

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

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

ITA No. 2821/Del/2018  
Assessment Year: 2011-12

BHATIA DIAMONDS PVT. LTD. 2919, BANK STREET, KAROL BAGH, NEW DELHI – 55 (PAN: AAECB2825C)	Vs.	ITO, WARD 4(4), NEW DELHI
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by	Sh. R.S. Singhvi, CA
Department by	Sh. S.L. Anuragi, Sr. DR.

**ORDER**

The assessee has filed the appeal against the order dated 19.1.2018 passed by Ld. CIT(A)-33, New Delhi relevant to assessment year 2011-12 by raising as many as 07 grounds, but at the time of hearing, Ld. counsel for the assessee has only argued the ground no. 5 which is reproduced as under:-

*"5. The Assessing Officer has erred on facts and in law forming a negative inference solely on the basis of extracts of statement by third parties without confronting the same to the assessee company and in total disregard to the provisions of law."*

2. Brief facts of the case are that assessee has not filed its return of income for the assessment year 2011-12. The case of the assessee was selected under section 147 of the Income Tax Act, 1961 (in short "Act").

Statutory notices u/s. 148/143(2)/142(1) of the Act were issued. In response thereto, the assessee filed its return of income on 18.5.2016 declaring NIL income for the AY 2011-12 and the AR of the assessee attended the assessment proceedings from time to time and filed necessary details. Shri Rajendra Jain, Shri Sanjay Choudhary and Shri Dharminchand Jain are some of the entry providers operating in Mumbai, indulged in providing accommodations entries in the nature of bogus sales and unsecured loans. The main allegation against the above mentioned groups were as under:-

- i) Their concerns are engaged in merely paper transaction.
- ii) In the name of their numerous concerns, they import rough and cut and polished diamonds for the other clients who do not want to show import in their own books. The physical delivery of the diamonds so imported is immediately handed over to these actual importers after clearance of the consignment by CHA.
- iii) These concerns issue bills/ give accommodation entries for a commission to various parties who normally purchase diamonds in cash from undisclosed parties and need bills to show purchases against sales in their account.
- iv) They provide accommodation entries of unsecured loans against cash.

2.1 The search action resulted in the collection of evidences and other findings which conclusively proved that the above mentioned persons, through a web of concerns run and operated by them, are engaged in providing accommodation entries in the nature of bogus unsecured loans and bogus sales / purchases. During the course of search and seizure action statement of Sh. Rajendra Jain and Sh. Surendra Jain were recorded on oath wherein they admitted that the concerned controlled and managed them are not doing any real trading in diamonds but indulged in paper transactions only and Shri Rajendra Jain also stated that if any concerns require bogus purchases bill for diamonds; however, our concerns have bogus stock of diamonds in our books of accounts, which are shown to be purchase / imported from foreign concerns. Therefore, the diamonds shown to be purchased / imported from foreign concerns by us are against shown to be sold to the independent concerns. These concerns take purchase bills from our concerns without actual delivery of diamonds. Further, payment made through cheques or RTGS, the cash components is generally settled by the key persons controlling the concerns, directly or indirectly by taking services of Angadia. Shri Rajendra Jain also submitted that there are some independent parties in the market which are in requirement of unsecured loans against unaccounted cash. The entries are usually for long period and the same gets reversed as and when such parties make payments through banking channels and take back the cash. The issue involved in this case is that M/s Bhatia Diamonds Pvt. Ltd. has made bogus purchases during the

financial year 2010-11 relevant AY 2011-12 from the following concerns managed and controlled by Rajendra Jain Group:

S.No.	Name of concern operated by Rajendra Jain Group which engaged in business of providing accommodation entry	Name of the beneficiary company	Amount (Rs.)
1	Arihant Exports (AFLPP5405N)	M/s Bhatia Diamonds Pvt. Ltd.	Rs. 4,80,001/-
2	Kriya Impex Pvt. Ltd. (AADCK1926b)	M/s Bhatia Diamonds Pvt. Ltd.	Rs. 2,67,430/-
		<b>Total</b>	<b>Rs. 7,47,431/-</b>

2.2 During the assessment proceedings notices u/s 133(6) was issued on 15.06.2016 for the verification of transaction made by the assessee company for accommodation entries during the financial year 2010-11 relevant AY 2011-12 from the following concerns :

<b><u>S.No.</u></b>	<b><u>Name of the party</u></b>	<b><u>Amount</u></b>
1.	M/s Arihant Exports	Rs.4,80,001/-
2.	M/s Kriya Impex Pvt. Ltd.	Rs. 2,67,430/-

2.3 M/s Kriya Impex Pvt. Ltd. vide his letter dated 15.07.2016 and M/s Arihant Exports dated 15.07.2016 have denied any transaction during the FY 2010-11 from the assessee company. In their letters "both" dated 15.07.2016 it was stated that "our company have not done any transaction from aforesaid company. The replies dated 15.07.2016 of these both parties are ditto in the language and also the font shapes and sizes. It is difficult to imagine and comprehend how two entities with different Directors and Partners submit such IDENTICAL letters with same

font shapes/sizes/language unless there is a tacit and clandestine understanding amongst such operators. Further the assessee vide his letter dated 02.11.2016 has stated that Shri Rajender Jain had retracted from his earlier statement in respect of bogus purchases. In response to that the AO vide his letter dated 28.11.2016 has written a letter to the DCIT Central Circle4, Surat regarding Sh. Rajendra Jain retraction of statement made during the search and after search proceedings and inform of the status of scrutiny assessment which was completed by the DCIT, Central Circle-4, Surat. In response to that, the DCIT Central Circle-4, Surat send a copy of assessment order in the case of M/s Kriya Impex Pvt. Ltd for AY 2012-13 u/s 144 r.w.s 153C of I.T.Act. dated 29.01.2016. In the said assessment order, the AO mentioned that during the course of search action in the case of Rajendra Jain Group, it is revealed that this group of companies has indulged as the groups in giving accommodation entries. The seizure made at place of Rajendra Jain, C-805, Oberoi Splendor Building, JVL Road, Andheri (E), Mumbai comprises of back up of Computer, Mobile and Two Pen drives which contains details of group companies including details belong to M/s Kriya Impex Pvt. Ltd. Looking at the nature of the transactions, the seized material carry a clear implication over the income of the assessee. Shri Rajendra Jain and Shri Surendra Jain in their statements recorded on oath during the search proceedings, have categorically admitted that they were operating the business of providing accommodation entries through various companies. M/s Kriya Impex Pvt. Ltd. is one of the companies in which Rajendra Jain has done

accommodation entries. As per the statement of Sh. Rajendra Jain dated 03.10.2013 during the search and seizure action u/s 132 of I.T.Act, 1961 has been carried out on the Sh. Rajendra Jain Group at C-805, Oberoi Splendor Building, JVL Road, Andheri (E), Mumbai M/s Arihant Exports, M/s AVI Exports 3rd M/s Karnawat Impex Pvt. Ltd. are also bogus companies and providing bogus accommodation entries only. The statement which are recorded by administering oath are presumed to be carrying truth in view of provisions of section 181 and section 193 of the Indian Penal Code which provides for imprisonment if the false statement is given. When it is so, no one like to be punished knowingly and hence, it is but logical to accept a sworn statement or the statement taken on oath as revealing the truth. Burden to prove the statement as incorrect is on the deponent and in case of failure of the deponent to prove that earlier stated facts were wrong, his earlier statements are sufficient to conclude a matter. Merely because a statement is retracted, it cannot become as involuntarily or unlawfully obtained. For any retraction to be successful in the eyes of law the deponent has to show as to how earlier recorded statements do not state the true facts or that there was coercion, inducement or threat while recording his earlier statements. Retraction was filed by the assessee on 31.10.2014 before AO after one year of search/statement recorded. The assessee has not filed any retraction before Investigation wing. The assessee has another chance to retract from his earlier statement on 05.12.2013 during the P.O. operation. Instead of denial of his earlier statement he has confirmed it. The

assessee has submitted that he retracted the statement recorded on 05.10.2013 through an affidavit before notary on 21.10.2013 and also retracted the statement taken on 05.12.2015 through an affidavit before notary on 09.01.2014 which was kept with him and filed it before the AO on 31.10.2014. The assessee by non filing the affidavit before Investigation wing stopped any further investigation and not given time to investigation wing to collect the evidence against retraction. The Hon'ble Supreme Court held that in absence of proper verification affidavit cannot be admitted in evidence (A.K.K. Nambiar v/s Union of India (AIR 1970 SC 652)). During the search and surveys proceedings the assessee could not produce any verifiable evidence that the business was actually conducted. Only evidences have been created in the form of bank entries and books of account to claim that business have been conducted. Auditor has verified the bills and vouchers; not the goods. The assessee claimed that his business activities are duly acknowledged by the other Govt. Authorities like customs department, sales tax department is not reliable. Regarding Customs Department, as explained by assessee himself diamonds were handed over to real beneficiaries after the clearance from customs officials. Other Government authorities has not done any physical verification as the I.T. Department has done. Issuance of sales tax/VAT registration, payment of trade tax (in certain cases) are done by State Authorities. There is no evidence brought before the department whether any spot verification or any physical verification is carried out by such authorities, on other hand proceedings u/s 132, collection of evidence and

information's during the course of such proceedings as well as corroborative verification with parties, transactions undertaken by this assessee prove that no real business was being carried out by this assessee. Such findings of the department is past the event of any verification of issuance of VAT/sales tax numbers, registration etc. by State Government or any other Authorities. During the course of search and seizure action, statements of Shri Sachin Pareek (Prop, of Arihant Exports, Director of KarnawatImpex Pvt. Ltd. & Moulimanilmpex Pvt. Ltd.), Shri Manish Sushil Jain (Prop. of Kalash Enterprises, Director of M/s Kriya Impex Pvt. Ltd, Karnawatimpex Pvt. Ltd.) and Shri Anoop Y. Jain (Prop, of Aadilmpex and Prop, of M/s AVI Exports) have also been recorded. All the above person in their statement admitted that they were acting as per the directions of their bosses namely Shri Rajendra Jain and Shri Surendra Jain, for which they were getting salary. Hence, it is clear that concerns listed at all the concern are totally controlled and managed by Sh. Rajendra Jain and Sh. Surendra Jain and other directors/partners/proprietors are just name lenders who are actually employees of Sh. Rajendra Jain and Sh. Surendrea Jain. The assessee has claimed that it had conducted proper purchase transactions with the parties - M/s Arihant Exports and M/s AVI Exports but not with the other two i.e. M/s Kriya Impex Pvt. Ltd and M/s Karnawat Impex Pvt. Ltd has also given their submission in response to notice u/s 133(6) of the I.T. Act. However, AO observed that what has to be understood in these kind of clandestine bogus purchases is that there is a tacit understanding

between the parties concerned and try their level best to ensure that all papers are manipulated to give a picture that these transactions look like "real and genuine business transactions". AO further observed that it is in fact all fake transactions and such activities pertaining to evade tax should be looked and examined to ensure that the curtain that blocks the activities from being exposed should be brought down and such transactions are made duly accounted in the books of accounts. It was further observed by the AO that how can such transaction which are claimed as genuine by this party be genuine when the party from whom they obtained the bills/vouchers etc have duly confessed that no genuine and actual purchases happen through statements given under oath during the search and post search proceedings. The attempt by M/s Bhatia Diamonds Pvt. Ltd. To get some benefit by the submitting the "retraction / statement of Sh ^Rajendra S Jian" was verified from the Assessing Officer of Shri Rajendra S Jain from Surat. The details of how the AO rejected the retraction statement and made addition u/s 144/153C of I.T. Act in his case has been already been mentioned above. AO noted that When the main person Sh. Rajendra S. Jain involved in this whole episode is not able to attend and substantiate his claim by way of evidence and submission before his AO, then how is it possible that M/s Bhatia Diamonds Pvt. Ltd. has made claims of the genuineness of the sale/purchases. In view of above discussions, the AO made the following additions in the hands of M/s Bhatia Diamonds Pvt. Ltd for this AY 2013-14. AO further observed that therefore, the creditworthiness and

genuineness of these transactions amount to Rs. 7,47,431/- has not been proved by the assessee :

<b><u>S.No.</u></b>	<b><u>Name of the party</u></b>	<b><u>Amount</u></b>
1.	M/s Arihant Exports	Rs. 4,80,001/-
2.	M/s Kriya Impex Pvt. Ltd.	Rs. 2,67,430/-

Hence, he added back the amount Rs. 7,47,431/- to the income of the assessee as unexplained cash credits u/s. 68 of the I.T. Act vide order dated 30.12.2016 passed u/s. 143(3)/147 of the Act by assessing the income of the assessee on the same amount. Against the above addition, assessee appealed before the Ld. CIT(A), who vide his impugned order dated 19.01.2018 has dismissed the appeal of the assessee. Aggrieved with the impugned order dated 19.1.2018, assessee is in appeal before the Tribunal.

3. During the hearing, Ld. counsel for the assessee has submitted that the AO has erred on facts and in law forming a negative inference solely on the basis of extracts of statement by third parties without confronting the same to the assessee company and in total disregard to the provisions of law. He further stated assessee vide ground no. 3 which is at page no. 2 of the impugned order of the Ld. CIT(A), has raised the issue that "*The AO made additions without giving opportunity of cross examination of the person on the basis of whose alleged statement, the additions was made*" and submitted that the same was not adjudicated by the Ld. CIT(A) and in spite of deciding the same, he has mentioned vide para no. 8.7 at page no. 15 that the AO has given sufficient opportunity to the assessee to

*present is contention and the appellant has no where mentioned in its submission that the AO was ever asked to provide opportunity to it to cross examine the persons whose statements were recorded, which was wrong. He further submitted that at page no. 8 of the impugned order of the Ld. CIT(A), the Ld. CIT(A) has reproduced the submission of the assessee that "the present appeal is against the additions under section 68 on assessment completed u/s. 148 of Rs. 747,431/- simply based on the report of investigation without ..... "doing cross examination of any one.....".* In view of above, he submitted that the addition in dispute was made and confirmed merely on the basis of the statement made by Sh. Rajendra Jain on the back of the assessee and without giving any opportunity to cross examine him, which is not sustainable in the eyes of law. Therefore, he submitted that the issue argued vide ground no. 5 is squarely covered by the decision of the ITAT, SMC, Delhi Bench wherein the Tribunal vide its order dated 06.11.2018 passed in ITA No. 3510/Del/2018 (AY 2014-15) in the case of Smt. Jyoti Gupta vs. ITO has allowed the appeal of the assessee on exactly similar facts and circumstances. Hence, he requested to follow the aforesaid case and allow the appeal of the assessee. In support of his contention, he filed a small Paper Book containing pages 1-23 in which he has attached the copy of Company Master Data from MCA; copy of balance sheet for AY 2011-12; copy of bank statement for AY 2011-12; copy of income tax return form and computation for AY 2011-12; copy of reasons recorded by the AO; letter of objections filed during the assessment proceedings;

copy of retraction affidavit given by Sh. Rajendra Jain and copy of replied u/s. 133(6) by M/s Arihand Exports and M/s Kriya Impex.

4. Ld. DR relied upon the orders of the authorities below.

5. I have heard both the parties and perused the records, especially the assessment order as well as impugned order and the Paper Book filed by the assessee containing pages 1-23 in which he has attached the copy of Company Master Data from MCA; copy of balance sheet for AY 2011-12; copy of bank statement for AY 2011-12; copy of income tax return form and computation for AY 2011-12; copy of reasons recorded by the AO; letter of objections filed during the assessment proceedings; copy of retraction affidavit given by Sh. Rajendra Jain and copy of replied u/s. 133(6) by M/s Arihand Exports and M/s Kriya Impex. I find that assessee has raised ground no. 3 which is at page no. 2 of the impugned order of the Ld. CIT(A), stating therein that "*The AO made additions without giving opportunity of cross examination of the person on the basis of whose alleged statement, the additions was made*". I find that the same issue was not adjudicated by the Ld. CIT(A). However, he has mentioned vide para no. 8.7 at page no. 15 that the AO has given sufficient opportunity to the assessee to present its contention and the appellant has nowhere mentioned in its submission that the AO was ever asked to provide opportunity to it to cross examine the persons whose statements were recorded, which is not tenable. I further find that at page no. 8 of the impugned order of the Ld. CIT(A), the Ld. CIT(A) has reproduced the submission of the assessee by stating that the present appeal is against

the additions under section 68 on assessment completed u/s. 148 of the Act of Rs. 747,431/- simply based on the report of investigation without ...."doing cross examination of any one.....". I further note that the addition in dispute was made and confirmed merely on the basis of the statement made by Sh. Rajendra Jain on the back of the assessee and without giving any opportunity to cross examine him, which is not sustainable in the eyes of law. I also notice from the copy of Company master Data from MCA that the date of incorporation of the assessee company is 25.08.2010. It is also noted from the assessee's reply dated 5.8.2016 and 23.12.2016 stating therein that assessee company had not purchased goods from M/s Arihant Exports and Kriyalimpex Pvt. Ltd. and no business activity was conducted during the period from 25.8.2010 (Date of incorporation of the assessee company) to 31.3.2011. It is also noted that Sh. Rajendra S. Jain has filed an affidavit 09.4.2014 by reconfirming his affidavit for retraction of statement. I further note that M/s Kriya Impex Pvt. Ltd. and M/s Arihant Exports vide their letter dated 15.7.2016 have confirmed that their companies have not done any transaction from the assessee during financial years 2010-11-2012.

5.1 Keeping in view of the aforesaid discussions, I am of the considered view that assessee has considerable cogency that addition was made on the basis of statement of Sh. Rajendra Jain, but the assessee was not granted the opportunity to cross examine Sh. Rajendra Jain which ground was also raised before the Ld. CIT(A), who did not adjudicate the same, which is against the settled law. I note that exactly on the similar facts

and circumstances the ITAT, SMC, Delhi Bench vide its order dated 06.11.2018 passed in ITA No. 3510/Del/2018 (AY 2014-15) in the case of Smt. Jyoti Gupta vs. ITO wherein, the SMC Bench has considered the statement of Vikrant Kayan and has held that since the impugned addition was made on the statement of Sh. Vikrant Kayan without providing any opportunity to the assessee to cross examine the same, which is in violation of principle of natural justice and against the law laid down by the Hon'ble Supreme Court of India in the case of Andaman Timber vs. CIT decided in Civil Appeal No. 4228 of 2006. For the sake of convenience, I am reproducing the relevant portion of the ITAT, SMC, Delhi Bench vide its order dated 06.11.2018 passed in ITA No. 3510/Del/2018 (AY 2014-15) in the case of Smt. Jyoti Gupta vs. ITO as under:-

*"13. Merely on the strength of statement of third party i.e. Shri Vikrant Kayan cannot justify the impugned additions. Moreso, when specific request was made by the assessee for allowing cross examination was denied by the Assessing Officer. The first appellate authority also did not consider it fit to allow cross-examination. This is in gross violation of the principles of natural justice and against the ratio laid down by the Hon'ble Supreme Court in the*

*case of Andaman Timber Vs. CIT Civil Appeal No. 4228 OF 2006 wherein it has been held as under:*

*"According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such*

*opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in*

*fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause. We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal.”*

*14. Considering the facts of the case in totality, I do not find any merit in the impugned additions. The findings of the CIT(A) are accordingly set aside. The Assessing Officer is directed to allow the claim of exemption u/s 10(38) of the Act."*

6. Keeping in view of the facts and circumstances of the present case and respectfully following the order of the Tribunal, SMC Bench, Delhi in the case of Smt. Jyoti Gupta vs. ITO (Supra) and in view of the law settled by the Hon'ble Supreme Court of India in the case of Andaman Timber vs. CIT (Supra), on identical facts and circumstances, the addition in dispute is deleted and the appeal of the assessee is allowed.

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

The decision is pronounced on 05/04/2019.

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

Dated: 05/04/2019

"SRBHATNAGAR"

**Copy forwarded to:**

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

Asst. Registrar,  
ITAT, New Delhi