

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

**BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER**

ITA No. 7772/DEL/2017  
[Assessment Year: 2014-15]

HIMANSHU CHOWDHARY,  
C/O M/S MALHOTRA KHANDELWAL  
& CO., CAs,  
41-46, HARDWARE CHOWK,  
NEAR GOVERNMENT PRESS,  
FARIDABAD HARYANA - 121001  
(PAN: AFFPC8696G)

Vs.

I.T.O, WARD 1(3)  
FARIDABAD

[Appellant]

[RESPONDENT]

Assessee by : Shri P.C. Parwal, CA &  
Sh. R.K. Khandelwal, CA

Revenue by : Shri SL Anuragi, Sr. DR.

**ORDER**

This appeal by the assessee is preferred against the order of the Ld. Commissioner of Income Tax [Appeals], Faridabad dated 29.11.2017 pertaining to assessment year 2014-15.

2. Brief facts of the case are that assessee filed his return of income on 29.1.2014 declaring income of Rs. 10,09,580/- and the same was processed u/s. 143(1) of the Income Tax Act, 1961 (in short "Act"). Later on, the case of the assessee was selected under scrutiny through CASS on the basis of information uploaded by

the Investigation Wing that "Suspicious Transaction relating to Long Term Capital Gain on Sale of Shares" and statutory notices were issued and served in time upon the assessee. The assessee acted as Proprietor of M/s Century Industries and was engaged in the business of job work of machine parts. During the year, the assessee had claimed exemption of Rs. 32,05,601/- u/s. 10\*38) of the Act on account of sale of securities. The assessment u/s. 143(3) of the Act was completed on 28.12.2016 at assessed income of Rs. 42,15,180/-. Against the assessment order, the Assessee appealed before the Ld. CIT(A) who vide his impugned order dated 29.11.2017 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 has only argued that AO while completing the assessment has relied on the statement of Sh. Nikhil Jain recorded during the course of survey proceedings carried out at M/s Abhinandan Stock Broking Pvt. Ltd. by DDIT (Inv.), Kolkata wherein he has admitted that he is engaged in providing bogus entry through penny stocks including the scrip of /s Kappac Pharma Ltd. However, neither M/s Abhinandan Stock Broking Pvt. Ltd. nor Sh. Nikhil Jain is directly connected with the assessee as apparent from the documents of

purchase and sale of shares. Thus relying on the statement of third party which is not directly connected with the assessee is illegal and bad in law. He draw my attention towards para no. 6.2 at page no. 11 of the Assessment order and stated that assessee has demanded an opportunity to cross examine Sh. Nikhil Jain vide its letter dated 07.12.2016 which was not provided, which is against the decision of the Hon'ble Supreme Court of India in the case of Andaman Timber Industries vs. CIT 127 DTR 0241. He further draw my attention towards Ld. CIT(A)'s order vide para no. 8(c) at page no. 6 and has stated that assessee was provided the statement of Nikhil Jain and others, used against him, which is totally wrong. However, nowhere in the assessment order, the AO has mentioned that the statement of Nikhil Jain was provided to the assessee and even no opportunity of cross examination him was provided, which was not considered by the Ld. CIT(A). He further draw my attention towards Assessment order page no. 12 para no. 6.3 and submitted that in the statement of Sh. Narendra Balasia, Director of M/s SMC Global Securities Ltd. through which assessee has opened DMAT account, nowhere the name of assessee is mentioned. AO has stated that an opportunity to cross examine Sh. Narendra Balasia in the office of DDIT (Inv.), Kolkata, at any time on or before 16.12.2016 is provided to assessee but no such communication was received from

DDIT (Inv.), Kolkata as to on what date assessee should appear before him for cross examination. In fact the AO has tried to shift his onus for cross examination to DDIT (Inv.), Kolkata which is not permissible under the law as it is the AO who has to decide the case and not DDIT (Inv.), Kolkata. It was submitted that shifting of onus for cross examination is bad in law. 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 appeal 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 that the AO has completed the assessment by relying on the statement of Sh. Nikhil Jain recorded during the course of survey proceedings carried out at M/s Abhinandan Stock Broking Pvt. Ltd. by DDIT (Inv.), Kolkata wherein he has admitted that he is engaged in providing bogus entry through penny stocks including the scrip of M/s Kappac Pharma Ltd. However, neither M/s Abhinandan Stock Broking Pvt. Ltd. nor Sh. Nikhil Jain is directly connected with the assessee as apparent from the documents of purchase and sale of shares. Thus relying on the statement of third party which is not directly connected with the assessee is illegal and bad in law. I further find from the assessment order para no. 6.2 at page no. 11 wherein it was stated that assessee has demanded an opportunity to cross examine Sh. Nikhil Jain vide its letter dated 07.12.2016 which was not provided to him, which is against the law settled by the Hon'ble Supreme Court of India in the case of Andaman Timber Industries vs. CIT in Civil Appeal No. 4228 of 2006. I further note that even the Ld. CIT(A) vide para no. 8(c) at page no. 6 of the impugned order has stated that assessee was provided the statement of Nikhil Jain and others, used against him, which is nowhere mentioned in the assessment order and is totally wrong and even otherwise no opportunity of cross examination Sh.

Nikhil Jain was provided to the assessee, which fact was not at all considered by the Ld. CIT(A). I further find that in the statement of Sh. Narendra Balasia, Director of M/s SMC Global Securities Ltd. through which assessee has opened DMAT account, nowhere the name of assessee is mentioned. AO has stated that an opportunity to cross examine Sh. Narendra Balasia in the office of DDIT (Inv.), Kolkata, at any time on or before 16.12.2016 is provided to assessee but no such communication was received from DDIT (Inv.), Kolkata as to on what date assessee should appear before him for cross examination. In fact the AO has tried to shift his onus for cross examination to DDIT (Inv.), Kolkata which is not tenable under the law as it is the AO who has to decide the case and not DDIT (Inv.), Kolkata. 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 plea, 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. In the result, the appeal filed by the assessee is allowed.

The order pronounced on 27.11.2018.

Sd/-

**[H.S. SIDHU]**  
**JUDICIAL MEMBER**

Dated: 27<sup>th</sup> November, 2018

SR BHATNAGAR

Copy forwarded to:

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

Asst. Registrar,  
ITAT, New Delhi