

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

BEFORE SH. H.S. SIDHU, JUDICIAL MEMBER

ITA No. 5317/Del/2018
Assessment Year: 2009-10

RNG IMPEX PVT. LTD. 429/3, PATHANPRUA, SHAHDARA, DELHI – 110 032 (PAN: AABCR5348C)	Vs.	ITO, WARD 20(3), NEW DELHI
(Appellant)		(Respondent)

Assessee by	Sh. Ved Jain, Adv. & Sh. Rishabh Jain, CA & Miss Umang Luthra, Adv.
Department by	Sh. S.L. Anuragi, Sr. DR.

ORDER

The assessee has filed the appeal against the order dated 09.1.2018 passed by Ld. CIT(A)-XXX, New Delhi relevant to assessment year 2009-10 by raising as many as 12 grounds, but at the time of hearing, Ld. counsel for the assessee has only argued the ground no. 11 which is reproduced as under:-

"11. On the facts and circumstances of the case, the Ld. CIT(A) has erred both on facts and in law in confirming the addition made by the AO relying on the report of the investigation wing made at the back of the assessee without giving an opportunity of cross examination."

2. Brief facts of the case are that assessee filed its return of income on 30.9.2009 declaring a total income of Rs. 5,30,970/-. The return of income was processed u/s. 143(1) of the Income Tax Act, 1961 (in short

“Act”). Subsequently, a letter dated 18.3.2013 information was received from the Investigation Wing that the assessee is a beneficiary of bogus accommodation entries received from companies intimating therein that Sh. Surinder Kumar Jina had been providing accommodation entries through a large number of dummy companies floated by him or his associates. The Investigation Wing has compiled a report and data of the beneficiaries of such entries. The name of the assessee company i.e. M/s RNG Impex (P) Ltd. figures in the list of beneficiaries of share capital premium / loan. The information was based on search and seizure operation conducted in the case of Jain Brothers (Sh. Virendera Jain and Sh. Surinder Kumar Jain) their group concerns on 14.9.2010. The material found and seized (Annexure A-1 to A-163) from the residence of Jain Brothers includes several diaries and registers and it contains incriminating information maintained in the form of daily cash books wherein detailed day to day receipt and payments in cash / RTGS and cheques from / to different persons / firm / companies have been recorded for the past six years till the date of search. AO observed that assessee is found to be amongst such beneficiaries. Therefore, proceeding u/s. 147 of the Act was initiated and notice u/s. 148 of the Act was issued on 28.3.2016. In response to this notice, the assessee, through its AR, vide letter dated 23.11.2016 submitted that the return of income already filed on 30.9.2009 for AY 2009-10 which may be treated to have been filed in response to notice issued. Subsequently, statutory notices alongwith questionnaire were issued to the assessee on

29.11.2016 and in its response, the AR of the assessee attended and filed the details. After considering the replies submitted by the assessee, the AO has observed that assessee was unable to explain the identity, genuineness and creditworthiness of the entities who have allegedly made the investment till date. AO further observed that the Directors of these companies were not produced either by the assessee company as required in the questionnaire on one pretext or other and regarding cross examination of Sh. SK Jain by the assessee, the AO treated as after thought of assessee to delay the finalization of assessment proceedings at fag end of the time barring date and held that the assessee has offered no proper, credible, reasonable and acceptable explanation about the amounts credited in its books, the receipt of Rs. 30,00,000/- therefore, cannot be treated as explained and made the same amount u/s. 68 of the Act in the hands of the assessee vide order dated 14.12.2016 by assessing the total income at Rs. 35,30,971/-. Against the assessment order, the Assessee appealed before the Ld. CIT(A) who vide his impugned order dated 09.1.2018 has partly allowed the appeal of the assessee. Aggrieved with the order of the Ld. CIT(A), assessee appealed before the Tribunal.

3. During the hearing, Ld. counsel for the assessee drew my attention towards page no. 9 of the assessment order wherein it has been mentioned that *"regarding cross examination of Sh. SK Jain by the assessee, the AO treated as after thought of assessee to delay the finalization of assessment proceedings at fag end of the time barring*

date.". He further drew my attention towards page no. 1 of the impugned order of the Ld. CIT(A) wherein, it was mentioned "*that the Ld. AO was not justified in making addition merely on the basis of the statement made by an individual on the back of the assessee and without giving any opportunity to cross examine the person whose statement has been relied upon by the department.*" He further draw my attention towards page no. 11, para no. xvii of the impugned order wherein it has been mentioned that "*Further, it is submitted that the additions as made by the Ld. AO was merely based on the statement made by a party without bringing any evidence on record that any cash has exchanged hands and no opportunity was given to the assessee for cross examination the person whose statement, on the back of the assessee, has been relied upon the department.*" In view of above, he submitted that the addition in dispute was made and confirmed merely on the basis of the statement made by Sh. S.K. Jain on the back of the assessee and without giving any opportunity to cross examine him, which is not sustainable in the eyes of law. Therefore, he submitted that the issue argued vide ground no. 11 is squarely covered 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 on exactly similar facts and circumstances. Hence, he requested to follow the aforesaid case 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 case laws cited before me. I find that at page no. 9 of the assessment order, it has been mentioned that *"regarding cross examination of Sh. SK Jain by the assessee, the AO treated as after thought of assessee to delay the finalization of assessment proceedings at fag end of the time barring date."* I further find that at page no. 1 of the impugned order of the Ld. CIT(A), the assessee has raised the ground no. 2 i.e. *"That the Ld. AO was not justified in making addition merely on the basis of the statement made by an individual on the back of the assessee and without giving any opportunity to cross examine the person whose statement has been relied upon by the department."* I further note that at page no. 11, para no. xvii of the impugned order of the Ld. CIT(A), it has been mentioned that *"Further, it is submitted that the additions as made by the Ld. AO was merely based on the statement made by a party without bringing any evidence on record that any cash has exchanged hands and no opportunity was given to the assessee for cross examination the person whose statement, on the back of the assessee, has been relied upon the department."* Therefore, I find considerable cogency in the contention raised by the assessee's counsel that addition was made on the basis of statement of Sh. S.K. Gupta, but the assessee was not granted the opportunity to cross examine Sh. S.K. Gupta, which ground was also raised before the AO and Ld. CIT(A), which is against the settled law. I 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."

6. 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.

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

The decision is pronounced on 25/01/2019.

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

Dated: 25/01/2019

"SRBHATNAGAR"

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi