

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

BEFORE SH. H.S. SIDHU, JUDICIAL MEMBER

ITA No. 3332/Del/2018
Assessment Year: 2015-16

SH. VIKAS SAINI, C/O RRA TAXINDIA, D-28, SOUTH EXTENSION, PART-I, NEW DELHI (PAN: DYWPS6375F)	Vs.	ITO, WARD 4(5), GURGAON
(Appellant)		(Respondent)

ITA No. 3333/Del/2018
Assessment Year: 2015-16

SH. SUBHASH CHANDER (HUF), C/O RRA TAXINDIA, D-28, SOUTH EXTENSION, PART-I, NEW DELHI (PAN: AAYHS1113E)	Vs.	ITO, WARD 4(3), GURGAON
(Appellant)		(Respondent)

ITA No. 3334/Del/2018
Assessment Year: 2015-16

SH. DILBAG SINGH SAINI (HUF) RRA TAXINDIA, D-28, SOUTH EXTENSION, PART-I, NEW DELHI (PAN: AAHHD8869D)	Vs.	ITO, WARD 1(4), GURGAON
(Appellant)		(Respondent)

ITA No. 3335/Del/2018
Assessment Year: 2015-16

SH. JASBIR SINGH SAINI, C/O RRA TAXINDIA, D-28, SOUTH EXTENSION, PART-I, NEW DELHI	Vs.	ITO, WARD 2(2), GURGAON
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(PAN: AAGHJ4276B)		
(Appellant)		(Respondent)

Assessee by	Dr. Rakesh Gupta, Advocate; Sh Deepesh Garg, Advocate & Sh. Shubham Sobti, Advocate
Department by	Sh. S.L. Anuragi, Sr. DR.

ORDER

The aforesaid assessees have filed the appeals against the respective orders passed by Ld. CIT(A) confirming the orders of Assessing Officer wherein following additions were made against sale of shares in the scrip of M/s Effingo Textile & Trading Ltd, treated as unexplained cash credit u/s 68 of the Income Tax Act, 1961 (in short "Act"). This was claimed as exempt by assessees u/s 10(38) of the Income Tax Act, 1961.

Name of the case	ITA No.	Addition (Rs)
VIKAS SAINI	3332/Del/2018	Rs 25,02,610/-
SUBHASH CHANDER SAINI (HUF)	3333/Del/2018	Rs. 24,98,000/-
DISBAGH SINGH SAINI (HUF)	3334/Del/2018	Rs 25,01,427/-
JASBIR SINGH SAINI (HUF)	3335/DEL/2018	RS. 24,81,510/-

2. Since facts involved in these appeals are same and identical, hence, the appeals were heard together and for the sake of convenience, all these appeals are being consolidated and disposed of by this common order. For sake of reference and facility, the facts in case of Sh. Vikas

Saini vs. ITO, Ward 4(5), Gurgaon (AY 2015-16) are taken up and only Grounds of appeal raised by assessee in this case are reproduced hereunder for the sake of convenience, being identical and similar, except the difference in the figures.

- 1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of the AO in making addition of Rs. 25,02,610/- u/s. 68 and has further erred in not allowing the exemption u/s. 10(38) as claimed by the assessee and that too by recording incorrect facts and findings and without granting opportunity of cross examination as per law and without providing the entire adverse material on records and without observing the principles of natural justice.*
- 2. That in any case and in any view of the matter, action of the Ld. CIT(A) in confirming the action of the AO in making addition of Rs. 25,02,610/- u/s. 68 and not allowing the benefit of exemption u/s. 10(38), is bad in law and against the facts and circumstances of the case.*
- 3. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not reversing the action of AO in charging interest u/s. 234B of the Income Tax Act, 1961.*
- 4. That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other.*

3. At the time of hearing, Ld. Counsel for the assessee has stated that the issue in all the appeals are almost identical, but he is arguing only one appeal i.e. ITA No. 3332/Del/2018 (AY 2015-16) – Vikas Saini vs. ITO and drew my attention towards Ground No. 1 raised by the assessee in the appeal as well as the ground raised by the assessee before the Ld. CIT(A), which the Ld. CIT(A) has reproduced in his impugned order. Also during the hearing, he further draw my attention towards ground no. 1 in all the appeals and stated that the said issue is in legal nature, hence, he wants to argue the same first and if the assessee succeeds in this ground, then the addition in dispute may be deleted and assessment may be cancelled. He further stated that if the Bench is not agreed with the assessee's contention on the issue involved in ground no. 1, then on merits, the appeal of the assessee may be re-fixed for hearing. He further submitted that the addition in dispute in all the appeals have been made by the AO and confirmed by the Ld. CIT(A) u/s. 68 of the I.T. Act on the basis of the statement of the entry provider Sh. Anil Kumar Khemka and Nikhil Jain referred in the impugned order, but the same has not been provided to the assessee as well as the opportunity of cross examination has also not been provided to the assessee despite the request made by the assessee to the AO. He further requested that non-providing of opportunity to cross examine the above said entry providers, it is against the principle of natural justice and against the settled law. He also draw my attention towards one Paper Book filed by the assessee containing pages 1 to 67 especially the Page No. 21-29 in which he has

attached the copy of letter issued by DDIT (Inv.), Unit-II, Kolkata to ITO, Ward 4(3), Gurgaon dated 11.10.2017 stating that nobody attended for cross examination; copy of reply dated 27.9.2017 filed with the AO submitting that the assessee deputed Sh. Ashwani Verma and Mr. SM Saini and issued him power of attorney for carrying out cross examination of Sh. Anil Kumar Khemka on his behalf and further assessee submitting the copy of letter dated 8.9.2017 issued by the AO providing opportunity for cross examination; receipt copy of letter dated 22.9.2017 filed to DDIT (Inv.) Unit-II, Kolkata to conduct cross verification of Sh. Anil Kumar Khemka alongwith power of attorney and copy of air tickets; confirmed copy of account of M/s DB (International) Stock Brokers Ltd.; copy of letter dated 31.7.2017 from M/s Ankush Poly Engineering (P) Ltd. issued to assessee providing the confirmed copy of bill, confirmed copy of receipt of payment, copy of ITR and the copy of written statement filed before Ld. CIT(A). He also filed the another paper book which is compilation of 30 case laws containing pages 1 to 402 and stated that the issue on merit is squarely covered by the said decisions. He further submitted that in view of the facts and circumstances of the present case as well as the documentary evidences filed by the assessee and the supporting case laws referred by him in the Paper Book, the addition in dispute may be deleted and requested to cancel the orders of the authorities below.

4. On the other hand, Ld DR has strongly relied on the orders of lower authorities and stated that the opportunity of cross examination has been given to the assessee, but the assessee has not availed the same. He

draw my attention toward the letter written by the ITO to the assessee providing the statement of entry providers as well as the opportunity to the assessee for cross examination the entry providers. He requested that the assessee has not availed the opportunity of cross examination in spite of the fact that the AO has provided the statement of the entry provider to the assessee. Therefore, the arguments advanced by the Ld. Counsel for the assessee as well as the case laws relied by him are not useful on the ground no. 1 in all the appeals, hence, on this account the appeal of the Assessee may be dismissed.

5. I have heard both the parties and perused the records, especially the Paper Books filed by the Ld. Counsel for the assessee as well as the impugned order. In find that assessee has filed a Paper Book containing pages 1 to 67 especially the Page No. 21-29 in which he has attached the copy of letter issued by DDIT (Inv.), Unit-II, Kolkata to ITO, Ward 4(3), Gurgaon dated 11.10.2017 stating that nobody attended for cross examination; copy of reply dated 27.9.2017 filed with the AO submitting that the assessee deputed Sh. Ashwani Verma and Mr. SM Saini and issued him power of attorney for carrying out cross examination of Sh. Anil Kumar Khemka on his behalf and further assessee submitting the copy of letter dated 8.9.2017 issued by the AO providing opportunity for cross examination; receipt copy of letter dated 22.9.2017 filed to DDIT (Inv.) Unit-II, Kolkata to conduct cross verification of Sh. Anil Kumar Khemka alongwith power of attorney and copy of air tickets; confirmed copy of account of M/s DB (International) Stock Brokers Ltd.; copy of

letter dated 31.7.2017 from M/s Ankush Poly Engineering (P) Ltd. issued to assessee providing the confirmed copy of bill, confirmed copy of receipt of payment, copy of ITR and the copy of written statement filed before Ld. CIT(A) and also perused another paper book which is compilation of 30 case laws containing pages 1 to 402 which are on merit of the case. I am of the considered view that assessee has raised ground no. 3 before the Ld. CIT(A) in all the appeals requesting for granting the opportunity of cross examination as per law providing entire adverse material on record used against him. It is noted that assessee has requested to the Ld. CIT(A) for providing cross examination of the entry provider and requested for the adverse material used against the assessee, but the Ld. CIT(A) has not decided this ground in the impugned order. I have also gone through all the four appeals and I am of the considered view that assessee has raised 6 grounds before the Ld. CIT(A). For the sake of convenience, I am reproducing 06 grounds of appeal as under, which are also mentioned at page no. 2 of the impugned order:-

1. That the appellant denies his liability to be assessed at total income of 25,34,787/- as against returned income of Rs. 33,360/- and accordingly denies liability to pay tax, cess and interest demanded thereon.

2. That having regard to the facts and circumstances of the case, Ld. AO has erred in law and on facts in framing impugned assessment order and that too with assuming jurisdiction us per law.

3. That having regard to the facts and circumstances of the case, Ld AO has erred in law and on facts in making addition of Rs. 25,01,427/- u/s. 68 and has further erred in not allowing the exemption u/s 10(38) as claimed by the assessee and that too by recording incorrect facts and findings without granting opportunity of cross examination as per law and providing the entire adverse material on records and without observing the principles of natural justice.

4. That in any case and in any view of the matter, action of Id. AO in making addition of Rs. 25,01,427 u/s 68 and not allowing the benefit of exemption u/s 10(38), is bad in law against the facts and circumstances of the case.

5. That having regard to the facts and circumstances of the case, Ld. AO has erred in law and on facts in charging interest u/s 234B of the Income Tax Act, 1961.

6. That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other. "

5.1 After perusing the aforesaid grounds raised before the Ld. CIT(A) by the assessee as well as the impugned order of the Ld. CIT(A), I note that Ld. CIT(A) has not decided the ground 3 raised before him and dismissed the appeal filed by the assessee on other grounds. No doubt that assessee has raised the ground no. 1 in these appeals which is relating to granting the opportunity of cross examination and providing

entire adverse material to the assessee. As argued by the Ld. Counsel for the assessee that at Page no. 23-30 in which statement of entry provider has been given to the assessee for cross examination namely Sh. Anil Kumar Khemka S/o Lakhi Narayan Khemka was also provided to the assessee. It is also noted that as per the evidence produced by the assessee regarding the air ticket at page no. 27-30 of the paper book, the assessee has gone to the office of the Dy. Director of Income Tax (Investigation), Unit-II(3), Kolkata where the cross examination of the entry provider was to be given by the Authority, but the same was not provided to the A.R. for the assessee. On the contrary, Ld. DR has stated that opportunity for cross examination of the entry providers has been provided to the assessee. In my view, the issue in dispute i.e. cross examination opportunity to the assessee was provided or not provided is not clear and is disputed. Secondly, this ground raised by the assessee before the Ld. CIT(A) vide ground no. 3, which is reproduced above, has not been decided by the Ld. First Appellate Authority. Hence, in my considered view and in the interest of justice, I deem it fit that the issue in dispute raised in ground no. 1 in the present appeal before this Tribunal and issue raised in ground no. 3 raised before the Ld. First Appellate Authority needs to be set aside to the file of the Ld. CIT(A) with the directions to decide the same as per law, after giving adequate opportunity of being heard to the assessee. I hold and direct accordingly. Ld. CIT(A) is also directed to verify the genuineness of the air tickets in dispute. However, Assessee is directed to fully cooperate with the Ld.

CIT(A) for disposing of the issue in dispute in the present appeal and will not seek any unnecessary adjournment. In the result, the appeal of the assessee is allowed for statistical purposes.

6. Since in all the other three appeals, i.e., in the case of Subhash Chander (HUF) in ITA 3333/Del/2018 (AY 2015-16); Disbagh Singh Saini (HUF) in ITA No. 3334/Del/2018 (AY 2015-16); and Jasbir Singh Saini (HUF) in ITA 3335/Del/2018 (AY 2015-16), similar facts are permeating, therefore, my finding given above will apply mutatis mutandis in these three appeals also, because the ground raised, evidences and documents are exactly the same in all the appeals.

7. In the result, all the four Appeals are allowed for statistical purposes.

The decision is pronounced on 08/01/2019.

Sd/-
(H.S. SIDHU)
JUDICIAL MEMBER

Dated: 08/01/2019

“SRBHATNAGAR”

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi