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

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

ITA No. 4481/DEL/2018
[Assessment Year: 2014-15]

AJAY GOEL, C/O SANDEEP SAPRA, ADVOCATE, C-763, NEW FRIENDS COLONY, NEW DELHI – 110 025 (PAN: AFTPG9686C)	Vs.	I.T.O, WARD 39(5) NEW DELHI
[Appellant]		[RESPONDENT]

ITA No. 4482/DEL/2018
[Assessment Year: 2014-15]

RAKHI GOEL, C/O SANDEEP SAPRA, ADVOCATE, C-763, NEW FRIENDS COLONY, NEW DELHI – 110 025 (PAN: AEDPG9645L)	Vs.	I.T.O, WARD 39(5) NEW DELHI
[Appellant]		[RESPONDENT]

ITA No. 4483/DEL/2018
[Assessment Year: 2014-15]

SUBHASH CHAND AGGARWAL, C/O SANDEEP SAPRA, ADVOCATE, C-763, NEW FRIENDS COLONY, NEW DELHI – 110 025 (PAN: AAGPA1722R)	Vs.	I.T.O, WARD 39(5) NEW DELHI
[Appellant]		[RESPONDENT]

ITA No. 4484/DEL/2018
[Assessment Year: 2014-15]

VARSHA AGGARWAL, C/O SANDEEP SAPRA, ADVOCATE, C-763, NEW FRIENDS COLONY, NEW DELHI – 110 025 (PAN: AGQPA1542D)	Vs.	I.T.O, WARD 39(5) NEW DELHI
[Appellant]		[RESPONDENT]

Assessee by : Shri Sandeep Sapra, Advocate

Revenue by : Shri SL Anuragi, Sr. DR.

ORDER

These 04 appeals filed by the different assessee are preferred against the common order of the Ld. Commissioner of Income Tax [Appeals]-13, New Delhi dated 25.4.2018 all pertaining to assessment year 2014-15. Since the common issues involved in these appeals, hence, the impugned order has been passed in all these appeals by the ld. CITA(A), therefore, for the sake of convenience, we are consolidated these appeals by this common order for the sake of convenience, by dealing with ITA No. 4841/Del/2018 (AY 2014-15) – AJAY GOEL VS. ITO.

2. Brief facts of the case are that assessee filed his return of income on 16.10.2014 declaring income of Rs. 8,26,860/- and the same was selected for scrutiny in CASS. Notice u/s. 143(2) of the

Income Tax Act, 1961 (in short "Act") on 22.9.2015. Subsequently, notice u/s. 142(1) of the Act alongwith questionnaire was issued. In response thereto, assessee's A.R. attended the assessment proceedings from time to time and filed necessary details as called for. During the year, the assessee has shown income from house property, income from business and other sources. On going through the Computation Income, AO observed that an amount of Rs. 5,57,495/- was shown as long term capital gain and claimed u/s. 10(38) of the Act. The assessment u/s. 143(3) of the Act was completed on 30.12.2016 at assessed income of Rs. 13,84,355/-. Against the assessment order, the Assessee appealed before the Ld. CIT(A) who vide his common impugned order dated 25.4.2018 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 assessee was not supplied with the copy of documents/ material relied by the AO and no opportunity of cross examination was afforded to the assessee. He further argued that AO has made the addition on the basis of the Directorate of Investigation Wing, Kolkata. However, the said report deserves to be kept aside/ ignored as the copy of the Investigation Report was not provided to the Assessee despite a specific request having been made by the

AO during the course of assessment proceedings. In this behalf, he draw my attention towards para no. 7.3 to 7.5 at page no. 21 of the impugned order and para no. 2 placed at page no. 37-40 of the Paper Book which is a letter dated 23.12.2016 of the assessee addressed to the Assessing Officer. He further submitted that the action of the lower authorities in not providing the opportunity of cross examination and not providing the copy of the Investigation report on which the AO has relied, is against the law laid down by the Hon'ble Supreme Court of India in the case of Andaman Timber Industries vs. CIT 127 DTR 0241 and Kishinchand Chellaram vs. CIT 125 ITR 713 at page no. 714; Hon'ble Delhi High Court decision in the case of CIT vs. Ashwani Gupta 322 ITR 396. 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 Investigation Report, but the copy of the Investigation Report was not provided to the assessee, despite request made by him in his letter dated 23.12.2016, which is against the law settled by the Hon'ble Supreme Court of India in the case Kishinchand Chellaram vs. CIT 125 ITR 713 at page no. 714; Hon'ble Delhi High Court decision in the case of CIT vs. Ashwani Gupta 322 ITR 396 and CIT vs. Pradeep Gupta 303 ITR 95 and CIT vs. Dharam Pal Prem Chand Ltd. 295 ITR 105. The relevant findings of the Hon'ble Courts are reproduced as under:-

