

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

BEFORE SH. H.S. SIDHU, JUDICIAL MEMBER

ITA No. 698/Del/2019
Assessment Year: 2015-16

RAVI SHARMA, F-26/124, SECTOR-7, ROHINI, DELHI – 110 085 (PAN: AIGPS9173A)	Vs.	ITO, WARD 2(2), FARIDABAD
(Appellant)		(Respondent)

ITA No. 699/Del/2019
Assessment Year: 2015-16

RAMESHWAR DAYAL SHARMA, F-26/124, SECTOR-7, ROHINI, DELHI – 110 085 (PAN: AFUPS3526G)	Vs.	ITO, WARD 2(2), FARIDABAD
(Appellant)		(Respondent)

Assessee by	Sh. Kapil Goel, Advocate
Department by	Sh. S.L. Anuragi, Sr. DR.

ORDER

These 02 appeals have been filed by the separate assesseees against the respective orders passed by Ld. CIT(A), Faridabad pertaining to assessment year 2015-16. In both the appeals, the assesseees have raised as many as 10 grounds, but Ld. Counsel for the assessee has argued only ground no. 2.1 which is legal in nature. For the sake of convenience, we are only reproducing the legal ground no. 2.1 involved in ITA No. 698/Del/2019 (AY 2015-16), because exactly similar ground has been

raised in other Appeal i.e. ITA No. 699/Del/2019 (AY 2015-16) and there is only difference in the figure.

"2.1 That order passed by the Ld. AO dated 16./11/2017 and further order passed by Ld. CIT(A) dated 30.11.2018 are bad in law in as much as addition of Rs. 18,84,470/- is made violating principles of natural justice without confronting any investigation wing report relevant extract, statements recorded by investigation wing, etc. and without offering cross examination of witness whose statement is extensively relied in impugned orders, which is sufficient to quash the assessment order and order passed by Ld. CIT(A), despite repeated specific request and in this regard (refer ground before Ld. CIT(A) and specific prayer noted at para 8 (D) of CIT(A) order and adverse finding of CIT(A) on this plea at para 13 of the order."

2. Since common legal ground has been raised by the assesseees in both the appeals, except difference in figures, hence, the appeals were heard together and are being disposed of by this common order for the sake of convenience, by dealing with ITA No. 698/Del/2019 (AY 2015-16)

– RAVI SHARMA VS. ITO and the result thereof will apply *mutatis mutandis* to other appeal i.e. RAMESHWAR DAYAL SHARMA VS. ITO (ITA No. 699/DEL/2019) (AY 2015-16).

3. At the time of hearing Ld. Counsel for the assessee stated that similar legal ground no. 2.1 involved in this appeal has already been decided in favour of the assessee by the Hon'ble Supreme Court of India in the case of Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata-II 281 CTR 241. Hence, he requested that the legal ground no. 2.1 may be decided in favour of the assessee by deleting the addition in dispute in this appeal by respectfully follow the above ratio. He also draw my attention towards the orders of the AO as well as Ld. CIT(A) regarding the issue involved in ground no. 2.1 which has been raised by the Asessee before the AO and CIT(A) and the same has been decided against the assessee, which is contrary to the law as laid down by the Hon'ble Supreme Court of India in the case of Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata-II (Supra). He also filed the copies of various decisions of the Tribunal in which the ITAT by respectfully following the aforesaid decision of the Hon'ble Supreme Court of India in the case of Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata-II (Supra) decided the similar issue in favour of the assessee and deleted the addition in dispute. In view of above, he requested to follow the aforesaid ratio of the Hon'ble Supreme Court of India in the case of Andaman Timber Industries vs. Commissioner of

Central Excise, Kolkata-II (Supra) and allow the appeal of the assessee by deleting the addition in dispute.

4. On the contrary, Ld. DR relied upon the orders of the authorities below and stated that the decision of the Hon'ble Delhi High Court in the case of Udit Kalra vs. ITO 2019-TIOL-751-HC-DEL-IT is applicable in the present case wherein the Hon'ble High Court has dismissed the appeal of the assessee. Hence, he requested that by following the decision in the case of Udit Kalra vs. ITO, the appeal of the assessee may be dismissed.

5. I have heard both the parties and perused the records, especially the orders of revenue authorities as well as the Paper Book filed by the Ld. Counsel for the assessee in which the assessee has filed the copies of the various decisions rendered by the Tribunal, Hon'ble Delhi High Court and the decision of the Hon'ble Supreme Court of India in the case of Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata-II (Supra). I am of the considered view that exactly similar issue as involved in this appeal vide ground no. 2.1 has already been decided by the Hon'ble Supreme Court of India in the case of Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata-II (Supra), in favour of the assessee wherein the Hon'ble Supreme Court of India 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 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."

5.1 Respectfully following the above ratio of the Hon'ble Supreme Court of India, I am of the view that assessee has made a request before the AO as well as before the Ld. CIT(A) for giving adequate opportunity for cross examination of witnesses whose statements have been used by the revenue authorities against the assessee for making the addition in dispute, but the same has not been provided to the assessee in spite of the request made by the assessee. Ld. CIT(A) has reproduced the request made by the assessee before the AO as well as made before me and given the findings in the impugned order for denial of cross examination and non-supply of documents by stating that it is not a violation of any natural justice. In my view the finding of the AO as well as Ld. CIT(A) is contrary to the law as laid down by the Hon'ble Supreme Court of India, as reproduced above in the case of Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata-II (Supra). Therefore, on the anvil of the above ratio, the impugned order is not sustainable in the eyes

of law, hence, respectfully following the same, I delete the addition in dispute and allow the appeal of the assessee.

6. In the result, both the appeals filed by the different assessee are allowed.

The decision is pronounced on 14/08/2019.

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

Dated: 14/08/2019

"SRB"

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi