

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.490/Coch/2018 : Asst.Year 2010-2011

ITA No.491/Coch/2018 : Asst.Year 2011-2012

The Asst.Commissioner of Income-tax, Central Circle Kollam.	Vs.	M/s.Sabari Switch Gear (P) Limited, 114 Trade Centre, Wallajah Roads Chennai. PAN : AAFCS9032E.
(Appellant)		(Respondent)

CO No.83/Coch/2018 : Asst.Year 2010-2011

CO No.84/Coch/2018 : Asst.Year 2011-2012

M/s.Sabari Switch Gear (P) Limited, 114 Trade Centre, Wallajah Roads Chennai.	Vs.	The Asst.Commissioner of Income-tax, Central Circle Kollam.
(Cross Objector)		(Respondent)

ITA No.492/Coch/2018 : Asst.Year 2010-2011

ITA No.493/Coch/2018 : Asst.Year 2011-2012

The Asst.Commissioner of Income-tax, Central Circle Kollam.	Vs.	M/s.Sabari Millennium Impex (P) Ltd. 7A, The Artia Chakkalakkal Road, Perumannur, Thevara Cochin PAN : AAHCS2407D.
(Appellant)		(Respondent)

CO No.85/Coch/2018 : Asst.Year 2010-2011

CO No.86/Coch/2018 : Asst.Year 2011-2012

M/s.Sabari Millennium Impex (P) Ltd., 7A, The Artia Chakkalakkal Road, Perumannur, Thevara Cochin	Vs.	The Asst.Commissioner of Income-tax, Central Circle Kollam.
(Cross Objector)		(Respondent)

Revenue by : Smt.A.S.Bindhu, Sr.DR
Assessee by : Sri. Iype Mathew

Date of Hearing : 04.09.2019	Date of Pronouncement : 16.09.2019
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ORDER

Per Bench :

These appeals by the Revenue and the Cross Objections by two different assesseees are directed against the orders of the CIT(A), both dated 19.07.2018, for the assessment years 2010-2011 and 2011-2012.

2. The common grounds, except for variance in figures, raised by the Revenue in case of both the assesseees are as follows:-

"1. The Commissioner of Income Tax (Appeals) erred in deleting the addition of Rs.7.36 Crores holding that the addition has been made only on suspicion and presumption.

2. The CIT(A) has ignored the statement of Shri Manish Khetan S/o Late Shri Gouri Shankar Khetan deposed before the Dy.Director of Income Tax (Inv) Unit 2(1), Kolkatta on 07.04.2016.

3. The CIT(A) has overlooked the fact the enormous funds have been obtained under the head "Loans & Advances" by the assessee from the Kolkatta based paper concerns, which had remained in the books of the assessee for period ranging from one to three years and on the basis of the principle of preponderance of probability these funds are to be treated as unexplained cash credits u/s 68 of the I.T.Act, 1961."

3. The Cross Objections filed by the assesseees, which are in support of the orders of the Assessing Officer, in both the appeals are as follows:-

"1. The Commissioner of Income Tax Appeals (III) Kochi has erred in rejecting the following technical grounds , on irrelevant and flimsy grounds.

2. The CIT has erred in rejecting the Appellant's ground of Appeal on the question of Jurisdiction of the ACIT , Central Circle, Kollam , without even assigning Jurisdiction to him by the Director General or Principal Commissioner of Income Tax , Chennai by an order u/s 127 of the 1. T Act. Neither objection from the Appellant was sought for the transfer of Jurisdiction from ACIT, Corporate Circle , Chennai to ACIT , Central Circle, Kollam, nor an order U/s 127 of the 1. T Act was passed to that effect. So the ACIT , Kollam has passed the order U / s 143 (3) W.r.s 147 without jurisdiction.

3. The Commissioner of Income Tax should have noted that the Appellant has filed their objection u/s 124 (3) before the ACIT, Kollam, vide their letter dtd 16/10/2017 , which was not even dealt with by the ACIT Kollam in the order of assessment passed by him.

4. The Commissioner of Income Tax has erred in rejecting the contentions of the Appellant on the ground that the A.O has considered the objection. of the Appellant made against the re-opening of the assessment on the basis of the reasons recorded for re-opening the assessment. The CIT should have noted that the main objection of the Appellant was that the assessment was re-opened only on the basis of suspicion regarding the credits in the books of accounts of the Appellant and therefore the re-opening was against the directions. of the CBDT vide circular No. 40 of 2016 dtd 09/12/2016.

5. *Based on the above objection of the Appellant, the order should have been quashed by the CIT Appeals on the ratio of the Supreme Court decision in the case of GKN Drive Shafts (India) Ltd Vs. ITO & Ors 259 ITR 19 and of the Madras High Court decision in Jayant Natrajan Vs ACIT 300 CTR (Mad) 225.*

6. *The Appellant craves leave to adduce additional grounds at the time of hearing."*

4. There was a short delay in filing these cross objections, as follows:-

- (i) M/s.Sabari Switch Gear Pvt. Ltd. for Asst.Years 2010-2011 & 2011-2012 – 8 days.
- (ii) M/s.Sabari Millennium Impex Pvt. Ltd. for Asst.Years 2010-2011 & 2011-2012 – 8 days.

5. However, at the time of hearing before us, the learned Counsel for the assessee has not pressed the cross objections filed by the assessee. Accordingly, the same are dismissed as not pressed.

6. Coming to the Revenue's appeals, the facts are identical in the case of both the assessees and for both the assessment years, except for variance in figures, hence, we reproduce the facts relating to M/s.Sabari Switch Gear Pvt. Ltd. for assessment year 2010-2011, as under:-

7.1 These grounds of appeal of the appellant relate to additions made u/s 68 of the I.T.Act.

7.2 The AO has passed identical orders for A.Y. 2010-2011 and 2011-12, contents of which are reproduced as under:

2. The assessee company, as mentioned earlier, is primarily a trader in export incentives received under Vishesh Krishi Gram Udyog Yojana (VKGUy), DP EB (Duty Entitlement Pass Book) and the like. The export incentives received by the Cashew exporters, Marine exporters who are mainly based in Kollam are purchased by the assessee and sold to importers based 'outside the State. Shri P Sunil Kumar also conducts the same kind' of business through his Companies as Managing Director. The businesses are

- i. M/s Sabari Quality Foods as proprietor
- ii. M/s Sabari Enterprises P Ltd as Managing Director
- ii. M/s. Sabari Millenium Exporters P Ltd as
Managing Director and
- iii. M/s. Sabari Switchgear P Ltd as Managing Director

3. Among the major purchasers of export incentives as per the books of accounts of Sabari Quality Foods, Sabari 'Millenium Exporter P Ltd and Sabari Switchgear P Ltd are

i. Basanth Impex, a proprietorship of Shri Manish Khetan with its address as ,Old China Bazar Street, Kolkotta.

ii: Shyam International, a proprietorship of Shri Manish Khetan with its address as, Old China Bazar Street, Kolkotta.

iii. Sree Chao Impex, a proprietorship of Shri Manish Khetan with its address as Old China Bazar Street, Kolkotta.

M/s Ajay Iron and Steel P Ltd , Fortune Chambers, 6 Lyons Range, Mezzanine Floor, Kolkatta.

v. Vani Exporters, CLIVE ghat Street, room No.7, 2nd Floor, Kolkatta

vi. Mayur Impex, p-68B, Block -2, Scheme - VII M, CIT

Road, Kolkatta

4. The seized materials as per annexure marked SKPIKLMIDS 1 to 23 clearly show lot of trade activity between the assessee and his companies namely, M/s.Sabari Enterprises P Ltd, M/s. Sabari Millenium Exports P Ltd. M/s. Sabari SwitchGear P Ltd , and Basanth Impex, Shyam International, Sree Chao Impex, Ajay Iron and Steel P Ltd. Vani Exports and Mayur Impex. The total turnover of the aforementioned businesses and their turnover with each of businesses of Sabari Group (Sabari Quality Foods.

i. Basanth Impex & Shree Chao Impex

Asst.Year	Total Turnover	Turnover with SQF	Turnover with Sabari Millennium Exports Pvt. Ltd.	Turnover with Sabari Enterprises Ltd.	Turnover with Sabari Switchgear Pvt. Ltd.
2009-10	410006631	386596312	8594439	0	14815880
2010-11	244490336	194527698	34520537	0	15442101
2011-12	938148418	175959088	287770321	4656465876	8953133
2012-13	256142048	98954776	29957586	116784990	10444696
2013-14	167547824	27370525	13802840	124601709	1772750
2014-15	106509871	16065781	25116634	64952906	374550
Total		899474180	399762357	771805481	51803110

ii. Shyam International

Asst.Year	Total Turnover	Turnover with SQF	Turnover with Sabari Millennium Exports Pvt. Ltd.	Turnover with Sabari Enterprises Ltd.	Turnover with Sabari Switchgear Pvt. Ltd.
2009-10	500617946	443543973	53660593	0	3413380
2010-11	523243688	514163516	4718097	0	4362075
2011-12	0	0	0	0	0
2012-13	0	0	0	0	0
2013-14	0	0	0	0	0
2014-15	371758345	156528239	47586619	167643487	0
2015-16	341213767	164791823	176521944	0	0

Total	0	1279027551	28487253	167643487	7775455
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iii. *M/s.Ajay Iron and Steel P Ltd.*

Asst.Year	Total Turnover	Turnover with SQF	Turnover with Sabari Millennium Exports Pvt. Ltd.	Turnover with Sabari Enterprises Ltd.	Turnover with Sabari Switchgear Pvt. Ltd.
2009-10	0	0	0	0	0
2010-11	0	0	0	0	0
2011-12	64841	0	64841	0	0
2012-13	0	0	0	0	0
2013-14	4034750	0	2555749	1479001	0
2014-15	4457276	0	2576166	1881110	0
2015-16	0	0	0	48718355	0
Total	0	0	5196756	52078466	0

iv. *Vani Exporters*

Asst.Year	Total Turnover	Turnover with SQF	Turnover with Sabari Millennium Exports Pvt. Ltd.	Turnover with Sabari Exnterprises Ltd.	Turnover with Sabari Switchgear Pvt. Ltd.
2009-10	120407959	15500035	58934156	0	45973768
2010-11	125761421	118503685	87124	0	7170612
Total	0	134003720	59021280	0	53144380

It can be noted from the aforesaid mentioned tables that business mentioned in para 3 were having substantial transaction with the business of Shri Sunil Kumar, M/s.Sabari Millennium Exports Pvt. Ltd., Sabari Enterprises P Ltd. and Sabari Switchgear P. Ltd.

5. *On an examination of the books of accounts of Sabari Quality Foods, Sabari Enterprises P Ltd, and Sabari Switchgear P. Ltd. they have declared a profit as a percentage of their sales as under:*

Asst.Year	Gross profit ratio declared by Sabari Quality Food	Gross profit ratio declared by Sabari Enterprises Ltd	Gross profit ratio declared by Sabari Millennium P. Ltd.	Gross profit ratio declared by Sabari SwitchGear P.Ltd.
2009-10	2.7		2	--
2010-11	3.3	--	12	11
2011-12	6.4	4.8	4.5	20
2012-13	4.6	2.6	5.4	15
2013-14	5.8	1.1	20	25
2014-15	3.6	6.4	18	52

As mentioned supra, the businesses of Sabari Group is declaring a profit of 1.1 to 52% for the Asst years mentioned above.

6. The Kolkatta based businesses mentioned in para 3 are declaring incomes in their returns as under:

Basanth Impex and Shree Chao Impex

Asst.Year	Total Turnover	Total Income Returned	Gross profit ratio declared
2009-10	1217756546	134990	0.10
2010-11	910675187	207600	0.14
2011-12	1884595022	252810	0.11
2012-13	1636835083	189540	0.28
2013-14	1194591232	218590	0.19
2014-15	801062840	291630	0.73

M/s.Ajay Iron and Steel P. Ltd.

Asst.Year	Total Turnover	Total Income Returned	Gross profit ratio declared
2009-10	0	640	0
2010-11	0	5390	0
2011-12	0	66100	0
2012-13	0	372908	0
2013-14	0	331001	0
2014-15	3963751	449359	3.05
2014-15	69970609	2896310	3.43

Mayur Impex

Asst.Year	Total Turnover	Total Income Returned	Gross profit ratio declared
2009-10	652200365	143400	0.086
2010-11	139942304	167910	0.399
2011-12	433860902	179160	0.988
2012-13	965138557	214270	0.47
2013-14	6567873213	125770	0.62
2014-15	242906501	292310	2.49
2015-16	3594855	9830	57.76

Vani Exports

Asst.Year	Total Turnover	Total Income Returned	Gross profit ratio declared
2009-10	2863662066	990900	0.60
2010-11	3031108532	760114	0.34
2011-12	845673545	211683	3.00
2012-13	2184183988	982890	0.42
2013-14	658241184	374514	0.60
2014-15	444409756	525030	1.06
2015-16	220741120	408150	2.92

Shyam International

Asst.Year	Total Turnover	Total Income Returned	Gross profit ratio declared
2009-10	142628764	188960	0.60
2010-11	1862136442	211590	0.16
2011-12	607109343	94480	0.37
2012-13	403987517	206970	0.46
2013-14	--	--	IT not filed
2014-15	1651106916	265480	0.22
2015-16	2991294481	103420	0.28

It is evident from the declared turnover and total income returned that the Kolkatta businesses are not earning profits in the scale of Shri Sunil Kumar even though they are also doing the same business.

7. These business also should be viewed in the background of a statement recorded from Shri Mahesh

Khetan S/o of Late Gouri Shankar Khetan by the Deputy Director of Income tax (Inv.) Unit 2(1), Kolkatta on 07.04.2016. The substantive part of the statement is the answer to question No.10 which states.

"Apart from the above companies these are the concerns in which my family members and I are / were associated with.

Sl. No.	Name of the Concerns	Name of proprietor	Nature of business
1	M/s Basanth Impex	Late Gouri Shankar Khetan	Deals in import licence.
2	Shree Chao Impex	-do-	-do-
3	Shyam International	Mrs.Seema Khetan	-do-
4	Mayur Impex	Shri Manish Khetan	-do-

All these proprietorships concerns run from 9 Old China Bazar Street, Kolkotta-OI " . Further he has stated that his late father Gouri Shankar Khetan managed and controlled all the above proprietorships and after his death he has taken over the business related work. In answer to question 12 he has explained that books of accounts of M/s Basanth Impex, M/s Shree Chao Impex, M/s Shyam International and M/s Mayur Impex are maintained by Sabari Group and are kept in their possession. He stated, they only put signature on legal documents, P&L Ale, Balance Sheet, Cheque books as per direction of Sabari Group. He also went on slate under Oath that M/s Basanth Impex, M/s Shree Chao Impex. Mis Shyam International and M/s Mayur Impex are controlled and managed by Sabari Group itself According to him all the business activities, books of accounts etc in respect of these proprietorships concerns were performed and maintained by Sabari Group. They were used only for signing authorities by Sabari Group. In lieu of signature they got commission from Sabari Group. He has further stated that the proprietorship concerns were only paper transactions, A copy of the aforementioned statement was furnished to the assessee along with notice U/S 142(1) on 29/11/2016. In their reply, an affidavit filed before the

Judicial First Class Magistrate, Alipur stating that the statement given before the Income tax Authority was being retracted on the following grounds.

1. That he was the proprietor of M/s Mayur Impex. 9, Old, China Bazar Street, Kolkott"a-700001. Further the name of the concerns of SI 1 & 2 in which his father late Gourii Shankar Khetan was the propeietor of the firm,

(i) M/s.Chao Impex, 9, Old Bazar, Street Kolkatta-700 001.

(ii) M/s.Basanth Impex, 9, Old Bazar, Street, Kolkatta-700 001.

2. That all the business transactions were made by his father

3. That he was forced to sign on the statement perpetuated to have been given by him and that there was criminal intimidation. He was also forced to sign a certificate at the end of the statement whose meaning he did not understand

4. That he was not allowed to go through the statement and he was just following the direction of the officer taking deposition.

5. That he was retreating his earlier statement which was recorded under threat correction and pressure.

8. The affidavit filed before the Judicial First Class Magistrate, Alipur has been carefully studied. Shri Manish Khetan has alleged criminal intimidation while recording the statement by the Income tax Authority and that the same was being "retreated" since it was done under "correction and pressure". The averments made by assessee lack clarity. There was no correction in the statement recorded from him. Though he has alleged criminal intimidation no complaint was raised before any authority. Moreover, the affidavit dated 12th May 2016 was never furnished to the Income tax Authority who had

recorded the statement or his assessing Officer after 'retreating'. This affidavit now produced, near to time limitation, is just a ploy to prevent further investigation and unearthing the truth behind the whole dealings. In order that retraction to be accepted as evidence, the witness need to be cross-examined. Even though, Shri Manish Khetan has retreated the statement given before the Income tax Authority, there are stark facts which cannot be denied. One of them is, it was his father and later on he himself who handled the business. They received a commission every year for their dealing with Sabari Group. His Pan is AFCPK5709F. Another fact is that bank accounts of these proprietorship are in Kollam branches of various banks as under:

- i. A/c No 200007114711 with IndusInd Bank, Kollam Branch in the name of Basanth Impex
- ii. A/c No 2000071 14811 with IndusInd Bank, Kollam Branch in the name of Mayur Impex
- iii. A/c No 200007114803 with Indus1nd Bank, Kollam Branch in the name of Shyam International

9. Another Kolkotta based business having substantial transactions with Shri Sunil Kumar and his companies are Mis. Ajay Iron and Steel P Ltd,. A survey uls I33A was conducted at the business premises of the company at Kolkotta on 281412016 and during the course of it a statement was recorded from Shri.Ravi Biyala, Chartered Accountant. In the statement, Shri Ravi Biyala stated that M/s Ajay Iron and Steel P Ltd. conducts its business at Kollam and the Kolkatta address is for namesake only. In support of this, he produced sales tax file of M/s. Ajay Iron and Steel P Ltd. which declared Nil sales in Kolkatta.

Another fact is that Shri Viswajith Menon. CEO of Sabari Group was one of the directors of this company. A copy of the statement was furnished to the Authorised Representative of the assessee in the case of Sabari Enterprises P Ltd. They have sought cross examination of Shri Ravi Biyala. Later. on 2211212016 the AR furnished

a copy of the affidavit of Chartered Accountant Ravi Biyala's retraction Dated 2211212016. The retraction at this late hour can be taken as a after thought by Ravi Bayala or due to the influence made by the assessee. This retraction without an opportunity to cross examine the assesses witness cannot be accepted. Still, certainfacts like Shri Viswajith Menon being one of the directors of Mis Ajay Iron and Steel P Ltd and the company having bank accounts in Kollam ING Vysalya Bank. which came to light on account of the Statement cannot be denied.

10. The balance sheets of M/s Basanth Impex, Shyam International. Shree Chao, Mayur Impex, M/s Ajay Iron and Steel P Ltd was obtained U/S 131 of the Act. As per the balance sheet schedules of Mis Basanth Impex. they have Sundry Creditors and Sundry Debtors. Where as the assessee has grouped the receipts under loans and advances for A Y 2010-11. Similarly the facts narrated above makes the following abundantly clear:

a. Shri P Sunil Kumar is the main person conducting the business of trading in export incentives either as proprietor or through his three other companies mentioned in para 2 of this order

b. The Kolkotta based proprietorships namely Mis Basanth Impex, Shree Chao Impex, Mayur Impex, and Shyam International are having substantial transactions with businesses of P Sunil Kumar. and his other companies Sabari Millenium Impex P Ltd. Sabari Enterprises P Ltd. Sabari Switchgear P Ltd.

c. Though on books they have trade activity with Shri Sunil Kumar or this Companies. Mis Basanth Impex, Shree Chao Impex, Mayur Impex and Shyam International do not have income in the scale of Shri Sunil Kumar. In fact they have only income in the range of 1 to 9 lakhs in spite of heavy turnover. This meager income cannot be account of any trade activity but some fees or commission for services rendered.

d. All the aforementioned Kolkotta businesses are functioning from the same address and the fact that

they are only businesses on paper are strengthened on the above facts.

11. On an examination of the books of accounts of the assessee and his companies it is noted that enormous funds have obtained under the head loans and advances from the Ko/kotta businesses. These loans are non interest bearing and remained in the books for period ranging from one to three years. Such substantial amounts loaned by busineeses with meagre income lacks credibility even though obtained through banking channels. Round tripping of funds or ploughing back of funds seem to be a dear possibility. On the basis of the principle of preponderance of probability these funds are income of the assessee and treated as unexplained cash credits u/s. 68 of the Act.

12. The assessee had received trade credit from M/s. Basanth Impex. However this amount has been grouped under Loans and Advances not as sundry creditors. On examination of the books of accounts of the assessee it is the same running account carried over from the previous year. Only change is that instead of sundry creditor it is shown as Loans and Advances in the Balance sheet as on 31.3.2011. As mentioned in the foregoing paragraphs these are credits from businesses engaged in trade with very thin margin therefore lacking credit worthiness. Similarly loans were received from M/s. Ajay Iron and Steel P Ltd., Mis. Shyam International. As these all engaged in the same business with very low margins, credit worthiness for extending such loans are unproven. Therefore, these credits are added to the total as reduced by addition made last asst year.

13. Sundry creditor balance in the books of M/s. Sabari Switchgear P Ltd from the aforementioned businesses are as under:

Ajay Iron and Steel : 39300000

Basanth : 13451136 (c/b 19400388, o/b 5949252)

Syam International : 20927465 (c/b 22250,000, o/b 1322535)

As the balances are in the company, the balances are added u/s 68. Addition on account of this Rs.7,36,78,601/-."

7. Aggrieved by the order of assessment, the assessee preferred appeal to the first appellate authority. The CIT(A) observed as under:-

7.4. I have gone through the assessment order and submission of the appellant. The order passed by the AO is identical to the orders passed in the cases of Shri P. Sunil Kumar and M/s. Sabari Enterprises Pvt. Ltd. The AO has reached his conclusion in para 10 of the assessment order, which has been reproduced earlier in this order. However! even at the cost of repetition, contents of para 11 of the assessment order are reproduced as under:

11. On an examination of the books of accounts of the assessee and his companies it is noted that enormous funds have obtained under the head loans and advances from the Kolkotta businesses. These loans are non interest bearing and remained in the books for period ranging from one to three years. Such substantial amounts loaned by businesses with meager income lacks credibility even though obtained through banking channels. Round tripping of funds or ploughing back of funds seem to be a clear possibility. On the basis of the principle 'of preponderance of probability these funds are income of the assessee and treated as unexplained cash credits u/s. 68 of the Act.

From the above, it is seen that, the AO has himself accepted that the transactions are through banking channels, and, therefore, genuineness of these transactions cannot be doubted. However, the AO suspects that there is a possibility of round tripping of funds or ploughing back of funds is also a possibility, and with these remarks, the AO added the difference between opening and closing balance as income of the appellant u/s. 68. In my opinion, the AO has stretched the scope of section 68 a bit too far in this case. In this case a search took place at the premises of Shri Sunil Kumar, the Managing Director of the appellant company, but no evidence regarding round tripping was found. The creditors are identifiable and they are admittedly income

tax assesses. Admittedly, the transactions have happened through banking channels, adding credibility to the transaction. On the other hand, the AO has only suspicion and presumption on which he has reached conclusion. M/s. Ajay Iron and Steel Pvt. Ltd. has a share capital of Rs.1,00,95,950/- and reserves and surplus 01 Rs.18,99,04,050/-, M/s. Basant Impex, though has small share capital, but has creditors of Rs.18,04,91,971/- and debtors of Rs.17,95,01,840/- and similarly M/s. Shyam International has debtors of Rs.30,89,72,749/- and creditors of Rs.30,78,29,014/-. All these company's accounts are audited. Also, the transactions between these concerns and the appellant are 'not one time transactions. There is regularity of transactions spread over a number of years. If the AO had suspicion,

regarding genuineness of transactions, nothing prevented him from further verification An addition u/s.68 can be made, if the appellant fails to furnish an explanation or fails to furnish explanation to the satisfaction of the AO. In the instant case, the appellant has furnished explanation with supporting evidences and the AO has not been able to disprove the same. On the basis of above set of facts, only on the basis of suspicion the addition made cannot be sustained and the same are deleted. Since the facts and circumstances are identical in A.Ys. 2010-11 and 2011-12, these grounds of appeal are allowed for both the assessment years."

