

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "C", NEW DELHI**

**BEFORE  
SH. N.K.BILLAIYA, ACCOUNTANT MEMBER  
AND  
SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.6590-92/Del/2017  
(Assessment Year: 2013-14, 2014-15, 20015-16)**

HIMANSHU KOHLI D-210, 1 <sup>ST</sup> FLOOR, ASHOK VIHAR, PHASE-1 NEW DELHI PIN : 110052 Pan : AKZPK7127R	<b>Vs.</b>	ACIT CENTRAL CIRCLE-28 NEW DELHI
Appellant		Respondent

Assessee by : Sh. Sri Gautam Jain & Piyush K. Kamal,  
Adv.

Revenue by : Sh. Sanjit Singh, CIT DR

Date of hearing : 12.06.2018

Date of pronouncement : 05.09.2018

**ORDER**

**PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER:**

These three appeals preferred by assessee are directed against separate orders dated 1.9.2017 passed by Ld. CIT (Appeals)- XXVI, New Delhi relating to assessment years 2013-14, 2014-15 and

2015-16. Since these appeals involve consideration of identical issues, they were heard together and are thus being disposed by this consolidated order.

2.0 At the outset, the learned counsel of the assessee submitted that the appeal for assessment year 2013-14 in ITA No. 6590/Del/2017 may be taken as the lead matter in these appeals. The learned CIT DR did not object to the aforesaid prayer of the learned counsel. As such, we take up the appeal for assessment year 2013-14.

2.1 In ITA No. 6590/Del/2017 for assessment year 2013-14, the factual matrix emanating from orders below are that the assessee had filed the original return of income on 20.7.2013 declaring an income of Rs.2,20,815/- which was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter called 'the Act'). A search & seizure action u/s 132 of the Act was carried out in Dua group of cases including the assessee on 25.4.2014. The assessee was a close associate of Dua brothers and handled all unaccounted cash sale/purchase of metal business of Dua group apart from his own business in the name of firm M/s Kewal Metals. During the course of search various incriminating documents were found and

seized and statements of various persons were also recorded. Accordingly, a notice u/s 153A of the Act was issued on 16.5.2016 requiring the assessee to file the return of income. In response to the notice, the assessee, vide letter dated 8.8.2016, furnished the copy of return of income e-filed u/s153A on 3.6.2016 declaring an income of Rs.24,61,850/-. The difference of Rs. 22,41,035/- due to additional income of Rs. 23,16,150/- was declared under the head “business or profession” in the return filed u/s 153A of the Act whereas no such income under the head “business or profession” was shown by the assessee in the return filed u/s 139 of the Act.

2.2 As a result of search it was revealed that the assessee was involved in unaccounted sale and purchase of non-ferrous metals. In the order of assessment the AO has noted that the assessee was a key person who handled out of books sale/purchase of the metal for the Dua group. The statement of the assessee was also recorded on oath u/s 132(4) of the Act during the course of search, in which assessee stated that he was paid commission of Re. 1 per kg. However, since the assessee had made surrender of commission income @ 0.50 paise per kg, the AO held that the assessee had made the surrender less by Rs. 12,50,356/- in the

instant year. The AO passed the assessment order u/s 153A/143(3) of the Act on 30.12.2016 assessing the total income of Rs.59,62,201/-.

2.3 This addition was confirmed by the Ld. CIT (Appeals) by holding as under:

*“ In the instant case, the AO has estimated commission on the basis of statement of the appellant wherein it was stated that the commission received was Rs.1 per Kg. During the appellate proceedings, the appellant stated that in the statement recorded it was also stated that the profits margin in sale value is of 0.22%, 0.3% and 0.47% in trading of copper brass and zinc respectively. It was further stated having regard to the above factor the commission was estimated at 50 paise per kg. A chart was filed before the AO to support the above calculation which is as under:*