> **"125 ITR 713, Kishinchand Chellaram Vs. CIT (Supreme Court), in which at page 714,** it was held as under:
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> "The statements of the manager in those two letters were based on hearsay, as in the absence of

evidence, it could not be taken that he must have been in charge of the Madras office on October 16, 1946, so as to have personal knowledge. The department ought to have called upon the manager to produce the documents and papers on the basis of which he had made the statements and confronted the assessee with those documents and papers. It was true that proceedings under the income-tax law were not governed by the strict rules of evidence, and, therefore, it might be said that even without calling the manager of the bank in evidence to prove the letter dated February 18, 1955, it could be taken into account as evidence. But before the income-tax authorities could rely upon it, they were bound to produce it before the assessee so that that the assessee could controvert the statements contained in it by asking for an opportunity to cross- examine the manager of the bank with reference to the statements made by him. ”

322 ITR 396, CIT vs. Ashwani Gupta (Jurisdictional Delhi H.C.), in which it was held as under:

"The Tribunal has correctly understood the law and applied it to the facts of the case. Once there is a violation of the principles of natural justice inasmuch as seized material is not provided to an assessee nor is cross-examination of the person on whose statement the Assessing Officer relies upon, granted, then, such deficiencies would amount to a denial of opportunity and, consequently, would be fatal to the proceedings. Following the approach adopted by us in SMC Share Brokers Ltd. 288 ITR 345 (Delhi), we see no reason to interfere with the impugned order. No substantial question of law arises for our consideration".

303 ITR 95, CIT vs. Pradeep Kumar Gupta (Jurisdictional Delhi H.C.), in which it was held that once there is a violation of the principles of natural justice inasmuch as when its seized material was not provided to an assessee nor was he permitted to cross examine a person on whose

statement the Assessing Officer relied, it would amount to deficiency, amounting to a denial of opportunity and therefore violation of principles of natural justice. In that case CIT (A) had deleted addition made by the Assessing Officer since the Assessing Officer had failed to provide copies of seized material to the assessee nor had he allowed the assessee to cross-examine the party concerned. The Division Bench held that once there is violation of the principles of natural justice inasmuch as seized material was not provided to the assessee nor was given opportunity of cross examining the person whose statement was being used against the assessee the order could not be sustained.

295 ITR 105 CIT vs. Dharam Pal Prem Chand Ltd.(Jurisdictional Delhi HC), in which it was held as under:

"Even if the strict rules of evidence may not apply, the basic principle of natural justice would apply to the facts of the case, assessing officer had placed reliance upon the report for deciding the matter against the assessee. The report could not be

automatically accepted particularly where there was a challenge to it and the assessee had sought permission to cross-examine the analyst making the report. Since the assessing officer did not permit the correctness or otherwise of the report to be tested, there was a clear violation of the principles of natural justice".

5.1 I further find from the Ld. CIT(A)'s order para no. 7.3 to 7.5 at page no. 21 that Ld. CIT(A) has himself written that AO has given reasonable opportunities to the assessee and even if there was any deficiency, appellant has due opportunity during appellate proceedings and also observed that the concept of affording cross examination is flexible, which shows that opportunity of cross examination was not provided to the assessee, which is not proper and 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 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 aforesaid precedents on identical facts and circumstances, the

addition in dispute is deleted and the appeal of the assessee is allowed.

7. Since in all the other 03 appeals, i.e., in the case of Rakhi Goel vs. ITO in ITA 4482/Del/2018 (AY 2014-15); Subhash Chand Aggarwal vs. ITO in ITA No. 4483/Del/2018 (AY 2014-15) and Varsha Goel vs. ITO in ITA No. 4484/Del/2018 (AY 2014-15), similar facts are permeating, therefore, my finding given above in ITA No. 4841/Del/2018 (AY 2014-15) in the case of Ajay Goel vs. ITO will apply mutatis mutandis in these three appeals also, because the facts and circumstances of the case are exactly the same.

8. In the result, all the 04 appeals filed by the assessee are allowed.

The order pronounced on 03.12.2018.

Sd/-

[H.S. SIDHU]
JUDICIAL MEMBER

Dated: 03rd December, 2018

SR BHATNAGAR

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi