

आयकर अपीलीय अधीकरण, न्यायपीठ – “B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “B” KOLKATA

Before **Shri Waseem Ahmed, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

ITA No.1232/Kol/2014
Assessment Year:2008-09

M/s Shree Bishandas Iron Works, 4 India Exchange Place, 2 nd Floor, Kolka-001 [PAN No.AANFS0164 Q]	बनाम / V/s.	DCIT, Circle-36, Kolkata
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri Ravi Tulsian, FCA
प्रत्यर्थी की ओर से/By Respondent	Shri Saurbh Kumar, Addl. CIT-DR
सुनवाई की तारीख/Date of Hearing	02-11-2017
घोषणा की तारीख/Date of Pronouncement	26-12-2017

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-XIX, Kolkata dated 09.04.2014. Assessment was framed by DCIT, Circle-36, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) vide his order dated 31.12.2010 for assessment year 2008-09.

Shri Ravi Tulsian, Ld. Authorized Representative appeared on behalf of assessee and Shri Surbh Kumar, Ld. Departmental Representative appeared on behalf of Revenue.

2. Sole issue raised by assessee in this appeal is that learned CIT(A) erred in confirming the order of AO by sustaining the disallowance of Rs. 1,17,47,513 on account of commission expenses claimed by the assessee.

3. Briefly stated facts are that the assessee in the present case is a partnership firm and engaged in the business of manufacturing and trading of iron & steel materials.

The assessee, in the year under consideration, has claimed an expense of Rs.118,47,513 under the head "commission". The AO during assessment proceedings compared the amount of commission expenses and the turnover of the current year with the earlier year data as depicted below:-

A.Yr.	Turnover (Rs)	Commission paid (Rs)	%
2007-08	55,11,52,854	23,232	0.0042
2008-09	69,94,50,911	1,18,47,513	1.6938
Increase	14,82,98,057(26.9%)	1,18,24,281,(50896%)	

From the above, the AO observed that the turnover of the assessee has increased by 26.90% whereas the amount of commission has increased by 50896% in comparison to the earlier year data. Accordingly the AO issued notices under section 131 of the Act to six parties on random basis to verify the genuineness of the commission expenses claimed by the assessee. Out of 6 parties four parties appeared in response to the notice issued u/s 131 of the Act whereas for remaining 2 parties the assessee filed necessary documents/ confirmation from them in support of his claim. The necessary details of 6 parties stand as under :

<u>S.No.</u>	<u>Name of party</u>	<u>Appeared</u>	<u>Statement recorded/Confirmation filed</u>
i)	M/s Gourishanka Bajaj & Sons (HUF)	Yes	Yes
ii)	M/s Tirumal Traders	"	"
iii)	Sri Manoj Sarda	"	"
iv)	M/s Shiv Kr. Ashok Kumar	"	"
v)	M/s Jai Kishor Agarwl (HUF)	No	No
vi)	M/s Basukinath Goods (P) Ltd	-	Confirmation filed

The statements recorded under section 131 of the Act by the AO of the 4 persons as discussed above are recorded on pages 2 to 6 of the assessment order.

The AO on the basis of statements recorded under section 131 of the Act was of the view that the services rendered by the parties have not been substantiated.

The AO during assessment proceedings also issued notices under section 133(6) of the Act to 7 parties to whom the assessee has made sales during the year to check the veracity of the commission expenses. The list of parties stands as under :

- i) M/s Bhagwti Steel Enterprise

- ii) M/s Chhotaria Udyog Nigm
- iii) M/s Doharia Steel Industries Ltd
- iv) M/s Jai Balaji Industries Ltd.
- v) M/s Jai Balaji Industries Ltd. (A/c ARC)
- vi) M/s Jai Balaji Sponge Ltd (A/c ARC)
- vii) M/s Calcutta Steel Traders

However all the parties have confirmed that no broker was involved in the business dealing with assessee. Similarly the Inspector was also deputed to verify the genuineness of commission expenses who also confirmed that no broker was involved.

In view of above the AO allowed the commission expense of Rs.1 lacs considering the earlier year commission expenses i.e. Rs. 23,232 only and disallowed the remaining commission expenses of Rs. 1,17,47,513.00 and added to the total income of the assessee.

4. Aggrieved assessee preferred an appeal to Ld CIT(A). The assessee before the ld. CIT(A) submitted that

- 1) It is purchasing H.R. Coils, P.M. Plates/HSM/CH Coil etc. from TATA and SAIL.
- 2) In the earlier years there were less numbers of dealers who were procuring the goods from TATA & SAIL. But during the year TATA & SAIL has appointed many small and medium sized dealers for the sale of their goods as compared to last year.
- 3) Due to high competition prompt lifting of goods from the stockyard of TATA/SAIL was very important in order to secure work from TATA and SAIL, which would have got diverted to the other small and medium dealers in case of any delay.
- 4) Moreover, the markets were very volatile during the year. A perusal of purchase invoices of different months will show the wide fluctuation in market rates.
- 5) As a result the assessee was required to monitor/ provide the following services:
 - i) To lift material promptly from the stockyard in order to maximize lifting which would provide twin benefits to the assessee; (a) larger rebates, (b) secure more business.
 - ii) To give information about the demand of the nature and quality of the materials in the market;
 - iii) To book the order of the materials as per specification before SAIL & TATA and coordinate accordingly with SAIL & TATA for availability of the specified materials.

Until last year due to fewer dealers in the market TATA & SAIL would themselves approach the assessee for orders, but now there was a need of initiative on the assessee's side;

- iv) To help the assessee make payment as per offer of materials issued by SAIL & TATA after taking into consideration the demand and price of the materials offered;
- v) To check for Shortages, i.e. to ensure that the quantity actually given by TATA & SAIL is not short of the quantity for which invoices have raised;

6) In view of above the assessee to get the above services appointed commission agents.

The detail of some of the agents stand as under :

- i) Gauri Shankar Bajaj & Sons (HUF),
- ii) Manoj Kumar Sarda,
- iii) Jai Kishan Agarwal (HUF) &
- iv) Basukinath goods Pvt. Ltd.

7) During assessment proceedings the following documents were filed

- i) Personal identity proof
- ii) Evidence of commission received from Shri Bishandas Iron Works during the year 2007-08
- iii) PAN no., receipt copy of IT Return for the AY 2008-09, computation of Tax and Balance Sheet for FY 2007-08.
- iv) Copies of their PAN cards, bank statements showing the commission receipt, IT returns, tax computations and Balance Sheets

8) The parties have also confirmed the above transaction and services rendered during the assessment proceedings and in response to the notice issued under section 131 of the Act.

However the Id. CIT(A) disregarded the contention of the assessee and confirmed the order of AO by observing as under:-

“4.4 On an analysis of the am order of the AO and the contention of the appellant as elucidated (supra) to substantiate its stand on the issue, my findings and decision thereon are as follows:

The AO examined the parties u/s. 131 to whom Commission was paid and found that none of them could give details of the services rendered, none of them could give details of the parties to whom they were servicing. In one of the cases the party also admitted that the transactions was an accommodation entry. I find that the appellant was given a chance to cross examine the parties

on 15/12/2010 & 20/12/2010, the appellant did not avail of the same. Now In the appellant proceedings the appellant did not avail of the same. Now in the appellate proceedings the appellant is raising a plea that no opportunity to cross-examine the parties were provided. The plea raised the appellate proceedings is found to be factually incorrect. In this regard I find that the Hon'ble Calcutta High Court in the case of Hindustan Tobacco Company vs. CIT dated 30/08/2012 in ITA No.267 of 2003 has held as follows:-

'If a party fails to avail of the opportunity to cross-examine a person at the appropriate stage in the proceedings the said party would be precluded from raising such issue at a latter stage of the proceeding. Therefore the belated claim of the assessee at the appellate stage that it was denied the opportunity of cross-examining witness in the assessment receding is wholly untenable in law.

I therefore find that the cross examination was offered to the appellant and he did not avail of the same and at this stage the appellant cannot be allowed to raise such a plea. I further find that the parties who were earning substantial Commission from the appellant and acting as agents to sell goods worth cross of rupees could not give details of services rendered, name of parties to whom they were servicing etc. Thus the basis details of the job claimed to be done by them was also not known by them. The parties to whom, these alleged agents were servicing also clarified that these parties were not known to them. I find that it is well established principle of law that the burden is upon the assessee to establish that any expenditure claimed a deduction was laid out or incurred for the purposes of business. In respect of the claim of payment of Commission for services rendered, the burden is upon the assessee to establish that the services were rendered for which payment was made. Their Lordships of the Calcutta High Court in the case of Vishnu Agencies (P) Ltd. held that the onus was on the assessee to establish that were facts in existence which entitled it to a deduction and it was for the assessee to adduce evidence to show that services, if any, were rendered by the ole selling agents. Similar view has been taken by their Lordships of the Gauhati High Court in the case of Assam Pesticides & Agro Chemicals v. CIT (1977) 227 ITR 846. Their Lordships held:-

'mere payment by itself would not entitle an assessee for deduction of the said expenditure unless the same was proved to be paid for commercial consideration. The onus of proof at all relevant times rests upon the assessee. The law does not prescribe any quantitative test to find out whether the onus in a particular case has been duly discharged. It all depends on the facts and situation of the case.'

The view expressed by their Lordships of the Calcutta High Court and that of the Gauhati High Court referred to above, is supported by the view of their Lordships of the Supreme Court in the case of Lachminaryan Madan Lal vs.cit [1972] 86 ITR 439. Their Lordships have held as under:-

“The mere existence of an agreement between the assessee and its selling agents or payment of certain amounts as Commission, assuming there was such payment, does not bind the Income-tax Officer to hold that the payment was made exclusively and wholly for the purpose of the assessee’s business. Although there might be such an agreement in existence and the payments might have been made, it is still open to the Income-tax Officer to consider the relevant facts and determine for himself whether the Commission said to have been paid to the selling agents or any part thereof is properly deductible under section 37 of the Act.”(p 440)

In the light of the above well settled judicial principles of law, in this case the assessee cannot be said to have discharged the onus for establishing the claim of the payment having been made from the services to the Commission agent. The surrounding circumstances and human probabilities also do not inspire confidence about the genuineness of the claim. The assessee had been given sufficient opportunity to establish the genuineness of the claim of rendering of services. All these factors taken together do not leave any doubt in my mind that the assessee had miserably failed to discharge the onus and for which, according to Hon'ble High Court Calcutta in the case of Vishnu Agencies (P) Ltd. (supra), the Hon'ble Gauhati High Court in the case of Assam Pesticides & Agro Chemicals v. CIT and the Supreme Court in the case of Lachminryan Madan Lal v. CIT, I hold that the AO was justified in making the disallowance of ₹1,17,47,513/- at the same is therefore upheld.”

Aggrieved by this, the assessee has come up in appeal before us.

5. The Id. AR before us submitted written submissions which are reproduced under:-

2.1 The assessee during the year procured H.R. Coils, P.M. Plates/HS~JCH Coil etc. from TAT A and SAIL. In the FY 2006-07, assessee was one of their few dealers. However, the position changed substantially in the current FY, when TAT A & SAIL gave dealership to many small and medium sized dealers. Accordingly, the level of competition at the procurement end was obviously higher in the current FY. Prompt lifting of goods from the stockyard was very important in order to secure work from TAT A and SAIL, which would have got diverted to the other small and medium dealers in case of any delay. Moreover, the markets were very volatile during the year.

2.2 In the light of changes in the market conditions as discussed above, there arose a need of constant monitoring, to render the following services (performed by agents at procurement end):

- To lift material promptly from the stockyard in order to maximise lifting which would provide twin benefits to the assessee; (a) larger rebates, (b) secure more business
- to give information about the demand of the nature and quality of the materials in the market;

- to book the order of the materials as per specification before SAIL & TATA and coordinate accordingly with SAIL & TATA for availability of the specified materials. Until last year due to fewer dealers in the market TATA & SAIL would themselves approach the assessee for orders, but now there was a need of initiative on the assessee's side;
- to help the assessee make payment as per offer of materials issued by SAIL & TATA after taking into consideration the demand and price of the materials offered;
- to check for shortages, i.e to ensure that the quantity actually given by TATA & SAIL is not short of the quantity for which invoices have been raised

2.3 The assessee, however lacked the infrastructure to perform all of the above on its own and hence decided to outsource the 'above mentioned services. The conditions of increased competition coupled with a fluctuating market called for constant vigilance, which gave rise to the need for commission agents.

2.4 Moreover, in order to outperform the other dealers and secure maximum business from TATA & SAIL it was necessary to maximise the sales. Therefore, commission agents were hired to provide the following services:

- to help maximize the customer base and increase the turnover and the turnover actually increased by 26.9% and the profits increased by 137.09% during the said period;
- to help the assessee realise the sale value by providing information of the credibility of the buyer and use of their influence to get the right price and timely payment from the buyer of the materials.

In light of the aforesaid factual position, it is clear that service of commission agents was absolutely essential with a view to maximize profits. In fact, the profits during the year actually increased by 137.09% as compared to the profits of last year [turnover increased from Rs. 55.1 crores (last year) to Rs. 69.95 crores this year].

3.1 Moreover, the assessee in course of assessment produced complete details of commission agents. Notices u/s 131 of the Act were issued to the agents who in turn appeared before him and produced the relevant details as requisitioned by the AO.

3.2 Let us now discuss in detail the documents furnished by the agents to the AO. In response to notice u/s 131 of the Act, the agent namely Gauri Shankar Bajaj & Sons (HUF) furnished the following:

- (i) PAN of the Karta & HUF
- (ii) Voter ID of Karta
- (iii) IT Acknowledgment of HUF
- (iv) Balance Sheet, P/L account of HUF together with its tax computation
- (v) Bank statement evidencing receipt of commission
- (vi) Invoice raised on the assessee together with a confirmation from the agent

3.3 A perusal of the invoice at page 8 of paper book shows that a commission of Rs.6,50,400/- was billed on the assessee which was paid in March, 2008 (See agent's bank statement at page 7 of the paper book). Further, a perusal of P/L & Tax computation at pages 5&6 shows that commission income of Rs. 7,92,400/- was

offered to tax by the agent. All the aforesaid documents were produced before the AO in course of assessment who pointed out no error in the given documents.

3.4 Further, the Karta of HUF personally appeared before the AO and confirmed the receipt of commission (reply to Question 4).

3.5.1 Similarly the other agents too Manoj Sarada, Jai Kishan Agarwal (HUF) and Basukinath Goods Pvt. Ltd. furnished copies of their bank statement, IT Acknowledgement, Tax Computation together with the invoices raised on the assessee. Copies of the said documents are enclosed at pages 30-38, 59-83 of the paper book. A perusal of the same shall establish the receipt of commission together with the fact that the said commission was offered to tax in their returns.

In rejoinder Id. DR submitted that the amount of commission represents the bogus expense therefore the same is not eligible for deduction.

On the other hand, Id. DR vehemently supported the order of the lower authorities.

6. We have heard the rival contentions and perused the materials available on record. The assessee has claimed an expense of ₹1,18,47,513/- under the head "commission" during the year. As per the assessee the amount of commission is not representing the commission for arranging/ procuring business for it rather it represents the payment against the services provided by them to the assessee. The services provided by the agents have already been elaborated in the preceding paragraph. Therefore the same are not repeated herewith for the sake of brevity.

From the foregoing discussion we note certain undisputed facts which are as under:-

1. The genuineness of payment has not been doubted.
2. The parties/ agents to whom the payments have been made not disputed.
3. All the agents/ recipients have disclosed the amount of commission in their respective books of accounts and offered to tax.
4. Four out of six parties have appeared and confirmed the transactions in response to the notice issued under section 131 of the Act.
5. Copies of the ITR, PAN, Identity, balance sheet, evidence of commission payment etc. are on record.
6. The turnover & profit of the assessee has increased during the year by 26.90% & 137.09% in comparison to the last year.

However, the AO disallowed the amount of commission on the basis that no service was rendered by the agents. The view taken by the AO was subsequently confirmed

by the Id. CIT(A). However in identical facts & circumstances we find that the Hon'ble jurisdictional High Court in the case of *CIT Vs. Hindustan Development Corporation Limited* reported in 101 taxman 146 wherein it was held as under:-

“Genuineness of the agreement had not been disputed. The assessee and ISC agreed that the sale would be through ISC and the commission on sales at a particular rate would be paid by the assessee. All payments were made by account payee cheques. Statements of partners of ISC were recorded by the ITO at the back of the assessee. No opportunity was given to the assessee to cross-examine them, not even copies of those statements were supplied to the assessee at the time of assessment, and these statements were used against the assessee. When the ITO had not allowed to submit copies of the evidences which were relevant to find out whether ISC had rendered any service, these very evidences, thereafter, were submitted in appeal before the Commissioner (Appeals) who as a matter of fact found that services were rendered and commission had been paid for the services rendered by ISC.

Whether any services had been rendered by ISC was basically a question of fact. No satisfactory answer had been given by the department to the query of the Bench as to what type of evidence in such cases was required. In cases of sales promotion, sales could be procured even on telephone if the purchaser was persuaded by the Agent.

There was a concurrent finding of the Commissioner (Appeals) as well as of the Tribunal that services had been rendered by ISC and that commission had been paid for that service. Merely, if some satisfactory answer had not been given by either of the partners of ISC to the ITO, that did not mean that no services were rendered or to disbelieve the genuineness of the agreement for services or sales, as well as of the payment. Even payment had not been denied. Therefore, in such cases it could not be said that the finding of fact was perverse. When the finding of fact regarding rendering of service was not perverse, the payment of commission could not be disallowed. No interference was, therefore, called for in the order of the Tribunal.”

6.1 We also note that Shree Gaurishankar Bajaj karta of Gaurishankar Bajaj & Sons has duly admitted in his statement u/s 131 of the Act that he has rendered the services to the assessee as evident from question no. 14 & its answer which reads as under:-

“Q4 Pl specify what kind of job you perform for earning Commission? Pl also state the names & addresses of three main persons / cos./concerns for whom you perform this job.

Ans.4 Deal in any kind of goods with two parties... I received Commission from Bishandas Iron Works ... I lifting their iron wires lifted from Tata.

Q5 : You have stated that you have worked for two parties in F.Y 2007-08. Pl state his name & address and the nature of job done for him.

Ans: Now I am do not remember so I check my books of account I give you a statement for party name & address. (I do not remember the job done for the other party)

Q6: Have you done this job for M/s Bishandas Iron Works ever before or after F.Yr. 2007-08? Pl give details.

Ans. I do not remember that. I tell you after the check books of accounts.

Q7: Does that mean that you do not do the job regularly for M/s Bishandas Iron Works?

Ans: Yes....

Q8: How did you Commission in contract with M/s Bishandas Iron Works? Do you know anybody from M/s Bishandas Iron Works?

Ans: I know only one person name Goyalji.

Q10: What were the terms & conditions for this job? Was there any written agreement?

Ans:10 There is no written of terms & condition I do the job in moth of Oct & Nov and I got the payment in month of March most probably.

Q 13: From the P & L A/c submitted by you, it appears that you have not debited a single rupee for travelling. How did you manage the lifting of iron goods from Tatanagar by sitting here in Kolkata? Pl specify.

Ans: The job was done by my brother in law on my behalf.

Q14: Do you know where this iron was lifted from, how it was transported, who made the payments for transport and where the goods were transported?

Ans14: Goods lifted from Tata (Tatngar), exactly address I do not know. Transport charges pay by the M/s Bishandas Iron Works. Goods lifted from tat to Kolkata (address I do not know). Lorries provided by M/s Bishandas Iron Works.

Q17: Regarding the other party, when did you do the job and when did you receive the payment?

Ans: I do not remember.

Adjourned to 09.11.2010 for producing details and books of accounts.

We also note that none of the party in his statement u/s 131 has denied the transaction with the assessee.

From the foregoing discussion, it appears that the opportunity for cross examination was provided to the assessee in the instant case. But the due procedure as required under the law has not been adhered. As per the provisions of section 131 of the Act the AO after recording the statement of the above parties should have issued the summon u/s 131 of the Act to the assessee for its confrontation. Neither such notice has been issued nor any statement of the above parties was provided to the assessee for his rebuttal. No such notice was issued by the Revenue to the assessee for the appearance at the time of recording of statement of the above parties. It is well settled

law that no statement can be used against the assessee without giving the opportunity as per the procedure of law. In this connection we rely on the judgment of Hon'ble Supreme Court in the case of *Andaman Timber Industries vs. CCE*, CA No. 4228 of 2006 (SC) (2015)127 DTR (SC) 241. In the said case, the Hon'ble Supreme Court held as under:-

“Not allowing the assessee to cross-examine the witness 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 awe. 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.”

6.2 We further rely on the judgment of Hon'ble Delhi High Court in the case of *CIT vs. Smc. Share Brokers Lt.* (2007) 288 ITR 345 (Del) in this case the Hon'ble High Court held as follows:-

“We are of the opinion that the Tribunal was right in its view that in the absence of Manoj Aggarwal being made available for cross-examination, despite repeated requests by the assessee, his statement could not be relied upon to his detriment.”