Sr. No.	Item	Average Rate per Kg.	Profit Margin %	Commission in Rs.	Percentage of total volume of business	Weighted commission
1.	Copper	325 per kg	0.22	71.5 paise	10%	7.15 Rs.
2.	Brass	250 per kg	0.30	75 paise	10%	7.5 Rs
3	Zinc	100 per kg	0.47	47 paise	80%	37.6 Rs.
					Total	52.25

*Ld AR has submitted that no defect was pointed out in the order of assessment proceedings in the above estimation by the appellant. It was also claimed that the foresaid computation of*

*commission was done at the behest of the Investigation Wing and no assets were found in the course of search including cash and stock to warrant any further addition; other than the sum declared by the appellant. The assessee has to take responsibility for his statements as the assessee is not coerced into conceding any position. In this matter, the income from commission on trading of metal on behalf of Mr.Pawan Due is to be estimated. The AO has proceeded to estimate on the basis of statement of the appellant and adopted the figure at Rs. 1 per Kg. However I find that a statement of Sh. Pawan Dua was also recorded on 24.6.2014 u/s 132(4) of the Act wherein he stated as under:*

*“Q.No. 5 If Sh. Himanshu Kohli was having the business relations with you, if yes then produce the activities of the same.*

*Ans. Yes. Himanshu Kohli is selling my goods on commission basis and the ratio of the said commission is 25-30 paise per kgs.”*

*The critical and material fact here is the statement of the assessee whereby he has given certain explanation about rate of commission earned by him. In view of the factual statement, I find it prudent to uphold the order of the assessing officer in respect of the commission earned by him. The statement of other party shall not impact as the assessee has already stated his earnings in this regard. Further, there is no supporting material available and the so called expenses are also pure estimations only.*

*As a result, the addition on account of the commission earned for metal trade is sustained.”*

2.4 Aggrieved, the assessee is in appeal before the Tribunal raising the following grounds:

*“1 That the learned Commissioner of Income Tax (Appeals) XXVI, New Delhi has erred both in law and on facts in sustaining an addition of Rs. 12,50,000/- representing alleged income from commission on trading of metal for the instant assessment year.*

*1.1 That basis adopted by the learned Commissioner of Income Tax (Appeals) for determining the commission income at Rs. 27,44,392/- instead of Rs. 14,94,036/- is factually and legally misconceived and untenable.*

*1.2 That no basis has been stated by the learned Commissioner of Income Tax (Appeals) that commission income earned by the appellant was Rs. 1 per kg. and not Rs. 0.50 paise per kg which is consistent stand of the appellant since the date of search and accepted by the Investigation Wing and no material has been found as a result of search or gathered in the course of assessment proceedings to hold to the contrary and, therefore addition made is illegal, invalid and untenable.*

*1.3 That even the quantity adopted for computing the commission income is incorrect and excessive and therefore untenable.*

*1.4 That the finding that “I find it prudent to uphold the order of the assessing officer in respect of the commission earned by*

*him. The statement of other party shall not impact as the assessee has already stated his earnings in this regard. Further, there is no supporting material available and the so called expenses are also pure estimations only” is factually incorrect, legally misconceived and untenable.*

*2 That the learned Commissioner of Income Tax (Appeals) has further erred both in law and on facts in sustaining an addition of Rs. 15,00,000/- out of Rs. 22,50,000/- on account of alleged commission income from MCX Dabba Trading for the instant assessment year.*

*It is therefore, prayed that it be held that, additions made and upheld by the learned Commissioner of Income Tax (Appeals) may kindly be deleted and appeal of the appellant be allowed.”*

3.0 Before us, the Ld. counsel contended that the Ld. CIT (Appeals) has partially appreciated the statement recorded on 26.4.2014 but has overlooked the reply dated 26.12.2016 in the course of assessment proceedings. It was contended that commission was received from Sh. Pawan Dua, who in his statement recorded on 24.6.2014 u/s 132(4) of the Act, had stated that the assessee was selling goods on commission @ 25-30 paise per kg. Reliance was placed by the Ld. Counsel on letter dated 24.6.2014 and statement dated 24.6.2014 u/s 132(4) of the Act. It

was prayed that the average rate of commission @ 0.50 paise per kg be accepted and addition made by adopting the commission @ Re. 1 per kg may kindly be deleted.

