

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F" DELHI**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
&
SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER**

I.T.A. No.1835/DEL/2019
Assessment Year 2015-16

Rajeev Gupta, B-9, Surya Nagar, Ghaziabad.	v.	ITO, Ward-2(2), Ghaziabad.
TAN/PAN: AHIPG7473L		
(Appellant)		(Respondent)

CO No.110/DEL/2019
(Arising out of ITA No.1835/DEL/2019
Assessment Year 2015-16

ITO, Ward-2(2), Ghaziabad.	v.	Rajeev Gupta, B-9, Surya Nagar, Ghaziabad.
TAN/PAN: AHIPG7473L		
(Appellant)		(Respondent)

Appellant by:	Shri P.C. Yadav, Adv. Shri S.K. Srivastav, IRS, Ms. Manjubala Yadav, Adv. Shri Prince Kumar, Adv. Ms. Surbhi Srivastav, Ad.		
Respondent by:	Shri Vivek Gurnani, Proxy Counsel for Shri Zoheb Hossain, Senior counsel for the Revenue.		
Date of hearing:	13	04	2022
Date of pronouncement:	09	05	2022

ORDER

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeal has been filed at the instance of the Assessee and the Cross Objection at the instance of the Revenue

against the order of the Commissioner of Income Tax (Appeals)-I, Noida ['CIT(A)' in short], dated 28.09.2018 arising from THE assessment order dated 29.12.2017 passed by the Assessing Officer (AO) under Section 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2015-16.

2. When the matter was called for hearing, ld. counsel for the assessee submitted that the Assessing Officer has *inter alia* embarked upon additions under Section 68 r.w. Section 115BBE of the Act amounting to Rs.47,48,795/- in gross infringement of principles of natural justice. It was submitted that the Assessing Officer has alleged Long Term Capital Gain earned by the assessee to be non genuine and in the nature of prearranged accommodation entry liable to be taxed under Section 68 r.w. Section 115BBE of the Act mainly on the basis of certain statements of the alleged entry operators. The copies of the statements were confronted to the assessee on 15.12.2017. The assessee replied thereto in objection vide submissions dated 26.12.2017 and denied any relation or transaction with these entry operators and urged for cross-examination of the statement of the deponent. The objection of the assessee was however disposed of against the assessee without any further opportunity and the assessment order was passed under Section 143(3) vide order dated 29.12.2017. It was thus submitted that Assessing Officer has unilaterally rejected the request of the assessee without any proper opportunity made available to the assessee. It was submitted that the assessee has been denied with its valuable right of cross-examination of these deponents. It was submitted that the right of hearing is the fundamental facet of principles of natural justice which has been clearly violated in the present case. Ld. counsel

accordingly submitted that the additions made is required to be deleted or alternatively the matter be remitted back to the file of the Assessing Officer for framing the assessment order in conformity with the principles of natural justice.

3. Ld. DR for the Revenue, on the other hand, submitted that the statements of the witnesses in question were duly provided to the assessee. It was next submitted that the right of cross-examination is not absolute and thus not available in all circumstances. Such right will have to be applied depending on the facts and circumstances of the case and cannot be put into a straightjacket. It was thus contended that no prejudice is, in fact, caused to the assessee when the statement was admittedly provided.

4. In the present appeal, the erstwhile Id. CIT(A), Shri S.K. Srivastava who is the author of the impugned first appellate order also intervened to challenge in the Cross Objection filed by the Revenue and sought permission of the Bench to defend his personal position in the matter. It was submitted that the Revenue in the Cross Objection has contended that then Id. CIT(A)-I, Noida, (Shri S.K. Srivastava) was not vested with the jurisdiction to pass the first appellate order as per the Cross Objections. Such objection of Revenue carries reflections against the author of first appellate order personally. Shri Srivastava submitted that in the present case, the first appellate authority has passed *ex-parte* order due to non compliance by the assessee and the first appeal was, in fact, dismissed and adjudicated against the assessee. Therefore, to infer *malafide* in the first appellate order and the claim of Revenue that first appellate authority has exceeded his

jurisdiction is far fetched. It was also submitted that the then CIT(A) proceeded to pass the order in accordance with law. Mr. Srivastava thus recorded his objection to counter the allegation that the order passed by the CIT(A) Noida was without any jurisdictional mandate.

5. We have dispassionately heard respective parties. The assessee has invoked the fundamental principles of natural justice and alleged that the same has not been followed by the Assessing Officer. Needless to say, these principles are the backbone of a judicial system and is an inseparable ingredient of fairness and reasonableness. It is contended on behalf of the assessee that the additions made in the present case towards unexplained credits under Section 68 r.w. Section 115BBE is primarily on the basis of oral evidence of third parties who have been alleged as entry operators. The assessee denies to have entered into any transactions with these parties, and therefore, considered it necessary to cross-examine the witnesses who depose before the Income Tax Authorities to the prejudice of the assessee. A reference to the decision of the Hon'ble Supreme Court in *Andaman Timber Industries vs. CIT*, (2015) 62 taxmann.com 3 (SC) was made to support its contention. It was thus contended that the Assessing Officer has committed a serious flaw in not abiding by the principles of natural justice which renders the assessment order to be a nullity. It is the contention of the assessee that opportunity to cross-examine the witness was specifically asked to the Assessing Officer to discredit the testimony of the witnesses. We also simultaneously note the plea of the Revenue that the statement of the witnesses were provided and denial of cross-examination in the circumstances is not

absolute and does not compromise with the principles of natural justice.

6. The sequence of event narrated on behalf of the assessee depicts that the show cause notice and the statement of witness was served on the assessee at the fag end on 15.12.2017. The reply thereto was filed by the assessee on 26.12.2017 wherein the allegation of the Assessing Officer that the Long Term Capital Gain earned by the assessee is an accommodation entry was denied. The objection was disposed of and the assessment order was passed promptly thereafter on 29.12.2017. These sequence of events show that reasonable opportunity to the assessee as to why the matter cannot proceed without cross-examination and why cross-examination is necessary despite it is not being absolute, was not provided to the assessee at all. Such action of the Assessing Officer has resulted in somewhat arbitrariness while passing the assessment order. Under these circumstances, we deem it expedient to restore the matter back to the file of the Assessing Officer for granting proper opportunity to the assessee while framing the assessment order.

7. In the factual backdrop, the question as to whether the cross-examination is necessary in the facts of the case shall be adjudicated by the Assessing Officer after granting proper opportunity in this regard to the assessee and thus kept open while remitting the matter back to the file of the Assessing Officer. Noticeably, the CIT(A) has disposed of the first appeal *ex-parte* and thus process of reasoning on merits on factual aspects raised on behalf of the assessee are not discernible. Pertinent to respectfully note here the observations of the Hon'ble Supreme

Court in the case of *Tinbox Co. vs. CIT 249 ITR 216 (2001)* wherein the Hon'ble Supreme Court observed that the assessee could have placed evidence before the First Appellate Authority or before the Tribunal is really of no consequence for it is assessment order that counts. That the assessment order must be made after the assessee has been given a reasonable opportunity for setting out his case. In the light of such observations, the order of the First Appellate Authority under challenge is set aside and the matter is remitted back to the file of the Assessing Officer for framing the assessment order *denovo* in accordance with law by observing the principles of natural justice. Consequently, the Cross Objection of the Revenue is thus dismissed as infructuous.

6. In the result, the appeal of the assessee is allowed for statistical purposes whereas the Cross Objection of the Revenue is dismissed.

Order was pronounced in the open Court on 09/05/2022.

Sd/-
[NARENDER KUMAR CHOUDHRY]
JUDICIAL MEMBER

DATED: **09/05/2022**

Prabhat

Sd/-
[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER