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

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

ITA No. 8219/Del/2018
AY: 2014-15

SURENDER KUMAR, C/O KAPIL GOEL, ADVOCATE, F-26/124, SECTOR-7, ROHINI, DELHI (PAN: AFXPM2941L	vs.	ITO, WARD 39(2), NEW DELHI
(Appellant)		(Respondent)

Assessee by : Sh. Kapil Goel, Adv.
Revenue by : Sh. S.L. Anuragi, Sr. DR.

ORDER

This appeal is filed by the assessee challenges order passed by Ld CIT(Appeals) 13 New Delhi confirming Ld AO's action disallowing long term capital gains exemption u/s 10(38) of the Act invoking deeming provisions of section 68 of the Act.

2. The brief facts of the case are that the assessee is an individual and has filed return of income u/s 139 of the of the Income Tax Act, 1961 (in short "Act") on 30.09.2014 declaring income of Rs 9,12,080/-. The return was selected for scrutiny under CASS. The notice u/s 143(2) was issued on 18.09.2015. The main issue taken up in assessment was exemption of long term capital gains arising from sale of shares of M/s Cressanda Solutions Limited of Rs 21,67,619/-. During assessment proceedings assessee has filed documents supporting exemption u/s 10(38) namely bank statements , broker notes, etc. Purchase and sale took place through doubtless banking channel. Notably no books of accounts were there before AO and Ld CIT(A) during assessment and first appellate proceedings. Apparently

Show cause notice was issued by AO to assessee on stated LTCG exemption claimed by assessee u/s 10(38) of the Act on basis of section68 of the Act for which reference may be made to pages 3 to 6 of the assessment order . Same is without any specific adverse material to implicate transaction of assessee. Now finally without show cause notice u/s 69A, addition is made in lighthearted manner at penultimate para of assessment order treating stated LTCG claimed as exempt as bogus and sham and accommodation entry u/s 69A of the Act. Finally AO treated the share sale proceeds as unexplained cash credit u/s 69A of the Act and made addition of Rs 21,67,619 u/s 69A of the Act. This was challenged by assessee before Ld CIT(A), who vide his impugned order dated 15.5.2018 has confirmed the action of the AO and dismissed the appeal of the Assessee. Thus feeling aggrieved with order of Ld. CIT(A) this appeal is filed by assessee before this Tribunal.

3. During the course of hearing before this Tribunal Ld Counsel for the Assessee, Sh. Kapil Goel, Advocate has argued mainly on two aspects of the case firstly on applicability of section 68 of the Act to share sale proceeds on mere basis of stated investigation wing inputs to AO and without books being available before AO and Ld CIT(A) qua share sale transaction and secondly on impact of serious violation of principle of natural justice before AO and Ld CIT(A). In this context, Ld AR has drawn my attention to the following specific legal grounds raised in grounds of appeal :

> *2.1 That order passed by AO dated 29/12/2016 and further order passed by ld CIT A dated 15/05/2018 are bad in law in as much as addition of Rs 21,67,619/- is made violating principles of natural justice without confronting any investigation wing report relevant extract, statements recorded by investigation wing, etc which is sufficient to quash the assessment order and order passed by Ld CIT(A) .*

5. That on the facts and in the circumstances of the case and in law, AO and Ld CIT(A) erred in making and sustaining subject additions without appreciating that law gives discretion to the assessing officer in applying deeming fictions u/s 68 etc as firstly no "books" are there in existence before AO in which any sum is found credited therein so as to invoke section 68 of the Act vis a vis subject LTCG is concerned , and secondly opinion and satisfaction u/s 68 has not been objectively arrived in facts of present case on due application of mind thirdly assessee has no economic capacity and source to generate given amount of unaccounted income. Fourthly law requires that additions under said deeming fiction cannot be made sans incriminating material brought on record which is completely lacking in present case. Lastly section 68 does not apply to sale of shares where no credit within meaning of section 68 can be said to have arisen therein

7. That on the facts and in the circumstances of the case and in law, ld CIT(A) erred in sustaining the action of AO in making addition of Rs 21,67,619/- without appreciating that no opportunity is given to the assessee to be confronted with back material relied extensively in impugned orders like investigation wing report etc and no opportunity to cross examine the revenue's witness was given despite specific written request in this regard made to Ld AO/CIT(A).

4. During hearing Ld AR has placed on record chart of arguments and proposition wise gist of case laws to support his arguments which was duly given to Ld DR also. Further few more issues are raised by Ld AR where it was argued that once AO has proceeded to give show cause notice u/s 68 and made final addition u/s 69A without any show cause for the same, which further underwent change by Ld CITA who confirmed addition u/s 68 of the Act it was pleaded before me that for want of clarity of provision to be applied at all stages , addition must be deleted on this count also. Further it was argued by Ld AR that view of Ld CIT(A) on evidentiary value of investigation wing report like any other document and expert opinion is contrary to entire scheme of income tax act which requires independent and exclusive opinion of AO only and not opinion of investigation wing who has no authority to pass assessment orders u/s 143(3) of the Act. Further it was argued by Ld AR that views of Ld CIT(A) at para 9.2 of his order that in every case it is not

required on part of AO to bring cogent material is again misconceived and cannot be countenanced as *sans* cogent material being brought by AO in assessment addition in deeming fictions of section 68/69A can't be sustained. Further it was pleaded by Ld AR that Ld CIT(A) misdirected himself by holding at para 7.10 of his order that subjective opinion of AO can't be subject matter of consideration by appellate courts is clearly against the scheme of appellate provisions u/s 246A and section 254 of the Act which empowers complete review on facts and law by CIT(A) and ITAT unlike high court who can only admit appeals u/s 260A on substantial question of law.

5. On the contrary, Ld. DR has argued that no where assessee has been able to establish his/her case successfully and merely taking shield of technicalities cant wish away the onus to prove the genuineness of exemption . Further proceedings with his argument Ld DR has stated with passion that AO and Ld CIT(A) have discussed at great length the serious flaw and deficiency in defense set up by assessee which is not adequately controverted by Ld AR. Ld DR has supported the invocation of section 68 of the Act on the broader principle of burden to give satisfactory explanation on part of assessee and thus argued for confirming the orders of AO and Ld CIT(A) . Ld DR has taken support of section 292B of the Act pleading for error if any being curable and has requested for confirming addition in section 69/69A of the Act requesting for use of wider discretion available to the tribunal. Ld DR has further highlighted that mere lack of cross examination is not fatal to revenue's case and same is at best a irregularity only . Ld DR has further exhorted before me that such kind of cases does not deserve any sympathy of the tribunal as entire transaction are proved to be sham and bogus. Continuing with his

arguments Ld DR preyed that grounds raised by Ld AR are devoid of merits and does not carry any legal weight. Finally Ld DR has relied on case laws referred in orders of AO and Ld CIT(A) praying for dismissal of this appeal.

6. I have heard both the parties and perused the records. On due consideration of the entire conspectus of the case, I proceed to adjudicate the appeals on aforesaid three grounds. The first issue of applicability of section 68 of the Act, it is firstly appropriate to refer to text of section 68 of the Act:

> ***"Cash credits.***
>
> ***68.*** *Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year :*
>
> ***Provided*** *that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—*
>
> *(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and*
>
> *(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:*
>
> ***Provided further*** *that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10."*

6.1 If objectively and dispassionately section 68 of the Act is dissected following would be key ingredients of the same:

6.1.1 Firstly is requires that "*Where any sum is found credited in the books of an assessee maintained for any previous year*" that is there is a "**sum**" **found t**o have been **credited** in books of **assessee for** previous year which mandates **existence of books of accounts of assesssee** sans which section 68 can't be pressed into service; Notably ***books of accounts*** are analysed in following provisions of the Act:

a) **Section 2 clause (12A) defines** *"books or books of account" includes ledgers, day-books, cash books, account-books and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device";*

b) **Section 44AA states** for Maintenance of accounts by certain persons carrying *on profession or business as :.*

"44AA. *(1) Every person carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or any other profession as is notified by the Board in the Official Gazette shall keep and maintain such books of account and other documents as may enable the Assessing Officer to compute his total income in accordance with the provisions of this Act.*

(2) Every person carrying on business or profession [not being a profession referred to in sub-section (1)] shall,—

(i) if his income from business or profession exceeds one lakh twenty thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession exceed or exceeds ten lakh rupees in any one of the three years immediately preceding the previous year; or

(ii) where the business or profession is newly set up in any previous year, if his income from business or profession is likely to exceed one lakh twenty thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession are or is likely to exceed ten lakh rupees, during such previous year; or

(iii) where the profits and gains from the business are deemed to be the profits and gains of the assessee under section 44AE or section 44BB or section 44BBB, as the case may be, and the assessee has claimed his income to be lower than the profits or

gains so deemed to be the profits and gains of his business, as the case may be, during such previous year; or

[47][(iv) where the provisions of sub-section (4) of section 44AD are applicable in his case and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year,]

keep and maintain such books of account and other documents as may enable the Assessing Officer to compute his total income in accordance with the provisions of this Act:

*\[48][**Provided** that in the case of a person being an individual or a Hindu undivided family, the provisions of clause (i) and clause (ii) shall have effect, as if for the words "one lakh twenty thousand rupees", the words "two lakh fifty thousand rupees" had been substituted :*

***Provided further** that in the case of a person being an individual or a Hindu undivided family, the provisions of clause (i) and clause (ii) shall have effect, as if for the words "ten lakh rupees", the words "twenty-five lakh rupees" had been substituted.]*

(3) The Board may, having regard to the nature of the business or profession carried on by any class of persons, prescribe[49], by rules, the books of account and other documents (including inventories, wherever necessary) to be kept and maintained under sub-section (1) or sub-section (2), the particulars to be contained therein and the form and the manner in which and the place at which they shall be kept and maintained.

(4) Without prejudice to the provisions of sub-section (3), the Board may prescribe, by rules, the period for which the books of account and other documents to be kept and maintained under sub-section (1) or sub-section (2) shall be retained."

6.2 From above provisions it is crystal clear that mere bank statement which is issued by bank to its client/account holder can't be elevated to status of books maintained by assessee within the meaning of section 2 clause 12A and section 44AA of the Act.

6.3 It is noted that judicial analysis of books of accounts is available in Hon'ble Bombay High Court decision in case of Sheraton Apparels reported at 256 ITR 20 relevant extract is reproduced below for sake of ready reference:

"..27. The appellants' case is that the diaries, which were seized, were regularly maintained in the regular course of business as regular books of account, which contained all the transactions entered into by the appellants. It reflected a true state of accounts constituting the real cash book. As such his case squarely falls within Explanation 5 to Section 271(1)(c) of the Act.

28. In order to appreciate the scope of Clause (1) to Explanation 5, it would be necessary to understand the words in which they are appearing under the said Explanation. Before concentrating on the specific meaning thereof, in the light of the legislative intent behind Clause (1), let us see, what do you mean by "books of account". If "books of account" is considered in isolation, then, it may mean books in which merchants, traders and businessmen generally keep their accounts and are maintained for recording (a) all receipts and expenses with matters relating thereto; (b) all sales and purchases; and (c) the assets and liabilities. They are the documents and ledgers which must be prepared and kept by the business entity including the profit and loss account and the balance-sheet. In traditional terms, books means a collection of sheets of papers bound together with the intention that such binding shall be permanent and papers used are kept collectively in one volume. It may also be assumed that it connotes the intention that it should serve as a permanent record. At the same time, the term of account, i.e., to account, means to reckon, and it is difficult to conceive of any accounting which does not involve either additions or subtractions or both of these operations of arithmetic. A book which contains successive entries of items may be a good memorandum book; but until those entries are totalled or balanced, or both, as the case may be, there is no reckoning and no accounts. A book which merely contains entries of items of which no account is made at any time, is not a "book of account" in a commercial sense.

29. In different legislations the concept of books of account has been employed. One of such oldest legislation is the law of evidence. Section 34 refers to the words "entries in books of account". Section 34 has been interpreted by various High Courts including the apex court. The Supreme Court in the recent judgment delivered in the case of Ishwar Dass Jain v. Sohan Lal, has observed as under (headnote) :

"Under Section 34 sanctity is attached in the law of evidence to books of account if the books are indeed 'account books', i.e., in original if they show, on their face, that they are kept in the 'regular course of business'."

30. So, the accounts under Section 34 means accounts which are maintained in the regular course of business.

31. The income-tax legislation has been using the term "book" or "books of account" right from its inception. But, these terms are defined in the Act for the first time by the Finance Act, 2001, with effect from June 1, 2001. Section 2(12A) defines the said terms to mean :

"(12A) 'books or books of account' includes ledgers, day-books, cash books, account books, and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electromagnetic data storage device."

32. Then above definition appears to have been framed by the Legislature keeping in view the development of computer technology. If the newly inserted definition of books of account inserted in the Income-tax Act is examined in contrast to the definition given under Section 34 of the Evidence Act, it will be clear that the stringent requirements of Section 34 are not to be found in the said definition. Obviously, for the simple reason that the purpose of both the legislations are different. So far as the cases at hand are concerned, they relate to the assessment years 1984-85 to 1988-89 ; much prior to the period of introduction of the definition which was introduced for the first time under the Finance Act, 2001.

33. In order to appreciate the submissions keeping in view the facts of the present cases, one has to concentrate not only on the bare term "books of account" but also on the words in whose company the said term is appearing. The extracted sub-clause appearing hereinbelow will have to be understood properly and appropriate meaning will have to be assigned keeping in mind the backdrop in which the concept of "books of account" is referred to in Sub-clause (1) of Clause (b) of Explanation 5. The words used are :

"such income is, or the transactions resulting in such income are recorded . . . in the books of account, if any, maintained by him for any source of income .. . before the said date."

34. The term "books of account" referred to in Sub-clause (1) of Explanation 5 to Section 271(1)(c)means books of account which have been maintained for determining any source of income. The term "source of income" as understood in the Income-tax Act is to identify or classify income so as to determine under which head, out of the various heads of income referred to in Section 14 of the Act, it would fall for the purposes

of computation of the total income for charging income-tax thereon. ***Thus, the term "books of account" referred to in this relevant sub-clause of Explanation 5 would mean those books of account whose main object is to provide credible data and information to file the tax returns****. A credible accounting record provides the best foundation for filing returns of both direct and indirect taxes. Accounting is called a language of business. Its aim is to communicate financial information about the financial results.* ***This is not possible unless the main objectives of the books of account are to maintain a record of business : to calculate profit earned or loss suffered during the period of time, to depict the financial position of the business ; to portray the liquidity position ; to provide up to date information of assets and liabilities with a view to derive information so as to prepare a profit and loss account and draw a balance-sheet to determine income and source thereof****. Thus, the term "books of account" referred to in Explanation 5 must answer the above qualifications****. It cannot be understood to mean compilation or collections of sheets in one volume. The books of account referred to are those books of account which are maintained for the purposes of the Income-tax Act and not diaries which are maintained merely as a man's private record ; prepared by him as may be in accordance with his pleasure or convenience to secretly record secret, unaccounted clandestine transactions not meant for the purposes of the Income-tax Act, but with specific intention or desire on the part of the assessee to hide or conceal income so as to avoid imposition of tax thereon.*

35. The words in Explanation 5 "books of account, if any, maintained by him for any source of income" are important words signifying the legislative intent embodied in the Explanation warranting grant of immunity from penalty. The legislative intent is to admit only those books of account maintained by the assessee on his own behalf as by their very nature and circumstances are maintained for the purposes of drawing the source of income. ***Therefore, when books of account are tendered for claiming the benefit of Explanation 5 to*** *Section 271(1)(c)* ***of the Act, it must be shown to be a book, that book must be a book of account, and on the top of it that must be one maintained for the purposes of drawing the source of income under the*** *Income-tax Act****. These essential requirements must be carefully observed while implementing tax legislation in the country where secret and parallel accounts based on frauds and forgery are extremely common and responsibility of keeping and maintaining accounts for***

the purposes of the tax legislation is honoured in the breach rather than the observance."

6.4 Above dictum leaves no room for any possible doubt that credit in bank account simply or any other raw information available to AO can't be loosely called as books of account u/s 68 of the Act.

7. Secondly it requires "..opinion" on part of "assessing officer" vis a vis explanation of assessee if any which opinion in clear prescription of statute is exclusively reserved for "assessing officer" which is defined u/s 2 clause 7A as "Assessing Officer" means the Assistant Commissioner or Deputy Commissioner or Assistant Director or Deputy Director or the Income-tax Officer who is vested with the relevant jurisdiction by virtue of directions or orders issued under sub-section (1) or sub-section (2) of section 120 or any other provision of this Act, and the Additional Commissioner or Additional Director or Joint Commissioner or Joint Director who is directed under clause (b) of sub-section (4) of that section to exercise or perform all or any of the powers and functions conferred on, or assigned to, an Assessing Officer under this Act" so satisfaction required on part of AO u/s 68 of the Act (which phrase is also employed in section 69 and section 69A etc) can't be implanted by any other authority. This view is fortified by the following decisions:-

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ITA No. 2835/Del/2015 (Assessment Year: 2012-13)
Smt. Tripat Kaur Date of pronouncement 09/10/2018

"…If authority is given expressly by affirmative words upon a defined condition, the expression of that condition excludes the

doing of the Act authorized under other circumstances than those as defined. It is also established principle of law that if a particular authority has been designated to perform an action on any particular issue, then it is that authority alone who should do that action. We draw support from various decision of Honorable High courts in 346 ITR 343 (Bom) , 345 ITR 223 (del) and also of the Honourable supreme court Anirudhsinhji Karansinhji Jadeja v. State of Gujarat [1995] 5 SCC 302 where in hon. Supreme court held as under :-

— 13. It has been stated by Wade and Forsyth in 'Administrative Law', 7th Edition at pages 358 and 359 under the heading 'SURRENDER, ABDICATION, DICTATION' and sub- heading "Power in the wrong hands" as below:- "Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another.The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the courts in applying this principle that they condemn some administrative arrangements which must seem quite natural and proper to those who make them.....". "Ministers and their departments have several times fallen foul of the same rule, no doubt equally to their surprise....":

8. After this detailed analysis of various ingredients of section 68 of the Act, I have no hesitation to accept the jurisdictional plea raised by Ld AR that invocation of section 68 in extant facts sans valid and proper books of account of assessee is invalid and accordingly addition made by AO as sustained by Ld CIT(A) is held to be incorrect and reversed. Signification of correct assumption of jurisdiction is highlighted in the following decisions of Hon'bl e Delhi and Madras High Court:

IN THE HIGH COURT OF DELHI AT NEW DELHI + ***WRIT PETITION (CIVIL) No. 5937/2016*** *Reserved on : 10th May, 2018 Date of decision: 30th November, 2018*

SHAH E NAAZ JUDGE ..... Petitioner

(speaking through His lordship as he then was Hon'ble Justice Mr Sanjiv Khanna)
"…31. Authority and power to conduct search and seizure operations is strident and caustic power authorized by law to be taken recourse to when the conditions mentioned under different clauses of Section 132 (1) of the Act are satisfied. Constitutional validity of the said provision has been upheld due to the safeguards provided by the section itself, to prevent and check cases of abuse and misuse. Investigation and detection of economic offences is onerous and a difficult task, for often evidence and material is concealed and subterfuge is adopted to prevent and deflect detection. This, however, does not give liberty to the authorities to disregard and authorize search and seizure operations without formation of requisite belief. ***Power and authority given to the authorities must be exercised in terms of the statute and not contrary to and in violation of jurisdictional requirements. Power, as given, also imposes an obligation on the authorities to satisfy jurisdictional pre-conditions for the exercise of power to be held to be valid and not bad and contrary to law****…"*

Above passage and ingeminated words makes it luculent that ". ***Power and authority given to the authorities must be exercised in terms of the statute and not contrary to and in violation of jurisdictional requirements. Power, as given, also imposes an obligation on the authorities to satisfy jurisdictional pre-conditions for the exercise of power to be held to be valid and not bad and contrary to law"*** *which fits in present facts fully.*
On jurisdictional fact , in recent decision of Madras high court in case of Karti Chidambram (2/11/2018) has succinctly observed that:

"168. From the above judgments, it could be deduced that existence of jurisdictional fact is a sine qua non for exercise of power. A jurisdictional fact is one on existence or non;existence of which depends jurisdiction on a Court or tribunal or authority, as the case may be. If the jurisdictional fact does not exist, the Court, authority or officer cannot act. If a court or authority has wrongly assumes the existence of such fact, the order can be quashed by a writ of certiorari.

