Delhi ITAT

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Timeline

ITAT DELHI

06 Apr 2018
Case filed

21 May 2019
Judgement

Shakuntala Agencies P.Ltd Delhi vs ITO, Ward-23(1) New Delhi

21.05.2019 ITA 2379 / DEL / 2018

Text Highlight

Issues & Grounds of appeal | Arguments | Holding & Outcome

Shakuntla Agencies Pvt. Ltd.

Shakuntla Properties Pvt. Ltd.

These 03 appeals have been filed by the separate assessees against the respective orders passed by Ld. CIT(A)-4 & Ld. CIT(A)-28, New Delhi respectively pertaining to assessment year 2009-10 by raising as many as 07 grounds in each appeal, but at the time of hearing, Ld. counsel for the assessee has only argued the ground no. 4 which is reproduced as under:-

> "4. That the Ld. AO erred in law and on facts in making and the Ld. CIT(A) erred in confirming the addition of Rs. 40 lac without affording opportunity of cross examination of the concerned parties whose records and statements were relied upon by the AO and made the basis for making addition. The veracity of documents / records allegedly found and seized during a search operation were not got confirmed and the assessee was not granted opportunity to verify such records by cross examination."

1.1 Since common legal ground has been raised by the assessees in all the 03 appeals, hence, the appeals were heard together and are being disposed of by this common order for the sake of convenience, by dealing with facts and circumstances of ITA No. 2378/Del/2018 (AY 2009-10) IPL Realtors Pvt. Ltd. vs. ITO and the result thereof will apply mutatis mutandis to other 02 appeals i.e. Shakuntala Agencies P. Ltd. vs. ITO (ITA No. 2379/Del/2018) (AY 2009-10) and Shakuntla Properties Pvt. Ltd.

vs. ITO (ITA NO. 2381/Del/2018) (AY 2009-10).

2. Brief facts of the case are that AO received information from Investigation Wing of the Department at New Delhi about the result of

Search and Seizure operations carried out in the case of Sh Surender Kumar Jain group of cases in which concrete evidences were gathered which proved that the said group was involved in providing accommodation entry to a number of persons who wanted to introduce their undisclosed income in

Law Referred

Income Tax Act, 1961
Section 10(38), Section 143(3), Section 147, Section 148, Section 68

through companies formed by the group for this purpose. Documents seized during the search revealed that the assessee company was one of such beneficiaries of accommodation entries. Such seized documents reveal the name of beneficiaries, amount involved, cheque nos., name of issuing company, the middle man involved and bank details. The modus- operandi unearthed as a result of Search & Seizure operation revealed that cash received from beneficiaries was being deposited in the accounts of paper firm/companies managed and controlled by Jain group in the disguise of bogus sales which were routed through bank accounts of various firms/companies of the group and ultimately after such layerings, funds were parked in few selected dummy companies which would transfer the required amount to the beneficiary's account in the form of share capital, share premium or loan etc through cheque or RTGS etc. After receiving and analyzing the seized documents and report from the Investigation Wing, it was inferred by the AO that the assessee has taken accommodation entry amounting to Rs 40,00,000/- in FY 2008-09 from three of the companies managed and manipulated by S. K. Jain group. The details of these transactions as gathered during Search & Seizure operation have been tabulated by the AO in the assessment order which reveal that the assessee has received Rs 15,00,000/- each from M/s Victory Software Pvt. Ltd. and Hum Turn Marketing Pvt. Ltd. and Rs 10,00,000/- from VIP Leasing & Finance Pvt. Ltd. respectively in the garb of share application money. After recording reasons to believe, notice u/s 148 of the I.T. Act, 1961 was issued to the assessee company and assessment was completed u/s 143(3)/147 of the Act. The AO asked the assessee to produce the Directors of the above mentioned companies which remained un-complied with. After detailed discussion of legal and factual aspects of the case, the AO held that the assessee has failed to discharge its onus u/s 68 and placing reliance on a number of case laws and in view of the detailed investigation carried out by the Investigation Wing in this regard, the AO treated Rs 40 lacs as assessee's undisclosed income u/s 68 of the I.T. Act. The AO further added a sum of Rs 80,000/- on account of commission paid by applying the rate of 2% on the amount of accommodation entry obtained by the assessee by holding the said payment of Rs 80,000/- as made from undisclosed sources and made the assessment at Rs. 46,58,820/- u/s. 143(3)/147 of the Act vide order dated 26.12.2016. Against the above addition, assessee appealed before the Ld. CIT(A), who vide his impugned order dated 12.02.2018 has dismissed the appeal of the assessee. Aggrieved with the impugned order dated 12.2.2018, assessee is in appeal before the Tribunal.

3. During the hearing, Ld. counsel for the assessee has submitted that the addition made by the AO and confirmed by the Ld. CIT(A) is merely on the basis of statement of Satish Garg alleged entry provider. He further submitted that assesse after submitted all the documents has asked for the cross

submitted that in a such a situation the courts and the various Benches of the ITAT have unanimously held that it is clear cut violation of the principle of natural justice and hence assessment deserves to be quashed and relied upon the decision of the Hon'ble Supreme Court of India in the case of Andaman Timber Industries vs. CIT (2015) 127 DTR 241 (SC); Shobit Goyal (HUF), ITA No. 2021/Del/2018 and Prabhatam vs. ACIT ITA No.

2525 of 2015 dated 28.3.2015. To support his contention, he draw my attention towards page no. 2 of the impugned order especially the ground no. 5, 6, and 7 which reproduced as under:-

> 5. The Ld. AO erred in law and on facts in making the addition without affording opportunity of cross examination of the concerned parties whose records were confronted to the assessee and made the basis of addition. The assessee was not granted opportunity to verify such records by cross examination.

6. The Ld. AO erred in law and on facts in making the addition without properly considering the explanation and evidence furnished by the assessee, in the facts and circumstances of the case.

7. The Ld. AO erred in law and on facts in making the addition without affording opportunity of cross examination of the concerned parties whose records were confronted to the assessee and the made the basis of addition. The assessee was not granted opportunity to verify such records by cross examination."

3.1 Since Ld. CIT(A) has not properly adjudicated the grounds no. 5, 6, & 7, hence, assessee has raised the ground no. 4 raised before the Tribunal. In this regard, he draw my attention towards page no. 23-24 of the Ld. CIT(A)'s order vide para no. 7.15 and stated that Ld. CIT(A) has wrongly held that the right of hearing does not include a right to cross examine and the right to cross examine must depend upon the circumstances of each case and also on the statute concerned and also stated that if AO refuses to produce an informant for cross examination by the assessee there cannot be any violation of natural justice and hence, not properly decided the ground no. 5, 6, & 7. raised before the Ld. CIT(A). In view of above, he submitted that the addition in dispute was made and no statement is confronted to the assessee much less offered for cross examination which also lacks of independent corroboration from any incriminating material, which is not sustainable in the eyes of law. Therefore, he submitted that the issue argued vide ground no. 4 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

the assessee.

4. Ld. DR relied upon the orders of the authorities below and reiterated the contents mentioned by the Assessing Officer in his order and relied upon the case laws cited by the AO. In support of his contention, he relied upon the decision of the Hon'ble Delhi High Court in the case of Udit Kalra vs. ITO dated 8.3.2019 2910-TIOL-751-HC-Del-IT and ITAT, SMC Bench decision dated 25.4.2019 in the case of Pooja Ajmani vs. ITO.

5. I have heard both the parties and perused the records, especially the assessment order as well as impugned order and forming a negative inference solely on the basis of extracts of statement which was not confronted to the assessee much less offered for cross examination and the case laws cited by the both the parties. I note that AO made the addition, which was confirmed by the Ld. CIT(A) merely on the basis of statement of Satish Garg alleged entry provider. However, the assessee has submitted all the documents and asked for the cross examination of Satish Garg, which request of the assessee has not been accepted by the AO and the Ld. CIT(A). I note from page no. 2 of the impugned order especially the ground no. 5, 6, and 7 which are reproduced as under:-

> 5. The Ld. AO erred in law and on facts in making the addition without affording opportunity of cross examination of the concerned parties whose records were confronted to the assessee and made the basis of addition. The assessee was not granted opportunity to verify such records by cross examination.

6. The Ld. AO erred in law and on facts in making the addition without properly considering the explanation and evidence furnished by the assessee, in the facts and circumstances of the case.

7. The Ld. AO erred in law and on facts in making the addition without affording opportunity of cross examination of the concerned parties whose records were confronted to the assessee and the made the basis of addition. The assessee was not granted opportunity to verify such records by cross examination."

5.1 I further note that Ld. CIT(A) at page nos. 23-24 of his impugned order vide para no. 7.15 has observed as under:-

> "7.15 In the present case, I find that the appellant has failed to discharge its burden of proof and the AO, on the other hand, has proved that the claim of the appellant was incorrect. It has also been emphatically contested by the appellant before me that the assessee was not provided with any adverse report and no opportunity was provided to cross examine the persons /witness whose statements have been used against the appellant. I find that such right as held in various decisions, is not an absolute right and depends not only the circumstances of the acse but

Mohd. AIR 1967 (SC) 122, and in the case of Nath International Sales vs. UOI AIR 1992 Del.

295 that the right of hearing does not include a right a cross examine. The right to cross examine must depend upon the circumstances of each case and also on the statute concerned. In the case of T. Devasahaya Nadar vs. CIT (1965) 51 ITR 20 (Mad.) it was held that "it is not an universal rule that any evidence upon which the department may rely should have been subjected to cross examination. If the AO refuses to produce an informant for cross examination by the assessee there cannot be any violation of natural justice."

5.2 Since the Ld. CIT(A) has not properly addressed the ground no. 5, 6 & 7 raised before him, hence, the assessee has raised the following ground no. 4 before the Tribunal:-

> "4. That the Ld. AO erred in law and on facts in making and the Ld. CIT(A) erred in confirming the addition of Rs. 40 lac without affording opportunity of cross examination of the concerned parties whose records and statements were relied upon by the AO and made the basis for making addition. The veracity of documents / records allegedly found and seized during a search operation were not got confirmed and the assessee was not granted opportunity to verify such records by cross examination."

5.3 After perusing the aforesaid finding of the Ld. CIT(A) vide para no. 7.15, it is clear that Ld. CIT(A) has not properly adjudicated the aforesaid ground no. 5, 6 & 7 raised before him, which is not sustainable in the eyes of law. Therefore, in view of above, the legal issue argued vide ground no. 4 before the Tribunal 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 wherein, the Tribunal has allowed the appeal of the assessee on exactly similar facts and circumstances. 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

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

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. As regards the case laws cited by the Ld. DR are concerned, in the case of Udit Kalra vs. ITO, the Hon'ble Delhi High Court has adjudicated the case on merits and has not adjudicated the issue on cross examination, therefore it will not help the department. As regards ITAT, SMC, Delhi decision in the case of Pooja Ajmani vs. ITO is concerned, in this case the assessee has not raised any legal ground and argued only on merit for which asseseee has failed to substantiate his claim before the lower revenue authorities as well as before the

Tribunal, which establish the facts are not identical to the present case, hence, do not support the case of the Department.

7. In the result, all the 03 appeals filed by the assessee are allowed.

The decision is pronounced on 21/05/2019.