-12 dated 07/05/2012 in the case of Smt. Jaya Vineet Agarwal for A. Y. 2004-05 has also deleted addition u/s. 69 of the I.T. Act, 1961 on the facts and circumstances relating to the statement of Shri Mukesh Choksi. Thus, the issue is squarely and directly covered by the Jurisdictional Ahmedabad order in the case of Manojkumar Sarwangi (supra) and the decisions referred to in the same order."

5.2 The Id. CIT(A), on the basis of these observations, the impugned addition was deleted.

6. Aggrieved by the aforesaid order of the Id. CIT(A), the Revenue is now in appeal before us.

7. The Id. Counsel for the assessee reiterated the relevant facts and contends that the additions have been deleted by Id. CIT(A) after due appreciation of facts and legal propositions. The particulars in respect of LTCG/STCG received by the assessee out of sale of shares of Talent Infoway Ltd and Parranet Indus. Ltd are as under:-

A)	<u>Amount</u>	<u>Gain</u>	<u>Share</u>
	Rs. 94,49,383/-	Long Term Capital Gain	Talent Infoway Ltd

Details of Purchases:

Purchased on:	4/4/2003	50,000
	8/4/2003	50,000
	11/4/2003	1,00,000

		2,00,000
		=====

(i) As on 31/3/2004 (AY 2004-05) assessee has duly shown these as investment in the books of accounts. Same are duly enclosed with return of income and accepted by I T Department in AY 2004-05 not only in original but also in reassessment u/s 143(3) rws 147. Thus in both assessments for the same year after detailed scrutiny have been accepted as assessee's Investments.

These shares were purchased through Gold Star Finvest P. Ltd. besides the they were also in D-mat account.

- (ii) Ld. AO did not conduct any enquiry from Gold Star Finvest P. Ltd. which is found to be registered as a sub Broker of NSE

Details of Sales

- (i) The shares are sold On 26/8/2004, 28/8/2004, 06/9/2004, 11/9/2004, 13/9/2004 through Maha Sagar Securities P. Ltd. which is a dealer of Inter Continental Stock Exchange and Sub Broker of NSE which has duly supplied the information received in pursuance to inquiries u/s. 133(6). Vide reply to show cause notice dated 10/12/2011 - Para No. 5 placed on Page No. 84 to 85 the details have been provided by NSE to the ld. AO in Annexure A confirming the transactions. Contents of Annexure A have neither been discussed by the AO in the Assessment Order nor given to the assessee for any further clarifications.
- (ii) Therefore, NSE having confirmed the transaction to ld. AO in reply to statutory inquiries u/s 133(6), ld. CIT(A) has rightly deleted the additions.

B)	<u>Amount</u>	<u>Gain</u>	<u>Share</u>
	Rs. 13,17,873/-	Short Term Capital Gain	- Parranet Indus.

Ld. Counsel contends that:

- (i) Total 50,000 shares sold on 16/3/2005 which were purchased by cheque payments on 3/9/2004 and duly entered in the books of accounts. Ld. AO made no enquiry from Purchaser Company.
- (ii) AO has accepted 30,000 sales as genuine thus the identity of party and capacity to pay the amount is clearly demonstrated. There is no justification to hold the part of sale as genuine and part as unexplained cash credit.
- (iii) Ld. AO for 20,000 shares Rs. 13,17,873 has made the addition u/s 68 on proportionate basis by holding it as unexplained/ income from other sources.

(iv) BSE has confirmed transaction of 30,000 Shares (of Neptune Securities P. Ltd) and 20,000 Shares have been sold through Vimla Exim P. Ltd. Surprisingly no enquiry has been conducted from Vimla Exim P. Ltd who is a member of Ahmedabad Stock Exchange. This fact is not disputed by the department.

7.1 It is vehemently contended that all the transactions of sale of shares are genuine, purchases relevant to AY 2004-05 have been affected through banking channels, entered in books of accounts and accepted by the department in two assessments for the same years. Ld. CIT(A) duly considered the material and facts available on the record and accepted the explanation of the assessee to be correct after detailed verification and consideration of legal propositions. Consequently there is no infirmity in his order.

7.2 It is further contended that in the assessment u/s 143(3) of assessee's wife Smt. Jaya Agrawal for AY 2004-05 questions were raised for similar type of share transaction. Ld. AO in her case accepted them by following observation:

" ...

In the meanwhile, the undersigned also with a view find out the genuineness of income under the head Long Term Capital Gain called for the relevant information from the Company named Gwalior Tank & Vessels Ltd., the shares of which the assessee sold and earned income under the head Long Term Capital Gain as mentioned earlier. The information from the broker, Gold Star Finvest Pvt. Ltd., Indore Stock Exchange and Union Bank of India was also called for. After going through the replies received from Union Bank of India and Gwalior Tank & Vessels Ltd. and the detailed submissions made by the assessee mentioned above, the transaction of shares on which the assessee has gained appears to be genuine. The letter issued to broker was returned as the broker Gold Star Finvest Pvt. Ltd. has shifted its office from Juhu, Mumbai to Shantakruz, Mumbai. The assessee however has filed confirming letters from the broker dated 6/11/2003 and 2/12/2003

wherein it is stated that 99,400 shares were received by them in physical form. The copies of contract note, sale deed confirming the sales of shares, distinctive nos. of shares and the amount realized with sale rate etc. have also been made available. Madhya Pradesh Stock Exchange Ltd. however, had replied that no data was available with them and therefore, the same cannot be provided. But, as all the other required details including the information from the bank confirming the deposits of the cheques with amount and the dates of deposit as shown by the assessee in his bank account indicate that the assessee earned income from LTCG. The assessee has sold the shares in open market through a registered broker who confirm the sale rate in the contract note and in the bills."

7.3 Similarly, in the assessment u/s 143(3) of Shri Sureshchandra Agrawal also, these transactions and capital gains on sales have been accepted. Copies of their assessment orders are placed on record.

7.4 In view of all these facts, circumstances, contentions and proposition of law, the order of Id. CIT(A) is perfectly justified and deserves to be upheld.

8. Ld. Sr. DR relied on the order of Id. AO.

9. We have heard the rival contentions and perused the material available on record. Apropos the issue of alleged share scam of Shri Mukesh Choksi, the Mumbai Tribunal has already considered the aspects of alleged "Shares Scam", involvement of Shri Mukesh Choksi and group entities in various cases. In similar set of facts, the Tribunal has deleted addition made u/s. 68/69 of the I. T. Act, 1961 qua the claims of long term and short term capital gains in following cases which are relied on by Id. CIT(A):

- (a) Smt. Hamida J. Rattonsej vs. DCIT
- (b) ITO vs. Rasila N. Gada

- (c) Smt. Durgadevi Mundra vs. ITO
- (d) Sachin N. Morakhia vs. ITO
- (e) Mukesh R. Marolia vs. ACIT((2006) 6 SOT 247)
- (f) CIT vs. Mukesh R. Marolia (Bombay HC)
- (g) ITO vs. Truptic Shah
- (h) ACIT vs. ShriRavindrakumar Toshniwal
- (I) ITO vs. Smt. Navneet Mehra

9.1 Following these precedents, the ITAT-Ahmedabad by following judgments, deleted similar additions made by authorities below by holding that Short/Long Term Capital Gain offered by assessee were accommodation entries provided by such persons and adding the amounts of such gains u/s. 68 / 69 of the I. T. Act, 1961:

- a) ITO vs. Shri Prakashchand S. Sandh
- b) ACIT vs. MaheshG. Vakil
- c) ACIT vs. Himani M. Vakil
- d) ManojkumarSarawangi HUF vs. ACIT

9.2 The proposition that, share purchases through broker Mahasagar Securities Pvt. Ltd. are not recorded in the name of, the assessee on the floor of stock exchanges outside the floor of stock exchange has not been held as unlawful activity as held by Mumbai ITAT in the case of Mukesh Moralia ((2006) 6 SOT 247) as under:

"10.3 Purchase and sale of shares outside the floor of Stock Exchange is not an unlawful activity. Off-market transactions are not illegal. It is always possible for the parties to enter into transactions even without the help of brokers. Therefore, it is not possible to hold that the transactions reported by the assessee were quite sham on the legal proposition arrived at by the CIT(A) that off-market transactions are not permissible. The assessee has stated that the transactions were made with the help of professional mediators who are experts in off-market transactions.

70.4 When the transactions were off-market transactions, there is no relevance in seeking details of share transactions from Stock Exchanges.

Such attempts would be futile. Stock Exchanges cannot give details of transactions entered into between the parties outside their floor. Therefore, the reliance placed by the assessing authority on the communications received from the Stock Exchanges that the particulars of share transactions entered into by the assessee were not available in their records, is out of place. There is no evidential value for such reliance placed by the assessing authority. The assessee had made it very clear that the transactions were not concluded on the floor of the Stock Exchange. The matter being so, there is no probative value for the negative replies solicited by the assessing authority from the respective Stock Exchanges. We are of the considered view that the materials collected by the assessing authority from the Stock Exchanges are not valid to dispel or disbelieve the contentions of the assessee."

9.3 The Mumbai Tribunal order in the case of Shri Mukesh Moralia has been upheld and confirmed by the Bombay High Court in Tax Appeal No.456 of 2007. Therefore, in view of foregoing, the shares purchased through off-market trade the same cannot be considered non-genuine ignoring the facts that the purchases are accepted by Department in preceding year by two assessments for the same year and the payments of purchases and sales are effected by a/c payee cheques.

9.4 Further in the case of Smt. Jaya Vineet Agarwal for A. Y. 2004-05, Id. CIT(A)-XI, Ahmedabad vide its Appeal order No. CIT(A)-XI/437/ACIL Cir. 6(5)/11-12 dated 07/05/2012, on similar facts, has also deleted addition u/s. 69 of the I.T. Act, 1961 on the facts and circumstances relating to the statement of Shri Mukesh Choksi. This order has been accepted by the Revenue. The parties to share transactions and facts being similar, Id. CIT(A) has taken a correct view in deleting the additions.

9.5 Ld. AO, though confirmed the sale of 30,000 Shares of Neptune Securities P. Ltd, however for part of 20,000 sale of shares held to be non-genuine and Rs. 13,17,873 were added u/s 68 on proportionate basis. It leads to a contradiction and despite the facts that BSE has confirmed transaction of 30,000 Shares. In the absence of any inquiry from Vimla Exim P. Ltd who is a undisputedly a member of Ahmedabad Stock Exchange no adverse inference can be drawn.

9.6 In view of these glaring facts, the assessment of Smt. Jaya Agrawal and the fact that the relevant purchases for AY 2004-05 have been held to be genuine, we see no infirmity in the order of ld. CIT(A) in deleting these additions. On the issues of Shri Chokshi, Mahasagar Securities Pvt. Ltd. and Goldstar Finvest Pvt. Ltd., a catena of judgments from ITAT, Mumbai and Ahmedabad is available in favour of the assessee which view also stands confirmed by Hon'ble Bombay High court in the case of Shri Mukesh Moralia. Respectfully following these judicial precedents and facts and circumstances as mentioned above, we uphold the order of ld. CIT(A). Revenue's ground stands dismissed.

10. In the result, Revenue's appeal as well assessee's CO, both are dismissed.

Order pronounced in the Court on 6th January, 2017 at Ahmedabad.

Sd/-

Sd/-

AMARJIT SINGH
(ACCOUNTANT MEMBER)

Ahmedabad; Dated 06/01/2017

Bjn T, S. RP

R.P. TOLANI
(JUDICIAL MEMBER)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद/ ITAT, Ahmedabad