8. After hearing both the parties, we are of the opinion that similar issue came for consideration before this Tribunal in assessee's group cases, in the case of Shri P.Sunil Kumar, Sabari Quality Foods in ITA Nos.347/Coch/2017 & Others. The Tribunal vide its order dated 13.12.2018 held as under:-

"7. We have heard the rival submissions and perused the record. The seized material marked as SKP/KLM/DA 1 to 23 clearly showed a lot of trade activities between the assessee and these companies namely, M/s.Sabari Enterprises P Ltd, M/s. Sabari Millenium Exports P Ltd, M/s. Sabari Switchgear P Ltd , and Basanth Impex, Shyam International, Sree Chao Impex, Ajay Iron and Steel P Ltd, Vani Exports and Mayur Impex. The narrated facts in earlier pages of this order in the tabular form proved the trade activities carried on by the assessee with the alleged parties. The Assessing Officer has not denied these business transactions with the alleged parties. The assessee is a trader of DEPB import licences. The assessee purchases these licenses from exporters in Kerala and other

neighbouring states and sells them to these Kolkota based companies and who sells it to other importers. These alleged Kolkota based companies acted as middlemen between the assessee and the final buyers, i.e. importers and, therefore, these Kolkota based companies have no option but to operate on thinnest of margins. Search was conducted at the residential as well as business premises of the assessee, Shri Sunil Kumar and consequently, statement of Shri Mahesh Khetan, s/o Late Shri Gauri Shankar Khetan, who managed the affairs of M/s. Basanth Impex, Shree Chao Impex, Shyam International and Mayur Impex, was recorded by DDIT, Kolkota, wherein Shri Mahesh Khetan stated that “all the business activities, books of accounts etc. in respect of these proprietary concerns were performed and maintained by Sabari Group. They were used only for signing authorities by Sabari group. In lieu of signature they got commission from Sabari group”. However, Shri Mahesh Khetan, later retracted from his statement claiming that the statement from him was taken exerting undue pressure and force. Subsequent to retraction by Shri Mahesh Khetan, the Assessing Officer did not carry out any further investigation and relied on the statement originally recorded by the DDIT, Kolkota. In the statement, originally recorded by the DDIT, Kolkota, Shri Mahesh Khetan stated that the books of accounts of his concerns, i.e., Basanth Impex, Shyam International, Vani Exports etc. were maintained by the assessee Shri P. Sunil Kumar. However, search was conducted at the premises of the assessee, and if the books of Mahesh Khetan’s group were found at assessee’s premises, the Assessing Officer would have mentioned the same in the assessment order. Obviously, the books of accounts relating to Shri Gauri Shankar Khetan and Shri Mukesh Khetan group of cases were not found within the contents of original statement of Shri Mahesh Khetan recorded by DDIT, Kolkota are not true and cannot be relied upon. Similarly, statement of Chartered Accountant, Shri Ravi Biyala was recorded, who also retracted subsequently. During the course of assessment proceedings, since the Assessing Officer was using these statements against the assessee, the assessee requested cross-examination of Shri Khetan and Shri Biyala, which was not given by the Assessing Officer as there was no sufficient time available with the Assessing Officer. As seen from the facts of the case, the Assessing Officer has not found any mistake in the books of account maintained by the assessee and he has not rejected the assessee’s books of account. The addition made by the AO was mainly based on the statement recorded from Shri Manish Khetan who later retracted his statement and therefore, much credence cannot be given to the statement recorded from these

persons as we do not know whether the statement is correct as they have not brought on record any corroborative evidence. Further, the Assessing Officer has not given opportunity of cross examination of these persons to the assessee. The books of accounts of these concerns were duly audited and they have filed the returns of income. The Department having accepted their returns of income, it is not possible to reject certain entries without bringing in any contra evidence against those entries. The main reason for making the addition in the hands of the assessee is that the other concerns were doing business with very low margin of profit. The Assessing Officer suspected extending such huge advances to the assessee. In our opinion, suspicion cannot be reason for making additions and it cannot replace the evidence on record. As rightly pointed out by the CIT(A), neither the Assessing Officer nor the Investigating authorities have brought on record any incriminating documents to suggest that the assessee is holding unaccounted income which was lend to the certain persons and got it back as loans and advances. The Assessing Officer cannot draw inference on the basis of suspicion, conjuncture and surmises. Suspicion cannot take place of material in support of the findings of the Assessing Officer. The Assessing Officer should act in a judicial manner, proceed with judicial spirit and should come to judicial conclusion. The Assessing Officer is required to act as a reasonable person and not arbitrarily and capriciously. The assessment should be made on the basis of adequate material and it should stand on its own legs. The Assessing Officer without examining the issue properly, he cannot come to the conclusion that the assessee had advanced loans to other business concerns and got it back. The evidence brought on record by the Assessing Officer does not suggest that the source of funds received from the alleged parties was sourced by the assessee. Addition was made only because of low profit margin of the parties who had advanced money to the assessee. These are the assessments u/s. 153A of the Act. The documents relied on by the Assessing Officer for the purpose of determining the income of the assessee is to be put before he assessee for comments or for cross examination. More so, if the Assessing Officer wants to rely on any statement of third party, the same is required to be furnished to the assessee and if the assessee wants to cross examine any of the parties whose statements were relied on by the Assessing Officer, the same is to be provided to the assessee.

7.1 In the present case, the assessee is having grievance of not being provided an opportunity of cross examination of the parties whose

statements were relied on by the Assessing Officer while framing the assessment, though the said parties retracted the statements. According to us, not allowing the assessee to cross examine the parties whose statements were relied upon to make addition in the impugned assessment order is a serious flaw which makes the order null and void in as much as it amounted to violation of principles of natural justice because of which the assesses were adversely affected. More so, the circumstances surrounding the case are not strong enough to justify rejection of the assessee's plea of providing opportunity of cross examination. In the present case, the entire evidence has to be appreciated in a wholesome manner and even when there is a documentary evidence, the same can be overlooked if there are surrounding circumstances to show that the claim of the assessee is opposed to the normal course of human thinking and conduct or human probabilities. There is difficulty in rejecting the assessee's plea as opposed to the normal course of human conduct. The evidence collected by the lower authorities was not enough to establish their stand that the main transactions carried out by the assessee with the above parties were only paper transactions and only accommodation entries. As discussed earlier, there is no evidence which was brought on record to directly show that these transactions are accommodation entries. Therefore, no addition could be made on account of these alleged transactions in the hands of the assessee by treating them as unexplained credits u/s. 68 of the Act. In our opinion, transaction shall be accepted to be real as there is no evidence showing otherwise. Further, the surrounding circumstances apart from the direct evidence in the instant case did not contain anything which belied the claim of the assessee. In view of this we are of the opinion that the addition made by the Assessing Officer cannot be sustained. As such, the CIT(A) is justified in deleting such additions made u/s. 68 of the I.T. Act and confirm the order of the CIT(A). Similar ground was raised in other appeals. This ground of appeals of the Revenue is dismissed for all the assessment years."

9. In view of the above order of the Tribunal, we do not find any infirmity in the order of the CIT(A) on this issue. Accordingly, the ground raised by the Revenue before us, in case of both the assessees, for both the assessment years, are dismissed.

10. In the result, the appeals filed by the Revenue and cross objections filed by the assessee are dismissed.

Order pronounced on this 16th day of September, 2019.

Sd/-
(George George K)
JUDICIAL MEMBER

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Cochin ; Dated : 16th September, 2019.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT (Appeals)-III, Kochi.
4. The CIT (Central) Kochi.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin