

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

**BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER**

ITA No. 5075/DEL/2016
[Assessment Year: 2009-10]

AERENS BUILDWELL LTD.,
C/O BGJC & ASSOCIATES,
RAJ TOWER, G-1, ALAKHNANDA
COMMUNITY CENTRE,
NEW DELHI - 110 019
(PAN: AACCA3045N)
[Appellant]

Vs.

ACIT, CC-18,
NEW DELHI

[RESPONDENT]

Assessee by : Shri Vivek Bansal, Adv.
Revenue by : Shri Sanjay Goel, CIT(DR)

ORDER

PER H.S. SIDHU, JM

This appeal filed by the assessee is preferred against the order of the Ld. Commissioner of Income Tax [Appeals]-25, New Delhi dated 28.6.2016 relating to assessment year 2009-10 on the following grounds:-

- i) That the said case Ld. CIT(A) has not followed instruction no. 20/2003 dated 23.12.2003 issued by CBDT regarding issue of appellate order within 15 days of last hearing of case.

- ii) That the said case in law and in the facts, on both, the Ld. CIT(A) has grossly erred in rejecting grounds of the appellant's appeal before him challenging on fact and law in rejecting the rectification application u/s. 154 by AO.
- iii) That the said case in law and in the facts, on both, the Ld. CIT(A) has grossly erred in rejecting grounds of the appellant's appeal before him and partly confirmed the addition made by AO and has disallowed an amount of Rs. 5,84,093/- (comprising gratuity Rs. 2,74,561/-), Rs. 2,93,264/- FBT and Rs. 16,268/- wealth tax) has already been disallowed by the assessee suo motto, while computing taxable income and the balance amount has not been claimed in the profit and loss account.
- iv) That the said case Ld. CIT(A) and AO, both has erred on facts and in law in calculating the tax payable by the assessee.
- v) That the said case Ld. CIT(A) and AO, both has erred on law. The provisions of section 234B, 234C and 234D are not applicable in the case of the appellant.
- vi) That the appellant craves leave to add, alter, modify withdraw, amend substitute any ground(s) of appeal either before or at the time of hearing.

2. Brief facts of the case are that assessee company belongs to the Aerens Group. Search & Seizure and Survey operations under section 132 / 133A of the Income Tax Act, 1961 were conducted on

17.08.2011 in the case of the Assessee Company alongwith other cases of the group at various residential & business premises. The jurisdiction over the Assessee Company was transferred from the ACIT, Circle 1(1), New Delhi to Central Circle-9, New Delhi vide order F.No.CIT-I/Centralization/2012-13/3042 issued by the office of Commissioner of Income Tax, Delhi-I, New Delhi under section 127 of the Act on 06.03.13. Return declaring Loss of Rs. 58,92,431/- was filed. During the course of the Search AO has found that the Assessee Company has shown receipt of Rs. 4,77,00,000/- as Share Capital and Share Premium in F.Y. 06-07, 07-08 and 08-09, relevant for A.Y. 07-08, 08-09 and 09-10. In post Search enquires it was also found that the receipt of the Share Premium and Share Capital shown are from Persons (including 6 Companies and 1 Individual, all of which were not traceable, neither the Individual could be traced nor the Companies were in existence at their registered offices). On the basis of various Documents seized, Statements recorded, Enquiries conducted, Information gathered and consideration of the Submissions of the Assessee Company, it was concluded by the Assessing Officer that the Share Capital (Rs. 79,50,000/-) @ Rs. 100/- per Share and Share Premium (Rs.3,97,50,500/-) @ Rs. 500/- per Share was claimed, were from bogus and non- existing Companies and bogus receipts

has also been claimed from the Individual and that the Assessee Company had taken the shelter of these Persons for its unaccounted money. For the instant year, addition of Rs. 1,56,00,000/- (Rs. 26,00,000/- as Share Capital plus Rs.1,30,00,000/- as Share Premium), claimed to be received from 2 Companies was made. Further, the Claim of Loss amounting to Rs. 58,92,431./- was disallowed in the absence of verification and disallowances u/s 40(a), 40A(7) and 43B under the heads, FBT, Wealth Tax, Interest and Gratuity, amounting to a total of Rs. 59,75,028/- were also made and income of the assessee was assessed at Rs. 1,56,00,000/- vide order dated 30.3.2014 passed u/s. 153 read with section 143(3) of the I.T. Act, 1961. Against the action of the AO, assessee appealed before the Ld. CIT(A), who vide his impugned order dated 28.6.2016 has partly allowed the appeal of the assessee. Aggrieved with the impugned order dated 28.6.2016, assessee is in appeal before us.

3. During the hearing, Ld. counsel for the assessee has argued that assessee was not provided an opportunity to cross examine the so-called entry providers and the AO simply relied upon the investigation report/ information provided by the Investigation Wing of the Department. He draw our attention towards the page no. 18-19 of the Ld. CIT(A)'s order and stated that the same plea

was taken before the Ld. CIT(A), who in his impugned order at page no. 56 vide para no. 27 has not given any comment on the same meaning thereby that Ld. CIT(A) has also not given any direction to the AO to supply the copy of the Statement of the so-called entry provide which has been used against the assessee while making addition in dispute. He further submitted that the action of the lower authorities in not providing the opportunity of cross examination of the so-called entry providers 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. He also relied upon the decision of the Hon'ble High Court of Delhi in the case of Pr. CIT vs. Best Infrastructure (India) (P) Ltd. (2017) 84 taxmann.com 287 (Delhi). Hence, he requested to follow the same and the appeal of the assessee may be allowed.

4. Ld. CIT(DR) relied upon the order of the authorities below and also relied upon the case on the merits of the case i.e. addition made u/s. 68 of the Act.

5. We have heard both the parties and perused the records, especially the assessment as well as impugned order and the submissions filed by both the parties. We find that the case laws relied upon by the Ld. DR are on the merits of the case, however, the ground argued before the Tribunal is relating to confirmation of

addition which was made on the basis of material collected at the back of the assessee without giving him an opportunity to rebut/cross examine the same which is in violation of the principle of natural justice, hence, the same are not applicable here. We find considerable cogency in the contention raised by the assessee's counsel that addition was made on the basis of material collected at the back of the assessee without giving him an opportunity to rebut/cross examine the same, which was also raised before the Ld. CIT(A), who did not adjudicate the same and wrongly upheld the AO's order, which is not proper and is against the principle of natural justice as well as 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 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."

6. Keeping in view of the facts and circumstances of the present case and respectfully following 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, we delete the addition in dispute and set aside the orders of the authorities below and accordingly allow the appeal of the assessee.

7. In the result, the appeal filed by the assessee is allowed.

The order pronounced on 21.12.2018.

Sd/-
(L.P. SAHU)
ACCOUNTANT MEMBER

Sd/-
[H.S. SIDHU]
JUDICIAL MEMBER

Dated: 21.12.2018

SR BHATNAGAR

Copy forwarded to:

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

Asstt. Registrar,
ITAT, New Delhi