

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI
'SMC' BENCH, NEW DELHI**

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

ITA No. 4565/DEL/2018
[Assessment Year: 2014-15]

ANUBHAV JAIN
18/3, RAJPUR ROAD,
CIVIL LINES,
DELHI
(PAN: AICPJ9132G)
[Appellant]

Vs.

I.T.O, WARD 35(5)
NEW DELHI

[Respondent]

ITA No. 4566/DEL/2018
[Assessment Year: 2014-15]

ASHISH JAIN
18/3, RAJPUR ROAD,
CIVIL LINES,
DELHI
(PAN: AFOPJ5271P)
[Appellant]

Vs.

I.T.O, WARD 35(4)
NEW DELHI

[Respondent]

Assessee by : Shri Pranshu Goel, CA

Revenue by : Shri SL Anuragi, Sr. DR.

ORDER

These appeals by the different assessees are preferred against the respective orders of the Ld. Commissioner of Income Tax [Appeals] – 12, New Delhi both dated 13.04.2018 pertaining to assessment year 2014-15. Since the grounds raised in both the appeals are common and identical, hence, the appeals were heard

together and are being disposed of by this common order for the sake of convenience, by dealing with ITA No. 4565/Del/2018 (AY 2014-15) – Anubhav Jain vs. ITO. In both the appeals the assessee has raised as many 05 grounds of appeal. But at the time of hearing, Ld. A.R. for the assessee has only argued the ground no. 3.2 which is reproduced as under:-

“3.2 That the order passed by the Hon’ble CIT(A) upholding the order of the Ld. AO is bad in law and liable to be quashed as the Hon’ble CIT(A) and the Ld. AO placed reliance on statement of some person(s) without providing any opportunity to the appellant to cross-examine the same.”

2. Brief facts of the case are that assessee filed his e-return of income on 30.6.2014 declaring total income of Rs. 6,24,370/- after claiming deduction under Chapter VI-A of Rs. 1,01,196/-. This return was revised on 22.4.2015 declaring total income of Rs. 6,26,250/-. The case of the assessee was selected for scrutiny through CASS for reason “Suspicion long term capital gain or shares”. Notice u/s. 143(2) of the Income Tax Act, 1961 (in short “Act”) was issued on 17.8.2016. Thereafter, notice u/s. 142(1) of the Act dated 14.9.2016 was issued. In response to the same, the

A.R. for the assessee attended the proceedings from time to time and furnished various details / documents, as called for from time to time and verified it. Thereafter, the AO completed the assessment u/s. 143(3) of the Act at an income of Rs. 25,73,338/-. Against the assessment order, the Assessee appealed before the Ld. CIT(A) who vide his impugned order dated 13.4.2018 has dismissed the appeal of the assessee. Aggrieved with the order of the Ld. CIT(A), assessee appealed before the Tribunal.

3. During the hearing, Ld. A.R. for the assessee draw my attention towards the Assessment Order page no. 6 para 13 in which the AO has himself reproduced the submission of the assessee submitted vide assessee's reply dated 7.12.2016 requesting therein to allow the assessee to cross examine the source on the basis of which such an opinion has been formed. he further submitted that AO has not considered this point while passing the assessment order. Further he draw my attention towards page no. 7 of the Ld. CIT(A)'s order para no. 13 mentioning the assessee's reply dated 7.12.2016 as made before the AO, as aforesaid, which was also not considered by the Ld. CIT(A). He further draw my attention towards page no. 24 of the Ld. CIT(A)'s order wherein it was specifically mentioned that the assessee is specifically asked for copies of the statements of Sh. Vikram Kayan

and also seeks cross examination of Sh. Vikram Kayan, but not considered the said request of the assessee. Further, it was submitted that vide ground no. 5 raised before the Ld. CIT(A) assessee has challenged the order of the AO by stating that the addition made by the AO is untenable in the eyes of law having been made without providing opportunity to cross examine the persons on the basis of whose statements the allegations have been made against the assessee and without following the principle of natural justice. He further submitted that Ld. CIT(A) has not adjudicated this ground and summarily dismissed the appeal of the assessee by upholding the assessment order. He further submitted that Finally, he submitted that this addition in dispute has been made only on the statement of Sh. Vikrant Kayan without providing any opportunity to the assessee to cross examine the same, which is violation of principle of natural justice. He further submitted that exactly on the similar facts and circumstances the ITAT, SMC, Delhi Bench vide its order dated 06.11.2018 passed in ITA No. 3510/Del/2018 (AY 2014-15) in the case of Smt. Jyoti Gupta vs. ITO the SMC Bench, Delhi has considered the statement of Vikrant Kayan and has held that impugned addition was made on the statement of Sh. Vikrant Kayan without providing any opportunity to the assessee to cross examine the same and Ld. CIT(A) has not

considered the same, which is in violation of principle of natural justice and against the law settled in the decision rendered by the Hon'ble Supreme Court of India in the case of Andaman Timber vs. CIT decided in Civil Appeal No. 4228 of 2006. Hence, he requested to follow the SMC Bench decision in the case of Jyoti Gupta (Supra) and allow the appeals of the assessee.