4. On the other hand, the Ld. CIT DR relied upon the orders of the authorities below and requested that estimation of income from commission from trading of metals of the assessee be rejected. In the written submissions filed by the department, it was stated as under:

*“ It is humbly submitted that the following decisions may kindly be considered with regard to validity of statement recorded u/s 132(4) of I.T. Act.:*

*1 Kishore Kumar v CIT (62 taxmann.com 215, 234 Taxman 771) (Copy enclosed) Where Hon’ble Supreme Court dismissed SLP against High Court’s order where it was held that since assessee himself had stated in sworn statement during search and seizure about his undisclosed income, tax was to be levied on basis of admission without scrutinizing documents.*

*B Kishore Kumar v. CIT (52 taxmann.com 449) Madras High Court confirmed (copy of enclosed)*

*2 Bhagirath Aggarwal v. CIT (31 taxmann.com 274, 215 Taxman 229, 351 ITR 143) (Copy Enclosed) where Hon’ble Delhi High Court held that an addition in assessee’s income relying*

*on statements recorded during search operations cannot be deleted without proving statements to be incorrect.*

3 *Smt. Dayawanti v. CIT [2016] 75 taxmann.com 308 (Delhi) [2017] 245 Taxman 293 (Delhi)/[2017] 390 ITR 496 (Delhi)/[2016] 290 CTR 361 (Delhi) (Copy Enclosed) where Hon'ble Delhi High Court held that where inferences drawn in respect of undeclared income of assessee were premised on materials found as well as statements recorded by assessee's son in course of search operations and assessee had not been able to show as to how estimation made by Assessing Officer was arbitrary or unreasonable, additions so made by Assessing Officer by rejecting books of account was justified.*

4 *M/s Pebble Investment and Finance Ltd. v. ITO (2017-TIOL-238-SC\_IT) (Copy Enclosed) where Hon'ble Supreme Court dismissed SLP challenging the judgment, whereby the High Court had held that statement made u/s 133A could be relied upon for purposes of assessment, in absence of any contrary evidence or explanation as to why such statement made was not credible.*

*M/s Pebble Investment and Finance Ltd. v. ITO (017-TIOL-188-HC-Mum-IT) Bombay High Court Confirmed (Copy Enclosed)*

5 *Greenview Restaurant v. ACIT [2003] 133 Taxman 432 (GAuhati)/[2003] 263 ITR 169 (Gauhati)/[2003] 185 CTR 651 (Gauhati)*

*“From facts, it was clear that there was a delay on the part of the appellant and its partner in retracting the*

*statements recorded. The attention of the Court had also not been drawn to any material on record to establish that any attempt was made on behalf of the appellant to prove the allegation of inducement, threat or coercion through the witnesses. Having examined the impugned orders rendered by the Tribunal with the reasonings in support of its finding against the complaint of threat, inducement or coercion, no good and sufficient reason was found to differ from it. In the facts and circumstances of the case, having regard to the material on record, the appellant had failed to establish that the statements of its partner had been recorded in the course of search by using coercion, threat or inducement. Hence, the contentions advanced by the appellant in that regard were dismissed and the conclusion of the Tribunal on that count was affirmed.”*

*[Para 9]*

6 *Raj Hans Towers (P) Ltd. v. CIT [56 taxmann.com 67, 230 Taxman 567, 373 ITR 9] where Hon’ble Delhi High Court held that assessee had not offered any satisfactory explanation regarding surrendered amount being not bona fide and it was also not borne out in any contentions raised before lower authorities, additions so made after adjusting expenditure were justified (SURVEY CASE)*

7 *PCIT v. Avinash Kumar Setia [2017] 81 taxmann.com 476 (Delhi) where Hon’ble Delhi High Court held that where assessee surrendered certain income by way of declaration and*

*withdraw same after two years without any satisfactory explanation, it could not be treated as bonafide and, hence addition would sustain (SURVEY CASE)”*

5. We have heard the rival submissions and have also perused the material on record. The undisputed fact is that the AO has estimated commission on the basis of statement of the assessee wherein it was stated that the commission received was Re. 1 per kg. It is noted that in statement recorded on 25.4.2014, it was stated as under:

*“Q.21 Please state association with Dua group and with Sh. Naresh Kumar Dua, Sh. Pawan Kumar Dua and Sh. Rajesh Dua?”*

*Ans. I have business association with Dua group. I handle the sale & purchase of metal business of Dua group apart from my own business in the name of M/s Kewal Metals I function as a agent by securing selling/purchaser parties for the purpose of metal trading business of Dua group for which they give commission to me which is around Rs. 1 per 1 kg and which translates to 01%..”*

5.1 Further, in the said statement in reply to question no. 24 it had been stated as under:

*“Q. No. 24. The question no. 19 and 20 in reply to the same in the annexure metal pieces/scrap of sale transaction is given. Please tell that what is your profit margin in the said sale transaction.*

*Ans. In the said sale transaction the sale value about 0.2% to 0.5% profit margin is there however the said profit margin of different metal trading in sale value of different percentage value is there. The above said Annexures mostly of Copper Brass and Zinc and in which profit margin is about sale value of 0.22%, 0.3% and 0.47% upto that only.”*

5.2 It is further seen that the assessee, in the course of assessment proceedings, had stated as under:

*“6.23.2 It will be apparent from the above that the assessee had stated that profit margin in the shape of commission on the trading of metals is in the range of 0.25% to 0.5%. The aforesaid profit margin on various item-wise is as under:*

<i>Sr. No.</i>	<i>Item</i>	<i>Percentage of profit</i>
<i>1</i>	<i>Copper</i>	<i>0.22</i>
<i>2</i>	<i>Brass</i>	<i>0.30</i>
<i>3</i>	<i>Zinc</i>	<i>0.47</i>

*6.23.3 It is submitted that if the rate per Kg is adopted on the aforesaid profit margin and weighted average method is applied, the commission will work out at 50 paisa per kg as would be evident from the chart hereunder:*

Sr. No.	Item	Average rate per Kg	Profit margin %	Commission in Rs.	Percentage of total volume of business	Weighted commission
1.	Copper	325 per kg	0.22	71.5 paisa	10%	7.15 Rs.
2.	Brass	250 per kg	0.30	75 paisa	10%	7.5 Rs.
3.	Zinc	100 per kg	0.47	47 paisa	80%	37.6 Rs.
					Total	52.25

6.23.4 Thus, from the aforesaid tabulation, it would be evident that the average rate of commission is 50 paisa per kg and the income declared may kindly be accepted as such.

6.23.5 Should your goodself require any evidence to verify the above submission, the assessee is willing to furnish the same though it is submitted that the aforesaid computation of commission was done at the behest of the Investigation Wing and no doubt, it is on estimated basis and average rates were adopted to work out the estimate real income of the assessee having regard to the nature of involvement of assessee and the assets founds in the course of search including cash and stock.”