169. If the jurisdictional fact exists, the authority can proceed further and exercise his power and take a decision in accordance with law. No Court or tribunal, statutory authority can assume jurisdiction, in respect of a matter which the statute does not confer on it. Error on jurisdictional fact, renders the order, ultra vires and bad. In the case on hand, as rightly submitted by

Mr.Gopal Subramanium, learned Senior Counsel, that in the light of sections 2(11) and 50 of the Black Money Act, 2015, jurisdictional fact to enquire does not exist and that the Principal Director of Income Tax/first respondent herein, has assumed jurisdiction that he can enquire into the matter under Section 55 of the Act, by issuing a show cause notice."

8.1 Accordingly plea of Ld DR that section 292B may cure the defect of wrong invocation of section 68 can't be accepted being jurisdictional error and same is the view of Hon'ble Delhi high court in case of JCB case reported at 398 ITR 189 wherein it is held that:

"19. As already noted, the final assessment order of the AO stood vitiated not on account of mere irregularity but since it was an incurable illegality. Section 292B of the Act would not protect such an order. This has been explained by this Court in its decision dated 17th July 2015 passed in ITA No. 275/2015 (Pr. Commissioner of Income Tax, Delhi-2, New Delhi v. Citi Financial Consumer Finance India Pvt. Ltd.) where it was held:

"Section 292B of the Act cannot be read to confer jurisdiction on the AO where none exists. The said Section only protects return of income, assessment, notice, summons or other proceedings from any mistake in such return of income, assessment notices, summons or other proceedings, provided the same are in substance and in effect in conformity with the intent of purposes of the Act."

20. The Court further observed that Section 292B of the Act cannot save an order not passed in accordance with the provisions of the Act. As the Court explained, "the issue involved is not about a mistake in the said order but the power of the AO to pass the order."

8.2 Further my decision on incorrect applicability of section 68 of the act in present facts is supported by following chain of decisions which are respectfully applied and followed by the Tribunal:

S.No. & Particulars / Title of decision	***Bench (citation / Ref. No./ Order No.***	***Held (Gist in brief) Relevant para.***
1. Babbal Bhatia	*A bench Delhi*	*Para 19 (Para 14 to 26)*

	ITAT ITA 5430 &5432/Del/2011(08/06/2018)	
2.Zaheer Abdulhamid Mulani	*SMC Pune Bench (Before Ms Sushma Chowla and Shri Anil Chaturvedi) ITA 862/Pun/2017 (31.08.2018)*	*Para 13*
3. Latif Ebrahim Patel	*Mumbai A bench ITA 7097/Mum/2013 (23.03.2018)*	*Para 7 & Para 8 (Mumbai ITAT decisions in 164 ITD 296 & 160 ITD 605 followed)*
4. Shamsher Singh Gill	*Delhi SMC Bench in ITA 2987/Del/2015 (28/02/2017)*	*Para 4 to 7*
5. Danveer Singh	*Delhi SMC bench in ITA 4036/Del/2017 (14/12/2017)*	*Para 5*
6. Om Prakash	*Delhi E bench in ITA 1325/Del/2011 (11/08/2016)*	*Para 5 to 8*
7. Kamal Kumar Mishra	*Lucknow ITAT 143 ITD 686*	*Para 7*
8. Sunil Vaid	*Delhi ITAT SMC bench in ITA 2414/Del/2016 (30/12/2016)*	*Para 7*
9. Vijay Kumar Prop. V.K. Medical Hall	***Delhi ITAT F bench ITA No. 2483/Del/2015 (27/11/2018)***	*Para 13 & 14*
10. INDER SINGH,	*Delhi ITAT B bench ITA No. 1931/Del/2016 (05/12/2018)*	*Para 5*

8.4 In above decisions notably it is also held that ITAT at this belated stage can't improve the order of AO and covert the addition from section 68 to section 69A etc. Even otherwise provisions of section 68 of the Act has been held can't be applicable

to mere share sale which is not akin to receipt of gift, loan, share capital, advance etc is view of:

The Hon'ble Delhi Bench of the Tribunal in the case of ITO vs Jatin Investment Pvt. Ltd. In ITA No.4325 & 4326/Kol/2009 order dated 27.05.2015 held as follows :-

"11. In his rival submissions, the Ld. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that the assessee was having investment in shares etc. which were duly shown on the asset aside of the balance sheet, out of those investments some were sold and few new were purchased and if there was any gain on the sale the same was offered for taxation. It was further submitted that in earlier year under similar circumstances, the case was reopened u/s 147 of the Act and the addition made by the AO was deleted by the I.T.A.T. It was further submitted that the assessee sold the shares which were earlier purchased in different years and duly shown in the balance sheet of the respective years and that the assessee had shown the sale proceeds in the books of accounts, the investments were reduced after making the sales. It was contended that there was no obligation under the law that the assessee was required to prove the source of payee. It was further contended that the AO had not rejected the books of accounts and the purchases were duly accepted so there was no reason to doubt the sales. It was submitted that the case of the assessee is squarely covered by the decision of this bench of the Tribunal in the case of ITO vs. M/s Vishal Holding and Capital Pvt. Ltd. in ITA no. 1788/Del/2009 order dated 17.07.2009 which has been upheld by the Hon'ble Jurisdictional High Court as reported in (2011) 200 Taxman 186 (Delhi). It was further, submitted that the issue is also covered by the order of the ITAT, Delhi Bench in the case of ITO vs. Goodwill Cresec Pvt. Ltd. in ITA No. 4151/Del./2010 order dated 25.01.2012.

Reliance was also placed on the following cases laws :-

"1. CIT vs. Sh. Udit Narain Aggarwal, ITA No. 560 of 2009, dt. 12.12.2012

2. CIT vs. Sudeep Goenka, ITA No. 468 of 2009, dt. 3.01.2013.

3. CIT vs. Anirudh Narain Aggarwal, ITA No. 195 of 2010, dt. 16.01.2013."

It was pointed out that the same issue has been decided by the I.T.A.T. in assessee's own case in I.T.A.T. No. 1584/Del./2009 for the A.Y. 2002-03 vide order dated 13.11.2009, in assessee's favour (copy of the order was furnished which is placed on record)

12. We have considered the submissions of both the parties and gone through the material available on the record. In the present case, it is noticed that the assessee purchased the shares in earlier years which were shown as investment in the books of accounts and reflected in the "Asset Side" of the "Balance Sheet", out of those investments (copy which is placed at page no. 23 and 24 of the assessee's paper book), the assessee sold certain investments and accounted for the profit / loss and offered the same for taxation. In the present case, the amount in question was neither a loan or the deposit , it was also not on account of share application money, the said amount was on account of sale of investment therefore the provisions of Section 68 of the Act were not applicable and the AO was not justified in making the addition. In our opinion, the Ld. CIT(A) rightly deleted the addition made by the AO. 13. On a similar issue the Hon'ble Jurisdictional High Court in the case of CIT vs. Vishal Holding and Capital Pvt. Ltd. vide order dated 9th August, 2010 upheld the order dated 30.7.2009 of the ITAT in ITA no. 1788/Del/2007 for the assessment year 2000-2001 wherein the order of the Ld. CIT(A) making the similar deletion was upheld by observing in para 6 as under :-

"We are of the view that the assessee had produced copies of accounts, bills and contract notes issued by M/s. MKM Finsec Pvt. Ltd., and had been maintaining books of account as per Companies Act. The assessee had also demonstrated the purchase and sale of shares over a period of time as seen from the balance sheet's.

In our opinion, the Assessing Officer has simply acted on the information received from the Investigation Wing without verifying the details furnished by the assessee.

The assessee has also produced best possible evidence to support its claim.

Consequently the addition made by the Assessing Officer cannot be sustained."

14. We, therefore, considering the totality of the facts do not see any valid ground to interfere with the findings of the Ld. CIT(A). Accordingly, we do not see any merit in this appeal of the department. In ITA no. 4326/Del./2009 of the assessment year 2004- 05 identical issue having similar facts is involved, the only difference is in the amount of addition which was deleted by the Ld. CIT(A). Therefore, our findings given in former part of this order, in respect of 16 4325 & 4326/ Del/2009 assessment year 2003-04, shall apply mutatis mutandis for assessment year 2004-05.

14. We, therefore, considering the totality of the facts do not see any valid ground to interfere with the findings of the Ld. CIT(A). Accordingly, we do not see any merit in this appeal of the department. In ITA no. 4326/Del./2009 of the assessment

year 2004- 05 identical issue having similar facts is involved, the only difference is in the amount of addition which was deleted by the Ld. CIT(A). Therefore, our findings given in former part of this order, in respect of assessment year 2003-04, shall apply mutatis mutandis for assessment year 2004-05."

The Hon'ble Delhi High Court in the case of Principal C.I.T. vs Jatin Investment Pvt. Ltd. [2017] TMI 342 (Delhi) held as follows :-

"4. The ITAT agreed with the conclusions of the CIT (A) upon its independent examination of the record. It also discounted the Revenue's submissions that the investment shown in the book of accounts and reflected as assets in the side of the balance sheet, should have been properly treated and that in the absence of such treatment. Section 68 applies. The ITAT rejected this contention and held – based upon the principles enunciated in CIT v. Vishaf Holding & Capital Pvt. Ltd. (order of this Court dated 9.8.2010) that the invocation of Section'68 in the circumstances is unwarranted.

5. Learned counsel for the Revenue reiterated the grounds cited in some of the contentions made before the ITAT. Learned counsel especially emphasized on the submission that the incorrect reflection of the receipts in the balance sheet belied the true nature of the receipts as a justification for the application of Section 68.

6. The ITAT in our opinion quite correctly appreciated the law and its application by the first appellate authority, i.e., CIT (A). Having regard to the facts and the nature of the analysis based upon the decisions of this Court, as well as the reliance on various decisions with respect to the true nature of Section 68, we are of the opinion that no question of law arises; the appeals are accordingly dismissed"

8. Applying the proposition of law laid down in the case law to the facts of the case, we delete the addition made u/s 68 of the Act for the reasons cited above."

While I was writing this order, I found that this hon'ble tribunal in following two recent decisions has been pleased to delete the similar additions after considering the entire conundrum of the matter:

Lalit Kumar Aggarwal in ***ITA No. 3509/Del/2018 : Asstt. Year : 2014-15 DELHI BENCH 'SMC', NEW DELHI Date of Pronouncement: 24.01.2019 Held***

"..21. I find that on examining the same and after making inquiries, no defect in the said documentary evidences could be brought on record by the revenue. The addition in question was made merely on the basis of suspicion and surmises. No

material has been brought on record to show that the assessee was involved in the racket which was unearthed by the Investigation Wing of the department. The revenue could not point out that in anywhere in the statement of Sh. Sanjay Vora and/or Sh. Praveen Kumar Agarwal, the name of the assessee was stated by them. Therefore, simply because some persons were involved in generation of bogus Long Term Capital Gain cannot lead to conclusion that the assessee was also involved in it without cogent material.

22. Further, after making inquiries from the person, from whom, the assessee purchased the shares in question and/or from the share broker through whom the assessee sold the shares, no material could be brought on record by the Assessing Officer to show that the transaction of the assessee was not genuine and the assessee actually paid any amount in cash to any person in consideration of cheque received by him from the authorized share broker. In absence of such a material being brought on record by the revenue, in my considered opinion, the transaction of the assessee which is supported by overwhelming documentary evidences cannot be impeached merely because share prices rose abnormally or other persons were involved in generation
of bogus Long Term Capital Gain. Thus, in my considered opinion, the addition made u/s 68 of the Act of Rs.23,51,714/- by the revenue is unsustainable."

Sanjeev Jain Prop. M/s. S.K. Jewellers ITA No.3381/Del/2017
Assessment Year: 2013-14 DELHI BENCH 'G', NEW DELHI (date of order :** 15.01.2019**)

Held

"21. We find merit in the arguments advanced by the Ld. Counsel for the assessee that the shares have been sold at the rate as prevailing on the stock exchange at the time of sale and the share prices of all the scrip are closely monitored by the stock exchange and SEBI. Even if the prices have gone up artificially as alleged by the revenue authorities, however, there is no material to hold that the assessee was involved therein. It is also an admitted fact that although the Assessing Officer had made enquiries from various entities i.e. assessee's banker, depository, broker and the banker of M/s. TCL Technologies Limited, however, nothing adverse have been found. There is no adverse finding by SEBI in relation to the scrip in question has been given to the Assessing Officer. Further in response to notice u/s 131

Sh. Sachin Jain, Frenchise of M/s. Globe Capital Market Ltd, appeared before the Assessing Officer and his statement was recorded wherein he has confirmed to have executed the order for sale of shares. Therefore, merely on the basis of preponderance of human probabilities the addition cannot be made in the hands of the assessee without disproving the various documents filed by the assessee. Case law relied:
Hon'ble Bombay High Court in the case of CIT Vs. Mukesh Ratilal Marolia, in ITA No.456/Del/2007 Order dated 07.09.2011; Hon'ble Jharkand High Court at Ranchi in the case of CIT vs. Arun Kumar Agarwal (HUF) & Ors, Tax Appeal No. 13 of 2011, since report in [2013] DTR (Jharkhand) 219 order dated 13.07.2012; Hon'ble Gujarata High Court in the case of CIT-I Vs.
Maheshchandra G. Vakil [2013] 40 taxman.com 326 (Gujarat) Hon'ble Gujarata High Court in the case of CIT-I Vs. Himan M. Vakil [2014] 41 taxman.com 425 (Gujarat); Hon'ble Punjab & Haryana High Court in the case of Prem Pal Gandhi (supra) finally Held that "…The various other decisions relied on the Ld. Counsel for the assessee also support his case. Under these circumstances and in view of our above discussion we are of the considered opinion that the addition made by the Assessing Officer u/s 68 of the Act which has been sustained by the CIT(A) is not justified under the facts and circumstances of the present case. We, therefore, set aside the order of the CIT(A) and direct the Assessing Officer to delete the addition…"

8.5 So respectfully applying ratio of above plethora of decisions to extant facts, I direct the AO to delete the additions made in captioned appeals in so far as it relates to share sale proceeds and alleged commission portion is concerned.

8.6 Now adverting to second issue framed above on impact of cross examination, I strongly rely on the following string of decisions of various courts to hold that when revenue strongly relies on statements of certain persons to implicate an assessee, principle of cross examination has to invariably followed if truth and justice needs to be found out. Following recent jurisprudence as relied by Ld AR is supportive to my view:

11.1. Even otherwise, the assessment order is solely based on the report of the Investigation Wing Kolkata which in turn is nothing but the narration of the statements recorded during the investigation and the AO was having in possession the statement of only Shri Anand Sharma. Therefore, all these proceedings conducted by the Investigation Wing Kolkata were at the back of the assessee and hence the statement which is the foundation of the report of the Investigation Wing Kolkata as well as the assessment order cannot be accepted in the absence of giving an opportunity of cross examination to the assessee. We find that the assessee has insisted for cross examination during the assessment proceedings and further during the appellate proceedings. The ld.CIT(A) even called for a remand report and directed the AO to allow cross examination to the assessee. However, the AO has expressed his inability to allow the assessee cross examination of the witnesses due to the reason that the witnesses belong to Kolkata and it is not possible for AO to make such arrangement. The ld. CIT(A) has finally denied the cross examination to the assessee by giving his finding in para 5.11 at page 188 already reproduced in the earlier part of this order and, therefore, the only reason for denial of cross examination by the ld.CIT(A) is that the statements are so vocal and undeniable that cross examination of such accommodation entry provided by thousands of beneficiaries across India is neither practicable nor viable and therefore uncalled for.

We find that the assessee has demanded the cross examination only in respect of the alleged transactions of loans and not for the entire business of the entry providers providing the bogus entries. Undisputedly, the statement of Shri Anand Sharma was recorded by the Investigation Wing Kolkata at the back of the assessee, even the proceedings by the Investigation were conducted at the back of the assessee, therefore, the said statement of Shri Anand Sharma cannot be the sole basis of assessment without giving an opportunity of cross examination to the assessee. The Hon'ble Supreme Court in the case of Andaman Timber Industries vs. CCE (supra) while dealing with the issue of violation of principles of natural justice for not providing the opportunity of cross examination of the witnesses

whose statements were relied on by the AO has held in para 6 to 9 as under :-

Once the assessee has disputed the correctness of the statement and wanted to cross examine the witness which was not given by the AO as well as ld. CIT (A), then the orders passed based on such statement are not sustainable in law. The Hon'ble Delhi High Court in case of CIT vs. Ashwani Gupta, 322 ITR 396 (Delhi) while dealing with the issue of not providing the opportunity to cross examine the witnesses has held in para 5 to 7 as under :-

Thus the Hon'ble High Court has held that once there is a violation of principles of natural justice inasmuch as seized material is not provided to the assessee nor is cross examination of the person on whose statement the AO relied upon, granted, then, such deficiencies would amount to denial of opportunity and consequently would be fatal to the proceedings. The Hon'ble Bombay High Court in the case of H.R. Mehta vs. ACIT, 387 ITR 561 (Bombay) has also considered the issue of not providing opportunity of cross examination in para 11 to 17 as under :- Thus the denial of opportunity to cross examine was considered by the Hon'ble High Court which goes to the root of the matter and strikes at the very foundation of the assessment and, therefore, renders the assessment order passed by the AO not sustainable. The ld. A/R has submitted that Coordinate Bench of this Tribunal in the case of DCIT vs. Shri Prateek Kothari vide order dated 16th December, 2012 in ITA No. 159/JP/2016 has considered this issue in para 2.8 to 2.11 as under :-