We rely in the judgment of Hon'ble jurisdictional High Court in the case of *Bangodaya Cotton Mills Ltd. vs. CIT* (2009) 21 DTR 200 (Cal). In the said case the Hon'ble jurisdictional High Court held as under:-

“AO having made the impugned addition simply on the basis of some letters seized from a third party in the absence of any corroborative evidence and without issuing summons to the concerned person or making him available for cross-examination, the order passed by the Tribunal upholding the addition is set aside and the matter is remanded back to the AO to consider the matter afresh.”

Again the Hon'ble jurisdictional High Court in the case of *Eastern Commercial Enterprise* (1994) 210 ITR 103 (Cal) at page 111:-

“It was true that 'R' had proved to be a shifty person as a witness. At the earlier stages, he claimed all his sales to be genuine but before the Assessing Officer in the case of the assessee, he disowned the sales specifically made to the assessee. This statement could at the worst show that 'R' was not a trustworthy witness and little value could be attached to what he stated either in his affidavits or in his examination by the Assessing Officer. His conduct neutralized his value as a witness. 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. If 'R' was neutralized as a witness what remained was the accounts, vouchers, challans, bank accounts, etc. Further the truth in R's depositions, could have been revealed only if he was subjected to a cross-examination by the assessee. As a matter of fact, the right to cross-examine a witness adverse to the assessee is an indispensable right and the opportunity of such cross-examination is one of the cornerstones of natural justice. Here 'R' was the witness of the Department. Therefore, the Department could not cut short the process of taking oral evidence by merely having the examination-in-chief. It is the necessary requirement of the process of taking evidence that the examination-in-chief is followed by cross-examination and re-examination, if necessary.

It is not just a question of form or a question of giving an adverse party its privilege but a necessity of the process of testing the truth of oral evidence of a witness. Without the truth being tested no oral evidence can be admissible evidence and could not form the basis of any inference against the adverse parties.

It is trite law that cross-examination is the sine qua non of due process of taking evidence and no adverse inference can be drawn against a party unless the party is put on notice of the case made out against him. He must be supplied the contents of all such evidence, both oral and documentary, so that he can prepare to meet the case against him. This necessarily also postulates that he should cross-examine the witness hostile to him. In the instant case, the first thing was that which of the statements of 'R' was correct, was anybody's guess. Therefore, it was necessary to delve out the truth from him and for that matter a cross-examination was necessary. Secondly, if the statement of 'R' as a witness against the adverse party, the assessee was relied upon as truthful, there would still remain the question of estimation of the profit. The assessee no doubt had given a comparative instance of gross profit rate but it was also necessary for the Department to come to a finding as to the norm of the gross profit on the basis of comparative cases. Therefore, it was the duty of the Assessing Officer to counter the comparative statement cited by the assessee before he could have the option to estimate the gross profit. Again, it is the comparative instance that alone can be the foundation of such estimate in case the accounts are really found to be unreliable and requiring to be rejected. Therefore, in the interest of justice for both the parties, the assessee and the revenue, it was necessary to direct the Tribunal to remand the case to the Assessing Officer for reconsidering the whole matter in the light of the observations and redo the assessment accordingly. All opportunities should be given to the assessee in order to lead any evidence that the assessee might feel necessary to rebut the case against him.”

6.3 We again rely on the judgment of Hon'ble Kerala High Court in the case of *P.S. Abdul Majeed* (1994) 209 ITR 82(Kel) – in the said case the Hon'ble High Court held 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 respect to the assessment, and that was sufficient to vitiate the order. The order of reassessment was not valid and was liable to be quashed.”

It is also undisputed fact that the lower authorities have not brought any defect on record in the documents submitted by the assessee to disprove the genuineness of the transactions. Here it is pertinent to note that the CBDT has discouraged to its officers to make the addition on the basis of the statements and without bringing any tangible materials in support of holding the transactions as bogus. The relevant extract of CBDT instructions issued vide F. No. 286/98/2013-IT(Inv.II) dated 18th of December 2014 reads as under:-

“Instances/complaints of undue influence/coercion have come to notice of the CBDT that some assesseees were coerced to admit undisclosed income during Searches/Surveys conducted by the Department. It is also seen that many such admissions are retracted in the subsequent proceedings since the same are not backed by credible evidence. Such actions defeat the very purpose of Search/Survey operations as they fail to bring the undisclosed income to tax in a sustainable manner leave alone levy of penalty or launching of prosecution. Further, such actions show the Department as a whole and officers concerned in poor light.

2. I am further directed to invite your attention to the Instructions/Guidelines issued by CBDT from time to time, as referred above, through which the Boards has emphasized upon the need to focus on gathering evidences during Search/Survey and to strictly avoid obtaining admission of undisclosed income under coercion/undue influence.

3. In view of the above, while reiterating the aforesaid guidelines of the Board, I am directed to convey that any instance of undue influence/coercion in the recording of the statement during Search/Survey/Other proceeding under the IT Act, 1961 and/or recording a disclosure of undisclosed income under undue pressure/coercion shall be viewed by the Board adversely.”

From the above circular, it is amply clear that the CBDT has emphasized to its officers to focus on gathering evidences during search/survey operations and strictly directed to avoid obtaining admission of undisclosed income under coercion/ undue influence. Keeping in view the guidelines issued by the CBDT from time to time regarding the statements obtained during search and survey operation, it is undisputedly clear that the lower authorities have not collected any other evidence to prove the impugned

transaction as bogus other than the statement. Therefore under such facts & circumstances we are inclined to disagree with the findings of lower authorities.

6.4 Besides the above we also note that it has been rightfully held in the case of *Mukesh R. Marolia vs. Addl. CIT, Range-15(2)* [2006] 6 SOT 247 (Mum), the Hon'ble ITAT, Bench 'F', Mumbai, 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.*"

Further, The ITAT Mumbai in case of *Chandrakant Babulal Shah Vs. AO* [ITA No.6108/Mum/2009] held that: "In view of the documentary evidence in favour of the assessee, the contention of the AO based on the statement which is also unsupported by any other evidence to deny the benefit of purchase of shares by the assessee 08-04-2000 is not acceptable."

7. The AO in the instant case has no evidence other than the statement of Manoj Sarda that would prove that the commission entries were merely paper entries, On the other hand the assessee has produced many documentary evidences to prove the genuineness of the commission transaction. The commission agents too have confirmed the transactions, which have been duly accounted for in their books of accounts. Therefore, the action of the AO in ignoring all the strong material evidence brought on record and merely relying on the statement of a third party (that too a statement which is contradicting the party's own written confirmation) is not justified. Going by the above judgment, in view of all documents in favour of the assessee's claim, the contention of the AO that entries were merely paper entries, based on statement of Manoj Sarda which is not supported by any other evidence, is not acceptable. Now whether in the given circumstances the statement of Mr. Sarda can be used as valid evidence against the assessee or not is a question of law which was answered by the Allahabad High Court in the case of *Gargi Din Jwala Prasad v. Commissioner of Income-tax* [0961TR 0097] held the following:

"the mere grant of the permission to cross-examine those witnesses was an eye-wash. The assessee could not have effectively cross-examined any particular person. The direction that he will issue a commission was illusory. The assessee was not told the names of witnesses or apprised of the contents of

their statements. It is clear that an adequate opportunity to cross-examine was denied. Even if we accept, for the sake of argument, that in law the requirements of natural justice are satisfied by supplying the substance of the statement sought to be relied upon, even that was not done in this case. The Income-tax Officer had refused to give copies of the statements of the witnesses on the view that they formed part of the record. Even so, he refused permission to the assessee to inspect the record. It is evident that the proceedings were vitiated by violation of the principles of natural justice."

The facts of the instant case are identical to the facts discussed in the above case law. Hence, by applying the above judgment to the facts it can safely be concluded that the opportunity of cross examination given was inadequate and illusory. Since, inadequate opportunity was given to the assessee, the assessment was vitiated by violation of principles of natural justice and therefore the statement of Mr. Sarda does not constitute valid evidence against the assessee.

After considering the facts in totality, we are of the view that the addition made by the lower authorities is not sustainable. Hence the ground of appeal of the assessee is allowed.

8. In the result, assessee's appeal stands allowed.

Order pronounced in open court on 26/12/2017

Sd/-

(न्यायिक सदस्य)

(S.S.Viswanethra Ravi)

Judicial Member

*Dkp, Sr.P.S

Sd/-

(लेखा सदस्य)

(Waseem Ahmed)

Accountant Member

दिनांक:- 26/12/2017 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-M/s Shree Bishandas Iron Works,4, India Exchange Place, 2nd Floor, Kolkata-001
2. प्रत्यर्थी/Respondent-DCIT, Circle-36, Kolkata
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

Sr. Private Secretary Head
of Office/DDO

आयकर अपीलीय अधिकरण, कोलकाता