5.3 We also note that the Ld. CIT (Appeals) has also noted that the assessee has claimed that no defect was pointed out in the order of assessment in the above estimation by the assessee. Moreover, it is a matter of fact and undisputed that what is being estimated in the income from commission on trading of metal is

said to be received from Shri Pawan Dua who had deposed as under:

*“Q.No. 5 If Sh. Himanshu Kohli was having the business relations with you, if yes then produce the activities of the same.*

*Ans. Yes. Himanshu Kohli is selling my goods on commission basis and the ratio of the said commission is 25-30 paise per kgs.”*

5.4 The Ld. CIT (Appeals), despite the above factual position, has upheld the addition on the basis that critical and material is the statement of the assessee and further that the statement of the other party shall not impact as the assessee had already stated his earnings in this regard. The case of the assessee is that this declaration of Re. 1 per kg was an initial declaration which was explained in the very said statement by percentages of profits and on basis of the said percentages, commission was determined at 0.50 paisa per kg which is higher than the commission of 0.30 paisa per kg as stated by the person who has paid the commission.

5.5 The Ld. CIT DR has not been able to assail the above factual aspect of the matter. He has relied on various judgments as to the validity of the statement under section 132(4) of the Act. Here is not a case of non acceptance of the statement of the assessee but is a case of appreciation of the statement as a whole. Applying the said principle it is noted that there is no material determining the commission at Re. 1 per kg., particularly when the assessee has explained the basis of the figure of 0.50 paise per kg which has not been shown to be incorrect and is also higher than admitted to have been paid by Shri Pawan Dua. In fact in this case, a surrender was made by the assessee vide letter dated 24.6.2014 on the basis of the entire seized documents and the statement was recorded to said effect u/s 132(4) of the Act. The amount as surrendered by the assessee stands duly offered and assessed to tax. There is no retraction to the said extent. Having regard to the foregoing, we are inclined to accept the claim that in absence of any material or evidence to reject the basis given by the assessee of 0.50 paisa per kg, the addition made by adopting the commission rate of Re. 1 per kg. is untenable and, therefore, liable to be deleted. Accordingly, ground nos 1 to 1.4 of the appeal are allowed.

6.0 Ground No 2 relates to addition of Rs. 15,00,000/- on account of commission income from MCX *dabba* trading for the instant assessment year. During the instant year, the assessee had also earned commission on MCX *dabba* trading and having regard to the seized documents the assessee had offered commission of Rs. 7,50,000/- by adopting the rate of Rs. 500/- per crore of trade value. In the course of search, statement on one Shri Gagan Arora was recorded and deposed that the rate of commission income on such trading is Rs. 2000/- per crore of trading value and as such the income was determined at Rs. 30,00,000/- and consequently addition was made of Rs. 22,50,000/-. The Ld. CIT (Appeals) restricted the same to Rs. 1500/- per crore of trading value and the assessee has challenged the said determination.

7.0 Before us it was contended by the Ld. Counsel that no material has been led to support the above estimation at Rs. 1500/- per crore. It was stated that the statement of Sh. Gagan Arora could not be relied upon in absence of cross examination, despite having specifically sought so in the assessment proceedings.

8.0 On the other hand, the Ld. CIT DR relied upon the order of the authorities below.

9.0 We have heard the rival submissions and have also perused the material on record. On the given facts and in terms of settled law, the statement of Sh. Gagan Arora, in absence of cross-examination cannot be used against the assessee. The Hon'ble Supreme Court in the case of Andaman Timber Industries v. CCE reported in 62 taxmann.com 3, while deciding an issue regarding not allowing the cross examination, has held that not allowing the assessee to cross examine the witness by the adjudicating authority, though statements of those witnesses were made the basis of the impugned order, amounted to a serious lapse which makes the order a nullity as it amounted to violation of principles of natural justice. Also in the case of Kishanichand Chellaram v. CIT reported in 125 ITR 713 (SC) it was held that any material collected at the back of the assessee and the assessee not being confronted with the same and no opportunity having been given the assessee to cross-examine, such material cannot be relied upon against the assessee. We are also guided by the judicial precedents as laid down in CIT v. Sunil Agarwal 379 ITR 367 (Del)

and CIT v. Best Infrastructure (India) (P) Ltd. 397 ITR 82 (Del). Accordingly, the addition made on this account is deleted and the ground no 2 of the appeal is allowed.

