

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

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

ITA No. 3510/DEL/2018
[Assessment Year: 2014-15]

Smt. Jyoti Gupta
B2/27A, Yamuna Vihar
New Delhi.

Vs.

The I.T.O,
Ward - 57(3)
New Delhi

PAN: AHOPG 9594 Q

[Appellant]

[Respondent]

Date of Hearing : 05.11.2018
Date of Pronouncement : 06.11.2018

Assessee by : Shri M.P. Gupta, Adv.

Revenue by : Ms. Aashna Paul, Sr. DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:

This appeal by the assessee is preferred against the order of the Commissioner of Income Tax [Appeals] - 19, New Delhi dated 06.04.2018 pertaining to assessment year 2014-15.

2. The sum and substance of the grievance of the assessee is that the ld. CIT(A) erred in confirming the assessment order wherein the Assessing Officer denied claim of long term capital gain and made addition u/s 68 of the Income-tax Act, 1961 [hereinafter referred to as 'the Act']. The assessee is further aggrieved by the action of the CIT(A) in confirming the addition made u/s 69C of the Act.

3. Briefly stated, the facts of the case are that return for the year under consideration was selected for scrutiny assessment through CASS and statutory notices were accordingly issued and served upon the assessee.

4. During the course of scrutiny assessment proceedings, the A.O observed that the assessee has sold 1250 shares of M/s Trinity Tradelink Ltd on 22.03.2014 for a total consideration of Rs. 12,30,799/- and has claimed exemption u/s 10(38) of the Act as the capital gains arose from sale of shares was long term capital gain.

5. The Assessing Officer came to know that a survey was carried out on 09.06.2014 u/s 133A of the Act at the registered office of M/s Trinity Tradelink Ltd. wherein statement of Shri Vikrant Kayan who happened to be the Director of M/s Trinity Tradelink Ltd was recorded on oath and in his statement, Shri Vikrant Kayan accepted that he has arranged entries for commission of 3% from various clients. The Assessing Officer further noticed that in his statement, Shri Vikrant Kayan has accepted that M/s Trinity Tradelink Ltd has provided long term capital gain to various clients and these clients were mostly from Delhi.

6. Taking a leaf out of the statement of Shri Vikrant Kayan, the Assessing Officer formed a belief that long term capital gain in the share of M/s Trinity Tradelink Ltd claimed by the assessee is bogus and fictitious.

7. After analysing the balance sheet of M/s Trinity Tradelink Ltd, the Assessing Officer came to the conclusion that the long term capital gain claimed by the assessee is not

bonafide and disallowed the same and added back to the total income of the assessee u/s 68 of the Act. Further, the Assessing Officer made an addition of Rs. 60,915/- being 5% of long term capital gain entry as unexplained expenditure.

8. The assessee carried the matter before the CIT(A) but without any success.

9. Before me, the ld. AR pointed out that the transaction relating to the purchase and sale of shares are duly supported by documentary evidence. It is the say of the ld. AR that the purchase and sale have been done through banking channel and merely on the strength of statement of Shri Vikrant Kayan, additions have been made without affording any opportunity to cross examine Shri Vikrant Kayan, thereby violating the principles of natural justice. The ld. AR prayed for deletion of additions.

10. Per contra, the Id. DR strongly supported the findings of the lower authorities and read the relevant observations of the Assessing Officer and the first appellate authority.

11. I have carefully perused the orders of the authorities below and relevant documentary evidences brought on record. Allotment of Equity Shares of M/s Trinity Tradelink Ltd is at page 7 of the paper book. Payment has been made through ING Vysa bank and the bank statement is at page 8 of the paper book. Share certificate and demat statement are at pages 9 to 11 of the paper book. The sale transactions are documented at pages 14 and 15 of the paper book. Payment has been received through banking channel which is evident from the bank statement at page 13 of the paper book.

12. These direct clinching evidences cannot be ignored. The transactions have been done by BSE through proper banking channels evidenced by supporting documentary evidences. Moreover, securities transactions tax has also been paid.

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.

15. In the result, the appeal filed by the assessee in ITA No. 3387/DEL/2018 is allowed.

The order is pronounced in the open court on 06.11.2018.

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 06 November, 2018

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
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	