4. Ld. DR relied upon the orders of the authorities below.

5. I have heard both the parties and perused the records, especially the assessment as well as impugned order and the reply filed by the assessee before the AO in response to the show cause notice. I find from the Assessment Order page no. 6 para 13 in which the AO has himself reproduced the submission of the assessee submitted vide assessee's reply dated 7.12.2016 requesting therein to allow the assessee to cross examine the source on the basis of which such an opinion has been formed which was not considered by the AO while passing the assessment order. I further note from the order of the Ld. CIT(A)'s in para no. 13 wherein the assessee's reply dated 7.12.2016 as made before the AO, as aforesaid was reproduced and also not considered by the Ld. CIT(A). I further find that at page no. 24 of the Ld. CIT(A)'s order, it was mentioned that the assessee was specifically asked for copies of the statements of Sh. Vikram Kayan and also seeks cross

examination of Sh. Vikram Kayan, but not considered the said plea of the assessee, despite request. I further find that in ground no. 5 raised before the Ld. CIT(A), wherein the assessee has challenged the order of the AO by stating that the addition made by the AO is untenable in the eyes of law having been made without providing opportunity to cross examine the persons on the basis of whose statements the allegations have been made against the assessee and without following the principle of natural justice. I note that Ld. CIT(A) has also not adjudicated the ground no. 5 raised before him and summarily dismissed the appeal of the assessee by upholding the assessment order. Moreover, the addition has been made only on the statement of Sh. Vikrant Kayan without providing the copy of statement of Sh. Vikrant Kayan and without providing any opportunity to the assessee to cross examine the same, which is in violation of principle of natural justice. I further note that exactly on the similar facts and circumstances the ITAT, SMC, Delhi Bench vide its order dated 06.11.2018 passed in ITA No. 3510/Del/2018 (AY 2014-15) in the case of Smt. Jyoti Gupta vs. ITO wherein, the SMC Bench has considered the statement of Vikrant Kayan and has held that since the impugned addition was made on the statement of Sh. Vikrant Kayan without providing any opportunity to the assessee to cross examine the same and Ld.

CIT(A) has not considered the same ground, which is in violation of principle of natural justice and against the law laid down by the Hon'ble Supreme Court of India in the case of Andaman Timber vs. CIT decided in Civil Appeal No. 4228 of 2006. For the sake of convenience, I am reproducing the relevant portion of the ITAT, SMC, Delhi Bench vide its order dated 06.11.2018 passed in ITA No. 3510/Del/2018 (AY 2014-15) in the case of Smt. Jyoti Gupta vs. ITO as under:-

"13. Merely on the strength of statement of third party i.e. Shri Vikrant Kayan cannot justify the impugned additions. Moreso, when specific request was made by the assessee for allowing cross examination was denied by the Assessing Officer. The first appellate authority also did not consider it fit to allow cross-examination. This is in gross violation of the principles of natural justice and against the ratio laid down by the Hon'ble Supreme Court in the case of Andaman Timber Vs. CIT

Civil Appeal No. 4228 OF 2006 wherein it has been held as under:

"According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has

specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit

their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits

giving its reasons for accepting or rejecting the submissions. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause. We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal."

14. Considering the facts of the case in totality, I do not find any merit in the impugned additions. The findings of the CIT(A) are accordingly set aside. The Assessing Officer is directed to allow the claim of exemption u/s 10(38) of the Act."

6. Keeping in view of the facts and circumstances of the present case and respectfully following the order of the Tribunal, SMC Bench, Delhi in the case of Smt. Jyoti Gutpa

vs. ITO (Supra) and in view of the law settled by the Hon'ble Supreme Court of India in the case of Andaman Timber vs. CIT (Supra), on identical facts and circumstances, the addition in dispute is deleted and the appeal of the assessee is allowed.

7. Following the consistent view as taken in ITA No. 4565/Del/2018 (AY 2014-15) in the case of Anubhav Jain vs. ITO, as aforesaid, the addition involved in ITA No. 4566/Del/2018 (AY 2014-15) in the case of Ashish Jain vs. ITO is also deleted and this appeal is also allowed.

8. In the result, both the appeals filed by the different assesseees are allowed.

The order pronounced on 26.11.2018.

Sd/-

[H.S. SIDHU]
JUDICIAL MEMBER

Dated: 26th November, 2018

SR BHATNAGAR

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi