

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES: 'F', NEW DELHI**

**BEFORE SMT. BEENA A PILLAI, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**ITA No. 5662/Del/2018  
AY: 2014-15**

Veena Gupta 88, Poorvi Marg, Vasant Vihar, New Delhi. <b>AAGPG8753L</b> <b>(Appellant)</b>	<b>vs.</b>	ACIT Circle 33(1) New Delhi. <b>(Respondent)</b>
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**Assessee by :** Sh. H.P. Agarwal, FCA

Ms. Prashuka Jain, FCA

**Department by :** Sh. Surender Pal, Sr. DR

**Date of Hearing :** 05/11/2018

**Date of Pronouncement:** 27/11/2018

**ORDER**

**PER BEENA A PILLAI, JUDICIAL MEMBER**

Present appeal has been filed by assessee against order dated 23/01/17 passed by Ld. CIT (A)-11, New Delhi for assessment year 2014-15 on following grounds of appeal:

1. *"The Ld.CIT(A) has erred on facts and in law in confirming addition of Rs. 1,39,32,231/- u/s 68 of the Income Tax Act on account of long term capital gain on sale of shares by treating the same as unexplained credit entries.*
2. *The order passed by the Ld.CIT(A) is bad in law, since the Ld.CIT(A) has erred in confirming the addition made by the AO –*
  - a) *By treating the purchase & sale of shares as sham and bogus, totally ignoring the reliable and credible*

*evidence submitted by the appellant (including merger order issued by Bombay High Court);*

- b) By ignoring all favourable judicial precedents cited by the appellant is irrelevant merely by remarking that the Hon'ble Courts/Tribunals have passed those judgments without being aware of the entirety of circumstances;*
- c) On the basis of unrelated third party statements without providing the appellant a copy of the statements and the opportunity of cross examination despite the specific request made by the appellant before the AO for the same; and*
- d) Merely on principles of human probability and preponderance of probability.*

*3. The appellant craves leave to add, or modify the above grounds of appeal at or before the hearing of the appeal.”*

2. Brief facts of the case are as under:

Assessee filed her return of income on 28/07/14, declaring total income of Rs.37,48,600/-. Case was selected for scrutiny due to suspicion of long term capital gain on shares as informed by investigation wing. Notice under section 143(2) of the Act was issued to assessee, along with questionnaire and notice under section 142(1) of the Act. In response to statutory notices, representative of assessee appeared before Ld.AO and submitted necessary details and documents which were examined on test check basis.

3. Ld.AO observed that assessee derived income from salary and house property, business or profession, capital gains and other sources.

4. Main issue that was taken up for consideration by Ld.AO was examining suspicious long term capital gain on shares declared by assessee in computation of income. It was found that assessee had long term capital gain, which was claimed to be exempt amounting to Rs.1,39,32,356/-. It was alleged that it was received from sale of shares. Assessee declared following calculations regarding income from long term capital gain of shares claimed as exempt under section 10(38) of the Act:

Name of script	Sale price (Rs.)	Purchase price (indexed) (Rs.)	Gain (exempt) (Rs.)
Unno Industries	1,48,83, 544/-	9,51, 188/-	1,39,32, 356/-

5. Ld.AO on examination of shares sale transaction, found that entire sale proceeds was received from sale of two scripts M/s Unno Industries (earlier named Basukinath Real Estate Ltd, when shares were purchased) and Maruti Udyog.

5.1 Assessee was called upon to give details regarding manner in which shares were purchased and documents in support. Assessee submitted that assessee purchased 2500 shares of M/s Basukinath Real Estate Ltd., in financial year 2011-12, through M/s Sharewood Furniture Pvt. Ltd., for an amount of Rs. 5 Lacs. It was submitted that Basukinath Real Estate Ltd., declared bonus in ratio of 18:1 on 16/03/12 and accordingly, 45,000 shares were allotted to assessee. Assessee further submitted that

the said 47,500 shares (2500 originally purchased + 45,000 bonus shares) got dematerialised and were credited into assessee's Demat Account on 29/09/12.

5.2 Assessee submitted that subsequently M/s Basukinath Real Estate Ltd., merged with M/s Unno Industries, pursuant to order passed *Hon'ble Bombay High Court*, approving Scheme of Amalgamation. Accordingly, 47,500 shares of M/s Unno Industries were issued to assessee and were credited in Demat Account on 28/03/2013.

6. From the above, Ld.AO observed that assessee bought 2500 shares of M/s Basukinath Real Estate Ltd., on 30/09/11 at a cost of Rs. 5 Lacs from M/s Sharewood Furniture Pvt. Ltd. Subsequently, bonus shares at the ratio of 18:1 were issued to assessee, totalling to 45,000 on 16/03/12, within a period of 5 months from date of purchase of shares. It was observed that subsequent to amalgamation approved by *Bombay High Court* assessee was allotted 47,000 shares of amalgamated company, being M/s Unno Industries. These shares were sold by assessee after lock in period of one year, thereby earning long term capital gain of approximately 1.39 crores.

6.1 And it was observed that during assessment proceedings Ld. AO recorded statement of one Sh. Amit Dalmia and Sh. Narendra Kumar Jain who has accepted to have managed and controlled various companies acting as accommodation entry and exit providers for M/s Unno Industries.

6.2 He, thus, made an addition on basis of test of human probabilities to an extent of Rs. 1,39,32,231/-.

7. Aggrieved by order of Ld. AO assessee preferred appeal before Ld. CIT (A), who upheld action of Ld. AO.

Aggrieved by order of Ld. CIT (A) assessee is in appeal before us now.

8. Main issue alleged by Ld. AR before us is in respect of denial of opportunity to cross examine persons whose statements have been basis for addition in hands of assessee.

9. Ld. AR submitted that Assessing Officer passed in violation of principles of Natural Justice. He submitted that copies of statement by Sh. Amit Dalmia and Sh. Narendra Kumar Jain recorded by investigating wing was not provided to assessee. He submitted that on merits, Section 68 of the Act is not applicable, as assessee had provided explanation for credit entries in its books of accounts. Further, reason for non-satisfaction by Ld.AO regarding explanation offered by assessee has not been subject to tests of law, since opportunity to cross examine persons, has not been granted to assessee, of whose statement has been relied upon by Ld.AO for making addition.

10. On contrary, Ld.Sr. DR submitted that, information obtained by assessee related to share trading pattern of assessee. He submitted that Ld. AO applied test of human probabilities to evaluate genuineness of transaction to conclude sale and purchase of shares to be sham transactions undertaken with purpose of obtaining bogus long term capital gains, Ld. Sr. DR placed reliance upon detailed observations by Ld. AO and Ld. CIT (A).

11. We have perused submissions advanced by both sides in light of records placed before. We also refer to all judicial precedents relied upon by both sides.

12. It is observed that both Assessing Officer as well as Ld.CIT(A) is relying upon statement recorded by Investigation Department of Sh. Amit Dalmia and Sh. Narendra Kumar Jain. It is based upon their statements, that test of human probabilities has been applied to facts of present case by authorities below. Further, it cannot be ignored that assessee was not granted opportunity to cross examine Sh. Amit Dalmia and Sh. Narendra Kumar Jain. Even after assessee asking for opportunity to crossexamine these persons, before First Appellate Authority, same was not granted. Assessee has contested truthfulness of statements given by Sh. Amit Dalmia and Sh. Narendra Kumar Jain before us.

12.1 It is pertinent to note that assessee, vide letter dated 21/12/16 had asked Ld. AO to provide material based upon which various allegations have been levied by Ld. AO. These factors from para 20 of assessment order, wherein assessee raised objections, one of which is opportunity to cross examine, in case of any evidence used against assessee.

12.3 To our surprise, Ld. AO without providing any material evidence, report on which he was relying and not granting an opportunity to cross examine the persons on whose statement he arrived at certain presuppositions, made addition in the hands of assessee. This is evident from para 22 of assessment order.

13. Before Ld. CIT (A) assessee once again raised plea of cross-examination granted to assessee and materials not based upon

which the submissions have been made has not been provided for examination. Even then opportunity was not granted to assessee, though Ld. CIT (A) had coterminous powers as that of Ld. AO.

14. In our view this amounts to gross violation of principles of natural Justice. We draw our support from the decision of *Hon'ble Supreme Court* in the case of *Andaman Timber Industries versus CCE* reported in (2015) 62 *Taxmann.com* 3, wherein *Hon'ble court* observed 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.”*

15. We, accordingly, respectfully following decision of *Hon'ble Supreme Court* in the case of *Andaman Timber Industries versus CCE (supra)* allow appeal of assessee on legal ground raised in **Ground 2(c)**, and quash and set-aside the assessment order so passed.

15.1 As we have allowed assessee's appeal on **Ground 2(c)**, other grounds raised by assessee becomes academic in nature which do not require any adjudication at this stage.

**Accordingly we allow the appeal of assessee on the legal issue raised in on Ground 2(c).**

**In the result appeal filed by assessee stands allowed.**

Order pronounced in the open court on 27/11/2018

Sd/-  
**(PRASHANT MAHARISHI)**  
**ACCOUNTANT MEMBER**

Dt. 27<sup>th</sup> November, 2018

Sd/-  
**(BEENA A PILLAI)**  
**JUDICIAL MEMBER**

\*Kavita Arora

Copy forwarded to: -

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

- TRUE COPY -

By Order,

**ASSISTANT REGISTRAR**  
ITAT Delhi Benches