10.0 In the result ITA No. 6590/Del/2017 filed by the assessee is allowed.

11.0 We now take up appeals bearing ITA No. 6591/Del/2017 and ITA No. 6592/D/2017 for assessment years 2014-15 and 2015-16 respectively. Ground Nos. 1 and 2 of the appeals are identical to ground Nos. 1 and 2 raised in the appeal for assessment year 2013-14. We have already held while disposing off the appeal for assessment year 2013-14 that estimation of income from commission from trading of metals and commission income from MCX *Dabba* trading were not in accordance with law, therefore, following the aforesaid findings, we delete the additions in assessment years 2014-15 and 2015-16 and accordingly, allow the grounds No. 1 and 2 of both the appeals.

12.0 Grounds 3 to 3.2 in ITA No. 6591/Del/2017 for AY 2014-15 challenge addition on account of unexplained receipts of Rs. 10 lacs in respect of commission received from Sh. Sushil Kumar for the instant assessment year. Before us, the learned counsel of the

assessee contended that the said addition sustained by the learned Commissioner of Income Tax (Appeals) is without appreciating the following aspects:

- a) That once the commission from MCX trading has been estimated there remains no valid basis to make specific addition;
- b) That statement of Sh. Sushil Kumar recorded on 25.4.2017 have been recorded behind the back of the assessee and without any opportunity for cross examination and therefore could not be made a basis to make an addition;
- c) That no material gathered by the learned Assessing officer to allege that sum of Rs. 10 lacs was received over and above the income estimated on account of commission.

13.0 On the other hand, the Ld. CIT DR relied upon the order of the authorities below.

14.0 We have heard the rival submissions and have also perused the material on record. Having considered the factual

matrix we are of the considered opinion that income from commission from MCX trading has been declared and assessed separately and having so done, in our opinion there is no material to independently tax the figure of Rs. 10 lacs. There is no material brought on record to state that this sum Rs. 10 lacs was received over and above the figure of commission of MCX trading separately estimated by the revenue. This estimation is done on the basis of pages 1 to 10, 13 and 15 of Annexure A-27 (Exhibit 5 from Flat 1-B Pocket-A, Near Satyawati College, Ashok Vihar, New Delhi and statement of Sh. Sushu Kumar recorded u/s 132(4) of the Act. It is noted that that the assessee, on the said basis and documents, had estimated the commission from MCX trading. Thus, once the said documents have already been considered as part of the estimation of commission, no separate addition is called for. Accordingly, the addition made of Rs. 10 lacs is deleted and ground nos. 3 to 3.3 of the appeal is allowed.

15.0 In the final result, all the three appeals for assessment years 2013-14, 2014-15 and 2015-16 filed by the assessee are allowed.

Order pronounced in the open court on 5<sup>th</sup> September, 2018.

Sd/-

**(N.K.BILLAIYA)**  
**ACCOUNTANT MEMBER**

Sd/-

**(SUDHANSHU SRIVASTAVA)**  
**JUDICIAL MEMBER**

Date: 5<sup>th</sup> September, 2018

\*Binita\*

*Copy of order to: -*

- 1) The Appellant;
  - 2) The Respondent;
  - 3) The CIT;
  - 4) The CIT(A)-, New Delhi;
  - 5) The DR, I.T.A.T., New Delhi;
- True Copy

By Order

ITAT, New Delhi

Date of dictation	13.06.2018
Date on which the typed draft is placed before the dictating Member	13.06.2018
Date on which the typed draft is placed before the Other Member	13.09.2018
Date on which the approved draft comes to the Sr. PS/PS	05 .09.2018
Date on which the fair order is placed before the Dictating Member for pronouncement	05.09.2018
Date on which the fair order comes back to the Sr. PS/PS	05.09.2018
Date on which the final order is uploaded on the website of ITAT	05.09.2018
Date on which the file goes to the Bench Clerk	.09.2018
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	