

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

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

ITA No. 3261/Del/2018  
Assessment Year: 2014-15

SURESH KUMAR JAIN, 38/12, 2 <sup>ND</sup> FLOOR, BLOCK-38, SHAKTI NAGAR, DELHI – 110 007 (PAN: ACGPJ8046D)	Vs.	ITO, WARD 35(2), NEW DELHI
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by	Ms. Himani Aggarwal, CA
Department by	Sh. S.L. Anuragi, Sr. DR.

**ORDER**

The assessee has filed the appeal against the order dated 21.2.2018 passed by Ld. CIT(A) relevant to assessment year 2014-15.

2. During the hearing, the Ld. counsel for the assessee has filed an Application of the assessee for admission of additional/revised ground in Appeal and stated that at the time of filing of appeal, inadvertently one ground of appeal could not be taken. It is also submitted that there is no malafide, intentional delay technique in revising the grounds of appeal. She drew my attention towards page no. 02 of the Ld. CIT(A) wherein, vide ground no. 3 (wrongly mentioned as '5') the assessee has raised the ground that "The AO erred in fact and law as well by not providing reasonably opportunity of being heard". She further drew my attention towards Page no. 32 of Ld. CIT(A)'s order wherein the Ld. CIT(A) has reproduced the plea of the Assessee that while making the addition of

Rs. 11,78,216/- the AO has relied on statements of Sh. Vikrant Kayan without providing opportunity to the assessee for cross examination of such person. Hence, in the interest of natural justice, she requested to admit the following additional/revised ground of appeal which is legal in nature, in view of the settled decision of the Hon'ble Supreme Court of India in the case of NTPC 229 ITR 383 (SC).

*"That Ld. AO as well as Ld. CIT(A) has erred in law as well as on facts in not providing opportunity to cross examination Sh. Vikrant Kayan, on whose statement Ld. AO has relied for treating the exempt Long Term Capital Gain claimed u/s. 10(38) of the Income Tax Act, 1961 of Rs. 11,78,216/- as undisclosed income.*

3. On the contrary, Ld. DR strongly opposed the admission of additional/ revised ground raised by the assessee.

4. After hearing both the parties as well as perusing the additional ground alongwith the orders passed by the Revenue Authorities, I find considerable cogency in the contention of the ld. counsel for the assessee has raised ground no. 3 (wrongly mentioned as '5') i.e. *"The AO erred in fact and law as well by not providing reasonably opportunity of being heard"*. I further find that Ld. CIT(A) at page no. 32 of his order has reproduced the plea of the Assessee that while making the addition of Rs. 11,78,216/- the AO has relied on statement of Sh. Vikrant Kayan without providing opportunity to the assessee for cross examination of such person. Hence, I am of the considered view that in view of the

decision of the Hon'ble Supreme Court of India in the case of NTPC Limited 229 ITR 383 (Supra), the additional ground raised by the assessee vide Application is purely legal ground and did not require fresh facts which is to be investigated and goes to the root of the matter. In the interest of justice, I admit the aforesaid additional ground raised by the assessee, in view of the case law of NTPC Limited (Supra) and proceed to decide the additional ground first raised by the Assessee during the hearing.

5. At the time of hearing, Ld. Counsel for the assessee has only argued the revised/additional ground and stated that the addition in dispute has 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 Sh. Vikrant Kayan, on whose statement the AO has treated the exempt Long Term Capital Gain claimed u/s. 10(38) of the Act of Rs. 11,78,216/- as undisclosed income of the assessee, but both the revenue authorities have not provided the opportunity to cross examination of Sh. Vikrant Kayan to the assessee. She further submitted that non-providing of opportunity of cross examination is against the principle of natural justice and against the settled law. She further stated that the issue in dispute is squarely by the decision of the ITAT, SMC, Delhi Bench wherein, the Tribunal 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 has allowed the appeal of the assessee exactly on similar facts and circumstances. Hence, she

requested to follow the aforesaid case and allow the appeal of the assessee.

6. On the other hand, Ld DR has strongly relied on the orders of lower authorities and stated that assessee has been given opportunity of being heard, but the assessee has not availed the same.

7. I have heard both the parties and perused the records, especially the assessment as well as impugned order and the case law cited before me. I find considerable cogency in the contention raised by the assessee's counsel that addition was made on the basis of statement of Sh. Vikrant Kayan, but the assessee was not granted the opportunity to cross examine Sh. Vikrant Kayan, which ground was also raised before the Ld. CIT(A). I am of the considered view that assessee has raised ground no. 3 (wrongly mentioned as ground no.5) before the Ld. CIT(A) in the appeal requesting for granting reasonable opportunity of being heard. I further find that Ld. CIT(A) in his impugned order at page no. 32 has reproduced the plea of the Assessee that while making the addition of Rs. 11,78,216/- the AO has relied on statement of Sh. Vikrant Kayan without providing opportunity to the assessee for cross examination of such person. In view of above, there is no doubt that assessee has raised the ground of providing opportunity of cross examination of Sh. Vikrant Kayan before the Ld. CIT(A) and also by way of revised/additional ground before the Tribunal. 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, 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."*

8. 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 Gupta 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.

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

The decision is pronounced on 24/01/2019.

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

Dated: 24/01/2019

"SRBHATNAGAR"

**Copy forwarded to:**

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

Asst. Registrar,  
ITAT, New Delhi