"2.8 We have heard the rival contentions and perused the material available on record. The transaction under question relates to unsecured loans taken by the assessee amounting to Rs 1 Crores from M/s Mehul Gems Pvt Ltd during the impunged assessment year and not accepting the said loan transaction as a genuine transaction by the Assessing officer and the resultant addition made under section 68 of the Act. Undisputedly, the primary onus to establish genuineness of the loan transaction is on the assessee. In the instant case, the assessee has provided the necessary explanation, furnished documentary evidence in terms of tax filings, affidavits and confirmation of the Directors, bank statements of the lender, balance sheet of the lender company, and an independent confirmation has also been obtained by the Assessing officer to satisfy the cardinal test of identity, creditworthiness and genuineness of the loan transaction. However, the Assessing officer has not given any finding in respect of such explanation, documentary evidence as well as independent confirmation. Apparently, the reason for not

accepting the same is that the Assessing officer was in receipt of certain information from the investigation wing of the tax department as per which the transaction under consideration is a bogus loan transaction. The said information received from the investigation wing thus overweighed the mind of the Assessing officer. The Assessing officer stated that the primary onus is on the assessee to establish the genuineness of the transaction claimed by it and if the investigation done by the department leads to doubt regarding the genuineness of the transactions, it is incumbent on the assessee to produce the parties alongwith necessary documents to establish the genuineness of the transaction. In response, the assessee submitted that Shri Bhanwarlal Jain is not known to him and regarding various incriminating documentary evidences seized during the course of search and statements recorded of Shri Bhanwarlal Jain and other persons, he specifically requested the AO to provide copies of such incriminating documents and statement of all various persons recorded in this regard and provide an opportunity to the assessee to cross examine such persons. However, the AO didn't provide to the assessee copies of such incriminating documents and statements of various persons recorded and allow the cross-examination of any of these persons. While doing so, the AO stated that "in his statements, Bhanwarlal Jain had described that they are indulged in providing accommodation entries of bogus unsecured loans and advances through various Benami concerns (70) operated and managed by them. This admission automatically makes all the transactions done by them as mere paper transactions and in these circumstances, further as per the information name and address of assessee and the Benami Concern through which accommodation entry of unsecured loans was provided is appearing in the list of beneficiaries to whom the said Group has provided. This admission is sufficient to reject the contentions of the asseesse." Further, regarding cross examination, the AO stated that "the right of cross examination is not an absolute right and it depends upon the circumstances of each case and also on the statute concerned.

In the present case, no such circumstances are warranted as in the list of beneficiaries to whom accommodation entries were provided by the said group categorically contains the name and address of the assessee. Further the group has categorically admitted to providing of accommodation entries of unsecured loans through various benami concerns." The AO further relied upon the decision of Hon'ble Supreme Court in he case of C. Vasantlal & Co. Vs. CIT 45 ITR 206(SC) and Hon'ble Rajasthan High Court in case of Rameshwarlal Mali vs. CIT 256 ITR 536(Raj.) among others. In this regard, it was submitted by the assessee that if the entries and material are gathered behind

the back of the assessee and if the AO proposes to act on such material as he might have gathered as a result of his private enquiries, he must disclose all such material to the assessee and also allow the cross examination and if this is not done, the principles of natural justice stand violated.

2.9 In light of above discussions, in our view, the crux of the issue at hand is that whether the principle of natural justice stand violated in the instant case. In other words, where the AO doesn't want to accept the explanation of the assessee and the documentation furnished regarding the genuineness of the loan transaction and instead wants to rely upon the information independently received from the investigation wing of the department in respect of investigation carried out at a third party, can the said information be used against the assessee without sharing such information with the assessee and allowing an opportunity to the assessee to examine such information and explain its position especially when the
assessee has requested the same to the Assessing officer.

2.10 In this regard, the Hon'ble Supreme Court in the case of Dhakeswari Cotton Mills Ltd. v. CIT (1954) 26 ITR 775 (SC) ***(Copy at Case Law PB 812-818)*** *has held that "The rule of law on this subject has been fairly and rightly stated by the Lahore High Court in the case of Seth Gurmukh Singh where it was stated that while proceeding under sub-section (3) of section 23, the Income-tax Officer, though not bound to rely on evidence produced by the assessee as he considers to be false, yet if he proposes to make an estimate in disregard of that evidence, he should in fairness disclose to the assessee the material on which he is going to find that estimate; and that in case he proposes to use against the assessee the result of any private inquiries made by him, he must communicate to the assessee the substance of the information so proposed to be utilized to such an extent as to put the assessee in possession of full particulars of the case he is expected to meet and that he should further give him ample opportunity to meet it." It was held in that case that "In this case we are of the opinion that the Tribunal violated certain fundamental rules of justice in reaching its conclusions. Firstly, it did not disclose to the assessee what information had been supplied to it by the departmental representative. Next, it did not give any opportunity to the company to rebut the material furnished to it by him, and lastly, it declined to take all the material that the assessee wanted to produce in support of its case. The result is that the assessee had not had a fair hearing."*

The Hon'ble Supreme Court in case of C. Vasantlal & Co. Vs. CIT 45 ITR 206 (SC) has held that "the ITO is not bound by any technical rules of the law of evidence. It is open to him

to collect material to facilitate assessment even by private enquiry. But, if he desires to use the material so collected, the assessee must be informed about the material and given adequate opportunity to explain it. The statements made by Praveen Jain and group were material on which the IT authorities could act provided the material was disclosed and the assessee had an opportunity to render their explanation in that regard."

The Hon'ble Supreme Court in case of Kishinchand Chellaram v. CIT (1980) 125 ITR 713 (SC) ***(Copy at Case Law PB 585-591)*** *has held that "whether there was any material evidence to justify the findings of the Tribunal that the amount of Rs.1,07,350 said to have been remitted by Tilokchand from Madras represented the undisclosed income of the assessee.*

The only evidence on which the Tribunal could rely for the purpose of arriving at this finding was the letter, dated 18-2-1955 said to have been addressed by the manager of the bank to the ITO. Now it is difficult to see how this letter could at all be relied upon by the Tribunal as a material piece of evidence supportive of its finding. In the first place, this letter was not disclosed to the assessee by the ITO and even though the AAC reproduced an extract from it in his order, he did not care to produce it before the assessee or give a copy of it to the assessee. The same position obtained also before the Tribunal and the High Court and it was only when a supplemental statement of the case was called for by this Court by its order, dated 16-8-1979 that, according to the ITO, this letter was traced by him and even then it was not shown by him to the assessee but it was forwarded to the Tribunal and it was for the first time at the hearing before the Tribunal in regard to the preparation of the supplemental statement of the case that this letter was shown to the assessee. It will, therefore, be seen that, even if we assume that this letter was in fact addressed by the manager of the bank to the ITO, no reliance could be placed upon it, since it was not shown to the assessee until at the stage of preparation of the supplemental statement of the case and no opportunity to cross examine the manager of the bank could in the circumstances be sought or availed of by the assessee. It is true that the proceedings under the income-tax law are 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 this letter, 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 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."

2.11 In light of above proposition in law and especially taking into consideration the decision of the Hon'ble Supreme Court in case of C. Vasantlal & Co. (supra) relied upon by the Revenue and which actually supports the case of the assessee, in the instant case, the assessment was completed by the AO relying solely on the information received from the investigation wing, statement recorded u/s 132(4) of Shri Bhanwarlal Jain and others, and various incriminating documentary evidence found from the search and seizure carried out by Investigation Wing, Mumbai on the Shri Bhanwarlal Jain group on 03.10.2013. It remains undisputed that the assessee was never provided copies of such incriminating documents and statements of Shri Bhanwarlal Jain and various persons and an opportunity to cross examine such persons though he specifically asked for such documents and cross examination. On the other hand, the burden was sought to be shifted on the ITA No. 159/JP/16 The ACIT, Central -2, Jaipur vs. M/s Prateek Kothari, Jaipur 21 assessee by the A.O. It is clear case where the principle of natural justice stand violated and the additions made under section 68 therefore are unsustainable in the eye of law and we hereby delete the same. The order of the ld CIT(A) is accordingly confirmed and the ground of the Revenue is dismissed."

Thus when the assessee has specifically asked for cross examination of the witnesses whose statements were relied upon by the AO, then the denial of the opportunity to cross examine would certainly in violation of principles of natural justice and consequently renders the assessment order based on such statement as not sustainable in law. Hence in view of the facts and circumstances of the case where the assessee has repeatedly requested and demanded the cross examination of the witnesses whose statements were relied upon by the AO in the assessment order and further the report of the DDIT Investigation Kolkata is also based on the statement of such person then the denial of cross examination by the AO as well as ld. CIT (A) despite the fact that the assessee was ready to bear the cost of the cross examination of the witnesses is a gross violation of principles of natural justice. Thus the additions made by the AO on the basis of such statement without any tangible material is not sustainable in law and liable to be deleted. Accordingly the addition made by the AO is also deleted on merits apart from the legal issue decided in favour of the assessee.

APPELLATE TRIBUNAL, FOREIGN EXCHANGE MANAGEMENT ACT AT NEW DELHI
Date of Decision:-13.04.2018

(1) FPA-FE-01/DLI/2018
Shri Ashwani Kumar Mehra … Appellant

Versus

Shri A.H. Khan

Directorate of Enforcement, Delhi … Respondent

CORAM
JUSTICE MANMOHAN SINGH : CHAIRMAN
SHRI G.C. MISHRA : MEMBER
JUDGEMENT
FPA-FE-01/DLI/2018, FPA-FE-03/DLI/2018, FPA-FE-04/DLI/2018 & FPA-FE-05/DLI/2018

"54. "The Hon"ble Supreme Court of India in the case of Ayaaubkhan Noorkhan Pathan v. State of Maharashtra & others reported in (2013) 4 SCC 465, has inter alia held that the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice." The Constitution Bench of the Hon"ble Supreme Court of India in State of M.P. v. Sadashiuva Vishampayan reported in AIR 1961 SC 1623, has also
confirmed the principle that, the rules of natural justice require that a party should be given the opportunity of cross-examining a witness. i) In Prem Singh Vs. Special Director, Enforcement Directorate, CRL A. 276 of 2008, Delhi High Court, decided on 24.04.2014, whereby it was held that the denial of right to cross examine the witnesses would cause prejudice to the accused as statements of witnesses are
not substantive evidence in themselves. It was held in the said judgement that delay is not a ground for disallowing the opportunity to cross examine witnesses. The court laid down that:
—18. The impugned order of the AO fails to discuss this aspect although it has noticed the submission of learned counsel for the appellants that the said statements had been retracted as they had been given under threat and coercion. In order to determine whether the claim of the appellants that they were subjected to torture, threat and coercion was a credible one, the SD sought to have permitted the appellants to cross-examine the officers of the ED who recorded the statements. As regards Prem Singh, his statement is stated to have been recorded by A.K. Narang, Assistant Director. The statement of Rajendra Singh was recorded by Devender Malhotra. Neither of these

officers was tendered for cross-examination. In the considered view of the Court, in the context of the specific allegation that the retracted confessional statements were obtained under torture and coercion, that aspect ought to have been examined by the SD. In the circumstances, the reasons given by the SD in the impugned AO for disallowing the request of the appellants for cross-examination of the ED officials only because it would tantamount to "further delay in finalising the proceeding" were not tenable or justified. The denial of cross examination of the ED officials by the appellants indeed has caused them severe prejudice since the ED was relying on the said statements as if they were by themselves substantive evidence."

(iii) The Hon'ble High Court of Delhi in Devashis Bhattacharya ***Vs. Union of India 159 (2009) DLT 780****, while deciding a case under Foreign Exchange Regulation Act, 1973 had observed that:*

—18. It is well settled that where an action under the statute entails civil consequences, then even if an opportunity of being heard may not be explicitly set out in the applicable legal provisions, the adherence to the principles of natural justice has to be read into such a statute.

19. There can be no dispute that the action permitted under section 61 of the FERA, 1973 certainly results in drastic penal consequences… (iv) The Hon'ble Supreme Court of India in Ramesh Ahluwalia Vs. State of Punjab & Ors. 2012 (10) SCALE 46 had observed that:

—18. This is in conformity with the principle that justice must not only be done. Actual and demonstrable fair play must be the hallmark of the proceedings and the decisions of the administrative and quasi judicial courts. In particular, when the decisions taken by these bodies are likely to cause adverse civil consequences to the persons against whom such decision are taken.

IV-A The Hon'ble Supreme Court of India in Ashiwin S. Mehta and Anr. Vs. Union of India (UOI) and Ors. (2012) 1 SCC 83 had observed that:

—27. It is thus, trite that requirement of giving reasonable opportunity of being heard before an order is made by an administrative, quasi judicial or judicial authority, particularly when such an order entails adverse civil consequences, which would include infraction of property, personal rights and material deprivation for the party affected, cannot be sacrificed at the alter of administrative exigency or celerity.‖

IV-B The Constitutional Bench of the Hon'ble Supreme Court of India in Khem Chand Vs. Union of India AIR 1958 SC 300 has defined the meaning of the term —reasonable opportunity‖ to include an opportunity to defined by cross-examining the

witnesses produced against the accused. The Hon'ble court held that:

—To summarize: the reasonable opportunity envisaged by the provision under consideration includes-

(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(b) An opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defense; and finally (c) An opportunity to make his representation as to why the proposed punishment should not be inflicted on him.

iv). The Hon"ble Supreme Court of India in ***Ayubkhan Noorkhan Pathan Vs. The State of Maharashtra & Ors. Decided on 08.11.2012,***

Civil Appeal No. 7728 of 2012*, after relying upon various authoritative judgments, has observed that cross-examination is an integral part and parcel of the Principles of Natural Justice. It held that Cross-examination is one part of the principles of natural justice.*

(v) A Constitution Bench of the Hon"ble Supreme Court in ***State of M.P. v. Chintaman Sadashiva Vaishampayan, AIR 1961 SC 1623,*** *has held that the Principle of Natural Justice require that a party be given the opportunity to adduce all relevant evidence upon which it relies, that evidence of the opposite party be taken in his presence, and that he be given the opportunity to crossexamine the witnesses examined by that party. Not providing the said opportunity to cross-examine is violative of the Principles of Natural Justice.*

(vi). In ***Lakshman Exports Ltd. v. Collector of Central Excise, (2005) 10***

SCC 634, *the Apex Court, while dealing with a case under the Central Excise Act, 1944, considered whether to grant permission for cross-examination of a witness. In that case, the assessee had specifically asked to be allowed to crossexamine the representatives of the concerned firm, in order to establish that the goods in question had been accounted for in the firm"s books of accounts and excise duty had been paid thereof. The Court held that such a request could not be turned down, as the denial of the right to cross-examine, would amount to a denial of the right to be heard i.e. audi alteram partem.*

(vii). In ***K.L. Tripathi v. State Bank of India & Ors., AIR 1984 SC 273,*** *the Hon"ble Supreme Court has held that in order to sustain a complaint of violation of the Principles of Natural Justice on the ground of denial of opportunity to cross-examine, it must be established that some prejudice has been caused to the party by the procedure followed. A party which*

does not want to controvert the veracity of the evidence on record or does not want to controvert the testimony gathered behind its back cannot expect to succeed in any subsequent grievance raised by him on the ground that no opportunity of cross-examination was provided to him especially when the same was not requested and especially when there was no dispute regarding the veracity of the statement.

(viii). In ***Rajiv Arora v. Union of India & Ors.****, AIR 2009 SC 1100, the Apex Court held:*

—Effective cross-examination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Indian Evidence Act as also the principles of natural justice demand that the maker of the report should be examined, save and except in cases where the facts are admitted or the witnesses are not available for cross-examination or similar situation. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review."

ix). The Hon"ble Supreme Court of India in ***New India Assurance Company Ltd., v. Nusli Neville Wadia & Anr., AIR 2008 SC 876,*** *while considering a case under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, held that though the statute may not provide for cross-examination, the same being a part of Principles of Natural Justice should be held to be an indefeasible right. It was held as follows:-*

—If some facts are to be proved by the landlord, indisputably the occupant should get an opportunity to cross-examine. The witness who intends to prove the said fact has the ***right to cross-examine*** *the witness.* ***This may not be provided by under the statute, but it being a part of the principle of natural justice should be held to be indefeasible right"***

x). The Hon"ble Supreme Court in ***Needle Industries (India) Ltd. & Ors. v. N.I.N.I.H. Ltd. & Ors., AIR 1981 SC 1298,*** *considered a case under the Indian Companies Act, and observed that:*

—It is generally unsatisfactory to record a finding involving grave consequences with respect to a person, on the basis of affidavits and documents alone, without asking that person to submit to cross-examination‖ (xi). Hon"ble High Court in ***Mehar Singh Vs. The Appellate Board Foreign Exchange 1986 (10) DRJ 19,*** *while dealing with a case under the Foreign Exchange Regulation Act, 1973, decided the appeal in favour of the Appellants on the short ground that the applications made*

to the Director of Enforcement and before the Appellate Board during the pendency of the appeal to summon four witnesses for cross-examination, were not dealt with by the authorities below. It was held:

—5. Non-summoning of the said witnesses for purposes of cross-examination has resulted in miscarriage of justice.‖

55. In the nature of the seriousness of present case, the right to cross examination would have been given in view of gravity of the matter."

INCOME TAX APPELLATE TRIBUNAL DELHI BENCH —G‖: NEW DELHI

ITA No. 1415 to 1417/Del/2018 (Assessment Year: 2013-14 to 2015-16)

Shri Brij Bhushan Singal

Date of pronouncement 07/12/2018

It is not in dispute that assessee has furnished all the details such as purchase bills, allotment details, demat accounts, bank statements , details of payments by cheques and sale on BSE electronic platform, proof of payment of Securities Transaction tax and receipt of payment through Cheque by an independent broker, sale bills etc which is not doubted by the revenue. The facts have already narrated by us in earlier paras, which are undisputed by both the parties. only following issues are to be decided in this appeal:- i. Whether AO can use the statements of third parties without granting crossexamination of those parties. ii. Whether without providing the copies of the statements as well as the cross examination of alleged exit providers, such evidences can be used against the assessee for making addition. iii. Whether the interim orders of The SEBI relied up on by the ld AO implicate the assessee for making addition u/s 68 of the act on alleged bogus longterm capital gains. iv. Whether Cash Trails of The buyers of the securities as stated by the ld AO makes the long-term capital gain of the assessee bogus. v. Whether the disclosure of some other persons as their undisclosed income of Long-term capital gain affects the case of the assessee also. vi. Whether de hors all the above facts addition in the hands of the assessee u/s 68 of long term capital gain can be made.

Thus, it is apparent that the assessee has not been granted an opportunity of the cross-examination of Sri R. K. Kedia and Shri Manish Arora. The learned authorised representative has relied upon the decision of the Hon'ble Supreme Court where in relying on case of state of Madhya Pradesh vs. Chintaman sadashiv Waishampayan AIR 1961 SC 1623 wherein in para number 11,

It has been held referring another decision in Union of India vs. TR Varma —stating it broadly and without intending it to be exhaustive, it may be observed that the rules of natural justice require that the party should have the opportunity of producing all relevant evidence on which he relies, that the evidences of the appellant should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no material should be relied on against him without he is being given an opportunity of explaining them.‖ It was further stated that it is hardly necessary to emphasize that the right to cross-examine the witnesses who give evidences against him is a very valuable right, and if it appears that effective exercise of this right has been prevented by the enquiry officer by not giving to officer relevant documents, to which he is entitled, that inevitably would be that the enquiry had not been held in accordance with the rules of natural justice. The Hon'ble Supreme Court thereafter, referring to the another decision of the Hon'ble Supreme Court held that the importance of giving an opportunity to the public officer to defend himself by cross-examining witness produced against him is necessary for following the rules of natural justice. Further, the decision of the Hon'ble Supreme Court in case of Anadaman Timber industries vs. Commissioner of Central Excise (2015) 281 CTR 241 (SC) has 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 crossexamination 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 notice.‖ In the present case, also the assessee sought opportunity of cross-examination of the witnesses whose statements are used by the learned assessing officer against the assessee for making the addition. The assessee has contested the truthfulness of the statement of the witnesses recorded by the assessing officer. The truthfulness is also tested by the changing stands frequently. It is also not for the assessing officer to decide that no opportunity is necessary because he is not aware what could be the purpose for the cross-examination asked by the assessee. Therefore not granting of opportunity of the cross-examination of the brokers Sri RK Kedia, Manish Arora, Ankur Agarwal, directors of the companies who have purchased shares from the assessee through electronic platform of the Bombay stock exchange/ NSE and various other people as were mentioned in the assessment order is fatal to the assessment made by the assessing officer. We are also conscious of the decision of the Hon'ble Supreme Court in case of M. Pirai Choodi vs. ITO 334 ITR 262, wherein the Hon'ble Supreme Court while considering the decision of the Hon'ble MP High Court in 302 ITR 40 has held that not granting an opportunity of cross-examination to the assessee is merely an regularity and therefore the High Court was not correct in cancelling the order of the adjudicating authority. Therefore, Hon'ble Supreme Court thought it fit to set aside the matter to the adjudicating authority with a direction to grant opportunity of cross-examination to the assessee. Before us, an issue arises that

whether the matter should be set aside to the file of the learned assessing officer to grant assessee an opportunity of cross-examination of all the witnesses whose statements have been used by the learned assessing officer in the assessment order for the purpose of making the addition under section 68 of the act or to annul the assessment order itself. On careful perusal of the decision of the Hon'ble Supreme Court, it is noted that such direction were given by the Hon'ble Supreme Court in the case of writ petition filed by the assessee before the Hon'ble High Court and therefore Supreme Court held that the assessee could have gone before the Commissioner Appeals to agitate this issue of cross-examination and therefore the opportunity was available to the assessee at that particular point of proceedings. In the present case, assessee has also raised the same issue before the learned CIT A that cross-examination has not been provided to the assessee despite asking for the same. The learned CIT A has also brushed aside the above argument of the assessee without giving any plausible reason. Therefore, when the assessee has not exhausted all the judicial process before reaching to the higher forum, but has bypassed them by invoking the different rights, then in such circumstances, the violation of the principles of natural justice, such as not granting of opportunity of the crossexamination, becomes any regularity and not an illegality. However, when the assessee has exhausted all the remedies available to him by exercising his right of the judicial process, then in such circumstances violation of the principle of natural justice, such as not granting an opportunity of cross-examination of the witness becomes an illegality. Therefore, in such circumstances, the order/addition made based on the statement of third parties and no opportunity has been granted to the assessee for their cross-examination despite repeated requests, addition deserves to be deleted. In view of our above findings, findings of the coordinate bench in assessee's own case for earlier years, and based on the various judicial precedent relied upon, we do not agree that document seized from third-party can be used for making addition in the hands of the assessee without assessee being granted an opportunity of cross-examination of those parties.

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

ITA No. 2576/Del/2010 Assessment year: 2003-04 Lords Distillery Limited,

COMMON GRIEVANCE NO. 2 NO CROSS EXAMIANTION OF SHRI R.K. MIGLANI WAS ALLOWED BY THE REVENUE

The ld. DR concluded by stating that ,in effect, Shri R.K. Miglani was an employee of the member of the UPDA and, therefore, there was no necessity for his cross examination. 64. The contention of the ld. DR that since Shri R.K. Miglani was related to the member distilleries of UPDA, therefore it was not necessary to allow cross examination is not acceptable. The Hon'ble High Court of Delhi in the case of Shri S.N. Aggarwal 293 ITR 43 has held as under: "11. In the present case the Assessing Officer has placed reliance on the statement of Smt.Sarla Aggarwal, daughter of the assessed while arriving at the conclusion, that the entries belong to the transactions of the assessed. This statement made by Smt.Sarla Gupta, cannot be said to be relevant or admissible evidence against the assessed, since the assessed was not given any opportunity to cross-examine her and even from the statement, no conclusion can be drawn that the entries made on the relevant page belongs to the assessed and represents his undisclosed income. It is also an admitted fact that the statement of the assessed was not recorded at any stage during the assessment proceedings. The only conclusion which can be drawn about the nature and contents of the document is that it is a dumb document and on the basis of the entry of nothings or figure etc. in this document, it cannot be concluded that this represents the undisclosed income of the assessee."

65. The Hon'ble Supreme Court in the case of Andaman Timber Vs. CIT in Civil Appeal No. 4228 OF 2006 has 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 in as much as it amounted to violation of principles of natural justice because of which the assessee was adversely affected."

66. The ld. DR has strongly emphasized on the evidentiary value of the statement recorded u/s 132(4) of the Act and has relied upon several judicial decisions to support his contentions. The ld. DR further relied upon the provisions of section 132(4A) of the Act and 292C of the Act. These sections read as under:

70. It can be seen from the above chart that the case in which the presumption was available, the Revenue accepted what was returned by Shri R.K. Miglani and on the strength of his statement that the documents seized from his premises belong to distilleries, the additions have been made as unexplained expenditure/contribution to UPDA.

71. It is well settled that only the person competent to give evidence on the truthfulness of the contents of the document is

writer thereof. So, unless and until the contents of the documents are proved against a person, the possession of the document or hand writing of that person on such document by itself cannot prove the contents of the document.

72. Considering the facts of the dispute in totality, we are of the opinion that the assessment framed u/s 153C of the Act is in gross violation of the principles of natural justice and deserve to be tagged as nullity.

IN THE INCOME TAX APPELLATE TRIBUNAL DELHI BENCHES: 'F', NEW DELHI
ITA No. 5662/Del/2018 AY: 2014-15
Veena Gupta Date of Pronouncement: 27/11/2018

12.1 It is pertinent to note that assessee, vide letter dated 21/12/16 had asked Ld. AO to provide material based upon which various allegations have been levied by Ld. AO. These factors from para 20 of assessment order, wherein assessee raised objections, one of which is opportunity to cross examine, in case of any evidence used against assessee.
12.3 To our surprise, Ld. AO without providing any material evidence, report on which he was relying and not granting an opportunity to cross examine the persons on whose statement he arrived at certain presuppositions, made addition in the hands of assessee. This is evident from para 22 of assessment order.
13. Before Ld. CIT (A) assessee once again raised plea of crossexamination granted to assessee and materials not based upon which the submissions have been made has not been provided for examination. Even then opportunity was not granted to assessee, though Ld. CIT (A) had coterminous powers as that of Ld. AO.
14. In our view this amounts to gross violation of principles of natural Justice. We draw our support from the decision of Hon'ble Supreme Court in the case of Andaman Timber Industries versus CCE reported in (2015) 62 Taxmann.com 3, wherein Hon'ble court observed as under:
"According to us, not allowing the assessee to crossexamine 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." 15. We, accordingly, respectfully following decision of Hon'ble Supreme Court in the case of Andaman Timber Industries versus CCE (supra) allow appeal of assessee on legal ground raised in Ground 2(c), and quash and set-aside the assessment order so passed.

15.1 As we have allowed assessee's appeal on Ground 2(c), other grounds raised by assessee becomes academic in nature which do not require any adjudication at this stage.
Recent coordinate and division Pune bench ITAT decision in case of Brijendra Nath Agarwal (ITA 1666/Pun/2015) date of order: 29/11/2018 has held as under:

"The issue which arises in the present appeal in such scenario, is whether re-assessment proceedings which have been completed against assessee, can stand in the eyes of law, where (a) documents asked for have not been supplied to the assessee and (b) cross-examination of witnesses have not been provided to the assessee. Before proceeding further, it may be pointed out that the Assessing Officer refers to the proceedings before DDIT(Inv) and alleges that all the documents have been handed over by DDIT(Inv) to the assessee and hence, they were not being provided. It is not clear as to what documents were provided by DDIT(Inv). Even if it was so, then it was incumbent upon the Assessing Officer to provide the documents, which were in his possession and which he was seeking to rely on in order to complete assessment against assessee. The assessee has time and again asked for the copies of documents and even was ready to pay copying charges but the Assessing Officer had blatantly refused to give the documents on the premise that they have already been received by assessee. But no such evidences of such documents being handed over by DDIT(Inv) has been filed on record. Another aspect to be noted is that the Assessing Officer is relying on statements of two persons, the assessee had sought cross-examination of the said persons and of many evidences also, which have not been provided by Assessing Officer. Another aspect of the issue is that the Assessing Officer has purely relied on the statement of Shri Pravin Kumar Jain of having provided accommodation entries in order to first initiate re-assessment proceedings and then also to complete re-assessment proceedings but the copy of said statement made by Shri Pravin Kumar Jain has been refused by

him. After the search proceedings, the assessee has even filed copy of affidavit of Shri Pravin Kumar Jain in this regard, but the same has not been commented on by the Assessing Officer nor referred to before making addition in the hands of assessee. The issue which has been raised before us is whether in such circumstances, re-assessment order passed by the Assessing Officer without providing copies of documents and without affording cross-examination is invalid and bad in law. 22. The issue which needs to be addressed is non providing of copies of documents and non affording of cross-examination of the witnesses is whether fatal to the assessment proceedings. The Assessing Officer alleges that the documents were provided by DDIT(Inv). However, it is not clear as to copies of what documents have been given by DDIT(Inv). In any case, the investigation was carried out not in the hands of assessee but in the hands of other person, so once the assessee asks that the documents be issued to it on which reliance is placed upon for reopening the assessment, then it was incumbent upon the Assessing Officer to provide the same to the assessee in order to enable the assessee to peruse the same and then point out whether by relying on the said documents, the re-assessment has been validly reopened. May be, the letter which is forwarded by DDIT(Inv) to the Assessing Officer is an internal document and the Assessing Officer has provided gist of the same to the assessee. However, there are other documents the assessee has asked for i.e. copies of page No.6 to 15 of bundle No.1 seized from the office of CIIL, Bhosari, the details of Directors of the companies as mentioned in the said letter. In addition, the assessee had sought cross-examination of different persons whose statements / materials seized from them were being relied upon. However, we have already made reference to the said documents in paras 15, 17 and 18 hereinabove. The assessee has time and again asked for the copies of said documents but the same have not been supplied to the assessee. The assessee has also sought cross-examination of the persons whose statements were being relied upon to propose re-assessment in the hands of assessee, for which reasons were recorded for reopening the assessment but none of the cross-examinations have been allowed. The non-allowance of cross-examination has been held by the Hon'ble Supreme Court in M/s. Andaman Timber Industries Vs. Commissioner of Central Excise in Civil Appeal No.4228 of 2006, judgment dated 02.09.2015 to be most fatal.

The facts of present case are similar, wherein no cross-examination has been allowed though the assessee has time and again asked for the same. Even if we accept the reasoning of Assessing Officer that seized documents have been supplied

to the assessee but no cross-examination of witnesses has been provided to the assessee. In such scenario, invoking of jurisdiction under section 147/148 of the Act gets affected as the assessee has a right to file objections to reopening of assessment and such a right of assessee has been violated. The learned Authorized Representative for the assessee has pointed out that in the absence of getting the documents relied upon and in not allowing cross-examination of witnesses, the assessee was not in a position to file objections against reopening of assessment. The jurisdiction is conferred upon the Assessing Officer for making re-assessment in the case of assessee only on the basis of aforesaid seized documents and the communication from DDIT(Inv), who in turn, has relied on the statements of various persons who were searched. Hence, in such circumstances, it was incumbent upon the Assessing Officer not only to allow cross-examination of witnesses but also furnish the copies of all the seized documents relied upon and even the letter forwarded by DDIT(Inv). It is this letter which has been relied upon by Assessing Officer to carry out investigation against assessee. Hence, the same partakes the character of an evidence to be used against assessee and ITA the principles of natural justice demand that such evidence which is to be used against assessee, then copy of the same should be made available to the assessee. The contents of said letter have been made available by the Assessing Officer, hence we do not understand what stopped him for making available the letter, copy of which was forwarded by DDIT(Inv). The perusal of assessment order reflects that the Assessing Officer has elaborately referred to the contents of said letter and relied upon the investigation carried out by DDIT(Inv) in order to reopen the assessment in the case of assessee. In the totality of the above said facts and circumstances, where the assessee has been denied copy of statement recorded and copy of letter issued by DDIT(Inv), which has been extensively relied upon by the Assessing Officer to record reasons for reopening the assessment and failure of Assessing Officer in not providing cross-examination of witnesses in order to enable the assessee to meet the case of both reopening and also the assessment being carried out against the assessee on the basis of such statements, violates the basic fundamental principle of natural justice and in such scenario, the assessment which has been completed against the assessee cannot stand. Accordingly, we hold so.

24. The Hon'ble Supreme Court in GKN Driveshafts India Ltd. Vs. ITO (supra) has held that it is incumbent upon the Assessing Officer to provide an opportunity to the assessee to submit his

objections to reopening of assessment and where the Assessing Officer has failed to provide such an opportunity, re-assessment order cannot stand. In the facts of present case, since the assessee did not receive copies of documents relied upon and also no cross-examination of witnesses on whose statements the Assessing Officer relied upon to record reasons for reopening assessment, was provided to the assessee, hence the assessee was prevented from filing the objections to reopening of assessment. In such scenario, even if the assessee was well aware of reasons for reopening but the failure to provide opportunity to file objections to the reopening of assessment violates the governing principle of law and hence, re-assessment order needs to be quashed and set aside. 25. The Hon'ble Bombay High Court in Agarwal Metals and Alloys Vs. ACIT (2012) 346 ITR 64 (Bom) has propounded such a view in turn relying on the judgment of the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. Vs. ITO (supra). The learned Authorized Representative for the assessee has raised various issues of change of opinion in the case of Shri B.N. Agarwal, wherein original assessment was completed under section 143(3) of the Act. However, since we have decided the issue on the other aspects of case and held the assessment order invalid and bad in law, we are not addressing the same. It may be pointed out herein itself that since the Assessing Officer did not provide copies of statements and did not allow cross-examination, then the plea of assessee that it could not object to the reasons recorded for reopening the assessment has merits to be allowed and for such act, wherein no proper opportunity was given to the assessee to file objections to re-assessment, proceedings initiated under section 147/148 of the Act cannot stand. There is no merit in the observations of CIT(A) that the assessee had participated in assessment proceedings and hence, it cannot be said that he had any objections to reopening of assessment. The preliminary issue affecting the jurisdiction of Revenue authorities can be raised at any stage and accordingly, we admit the plea of assessee and hold that assessment order passed in the case without jurisdiction is both invalid and bad in law. The grounds of appeal No.1 to 3 raised by assessee are thus, allowed."

We humbly request that instant proceedings may please be quashed on this count only that Ld AO has chosen not to supply any back material referred in reasons recorded namely investigation wing report letter etc and even cross examination is never offered with reference to statement of searched person if any , so entire proceedings are bad in law.

Recently Delhi ITAT A bench decision in case of Ashtech Industries Private Limited (20/12/2018) has clearly held that

"*We further note that AO supplied the reasons recorded (without approval) to assessee (as placed in paper book before us) which were objected before the AO in detailed manner vide objection letter dated 27.04.2016 in which note worthy aspect is assessee specifically sought from AO copies of back material referred in reasons including investigation wing report/letter, seized documents etc referred therein, AO without confronting any back material as evident from objection disposal order dated 17.05.2016 rejected assessee's objection challenging reopening action. In various letters placed in paper book and referred in written submission before us, it was specifically asked to AO during assessment proceedings to confront the back material as referred in reasons recorded namely in letters dated 07/06/2016, 20/10/2016 which request of assessee has not been adverted to by the AO is patent from objection disposal order dated 17/05/2016 and further notices dated 09/08/2016 u/s 142(1) and show cause notice dated 13/10/2016. In none of these notices as placed in paper book, we could find the back material being confronted to assessee as specifically requested by assessee. We note here that the Tribunal in various decisions specially one which is referred by Ld counsel for the assessee extensively in case of Moti Adhesives (ITA 3133/Del/2018) in order dated 25/06/2018 copy placed before us, has been consistently holding while taking support from Hon'ble Apex court leading decision in Andaman Timber Industries case (Civil Appeal No. 4228 OF 2006) reported at 127 DTR 241 that violation of principle of natural justice (here withholding of back material referred in reasons which is specifically requested for repeatedly) is a serious flaw and results in nullity of the order so passed, which is squarely applicable to present case."*

All the above decisions squarely answers the serious wrong impression in mind of revenue authorities on principle of cross examination may be compromised or eschewed and excluded from income tax assessment proceedings where entire assessment is otherwise plagiarized and heavily influenced by statements recorded by investigation wing which cant be taken on board unless tested on terra ferma of cross examination which for reasons best known to revenue is not adhered in any of such cases. As discussed supra there are five judge constitution bench rulings from Hon'ble Apex court (Hon'ble Supreme Court of India in Khem Chand Vs. Union of India AIR 1958 SC 300; the Hon"ble Supreme Court in ***State of M.P. v. Chintaman Sadashiva Vaishampayan, AIR 1961 SC 1623***

etc) *holding not providing the said opportunity to cross-examine is violative of the Principles of Natural Justice and has also held that the meaning of the term —reasonable opportunity‖ to include an opportunity to defined by cross-examining the witnesses produced against the accused.. Even celebrated decision of Hon'ble Apex court in Andaman Timber case (supra) which this tribunal is regularly following in various rulings consistently is also complete answer to contrary revenue argument which cant be accepted. In this connection, there is one recent division bench decision of this Hon'ble Tribunal where one Pradeep Jindal statement was made as basis to draw adverse inference and sans cross examination of that person it is held by this Tribunal in case of Reeta Singhal in ITA No.4819/DEL/2018 order dated 17/01/2019 held (DELHI BENCHES 'CAMP AT MEERUT)that:*

"..6. On appeal, Ld. CIT(A) deleted the addition mainly on the ground that the sum of Rs.50 lac received by the assessee was towards sale consideration of shares of M/s. Shri Ganga Paper Mills Pvt. Ltd. at face value on which the assessee had not earned any capital gain. The shares already existed in the balance sheet of the assessee in the Assessment Years 2006- 07 and 2009-10. Further, the assessee was not allowed crossexamination of the maker of the statement that the assessee received accommodation entry of Rs.69 lac in the guise of sale consideration of shares, and therefore, the statement of the persons cannot be used against the assessee for making addition u/s.68 of the Act and relied upon the decision of Hon'ble Supreme Court in the case of M/s. Andaman Timber Industries (supra). No material has been brought on record by the Department to show that the above findings of the ld. CIT(A) are not correct. Even otherwise, no specific error in the order of the ld. CIT(A) could be pointed out by the learned Department Representative. Hence, we find no good reason to interfere with the order of the ld. CIT(A) which is hereby confirmed and the grounds of appeal of the Revenue is dismissed."

9. Keeping in view of the facts and circumstances of the case and respectfully following and applying principles in aforesaid Hon'ble Supreme Court, Hon'ble High Court and this Tribunal rulings, on the issue of lack of cross examination and violation of principle of natural justice, I have no hesitation to accept the plea of Ld AR that lack of cross examination and violation of principle of natural justice results

is total nullity of the entire addition, hence, the additions in dispute is hereby deleted.

10. In the result, the appeal of the assessee is partly allowed.

Order pronounced on 18.02.2019.

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

Dt. 18-02-2019

SR BHATNAGAR

Copy forwarded to: -
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

ASSISTANT REGISTRAR
ITAT Delhi Benches