

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Neutral Citation No.2023:PHHC:143650-DB

ITA-38-2023 (O&M)

Pr. Commissioner of Income Tax (Central), Ludhiana
.....Appellant
Versus

M/s DSG Papers Pvt. Ltd., Patiala (Assessment Year 2013-2014)
.....Respondent
(2)

ITA-1-2023 (O&M)

Pr. Commissioner of Income Tax (Central), Ludhiana
.....Appellant
Versus

M/s DSG Papers Pvt. Ltd., Patiala (Assessment Year 2017-2018)
.....Respondent
(3)

ITA-8-2023 (O&M)

Pr. Commissioner of Income Tax (Central), Ludhiana
.....Appellant
Versus

M/s DSG Papers Pvt. Ltd., Patiala (Assessment Year 2014-2015)
.....Respondent
(4)

ITA-11-2023 (O&M)

Pr. Commissioner of Income Tax (Central), Ludhiana
.....Appellant
Versus

M/s DSG Papers Pvt. Ltd., Patiala (Assessment Year 2015-2016)
.....Respondent
(5)

ITA-281-2022 (O&M)

Pr. Commissioner of Income Tax (Central), Ludhiana
.....Appellant
Versus

M/s DSG Papers Pvt. Ltd., Patiala (Assessment Year 2016-2017)
.....Respondent

Decided on: 09.11.2023

**CORAM : HON'BLE MR.JUSTICE G.S. SANDHAWALIA
HON'BLE MS.JUSTICE LAPITA BANERJI**

Present:- Ms. Gauri Neo Rampal Opal, Senior Standing Counsel
for the appellant.

G.S. Sandhawalia, J.(Oral)

The present judgment shall dispose of five appeals i.e. ITA No.281 of 2022 and ITA Nos. 1, 8, 11 and 38 of 2023, which have been filed under Section 260A of the Income Tax Act, 1961 (for short 'the Act') regarding the Assessment Years 2013-2014, 2014-2015, 2015-2016, 2016-2017 and 2017-2018. The facts are being taken from ITA-38-2023 pertaining to the Assessment Year 2013-2014.

2. It is to be noticed that the Tribunal had decided 5 appeals bearing ITA Nos.82 to 86/CHD/2022 for the Assessment Years 2013-2014, 2014-2015, 2015-2016, 2016-2017 and 2017-2018 vide common order dated 29.07.2022. The Tribunal had allowed the appeals principally on the ground that the Assessing Officer has not given any opportunity of cross-examination to the assessee regarding the persons on whose statements the assessing authority had relied on. Resultantly while placing reliance upon the judgment of the Apex Court passed in **Andaman Timbers Industries Vs. Commissioner of Central Excise, (2015) 81 CTR (SC) 241**, judgment of the Delhi High Court in **Commissioner of Income Tax Vs. Dharam Pal Prem Chand Ltd. (2007) 295 ITR 106; Commissioner of Income Tax Vs. Rajesh Kumar (2008) 306 ITR 27 (Delhi)** and judgment of the Madhya Pradesh High Court in **Prakash Chand Nahta Vs. Commissioner of Income Tax (2008) 301 ITR 1354**, it allowed the above said appeals.

3. The following substantial questions of law are sought to be raised:-

“3.1 Whether on the facts and circumstances of the case, the Hon'ble ITAT has erred in allowing relief regarding the addition of Rs. 14,70,900/- made by applying net profit (declared by the assessee) @ 3.12% on suppressed sales, ignoring the fact that the said books of accounts were already rejected u/s 145(3) of the Income Tax Act, 1961.

3.2 Whether on the facts and circumstances of the case, the Hon'ble ITAT has erred in allowing relief to the assessee by observing that the AO did not provide opportunity of cross examination though information received from Directorate General of GST Intelligence (DGGI) which is a law enforcement agency was duly confronted to the Director of the company.

3.2A. Whether on the facts and circumstances of the case, the Hon'ble ITAT has erred in allowing relief to the assessee by observing that proper opportunity of cross examination was not provided to the assessee keeping in view of the principles decided in the judgment of Hon'ble Calcutta High Court in the case of Kisanlal Agarwalla vs. Collector of Land Customs AIR 1967 & Cal.80 which throws light on the right of cross examination.

3.3 Whether the impugned order dated 29.07.2022 passed by the Hon'ble ITAT is erroneous in the eyes of law and deserves to be vacated and overruled.”

4. It has also been admitted by the revenue as such that for the Assessment Year 2013-2014, 2014-2015, 2015-2016, 2016-2017 and 2017-2018 the tax effect is of ₹5,19,998/-, ₹1,89,733/-, ₹28,57,860/-, ₹52,52,093/- and ₹27,63,990/-, respectively, which is below the prescribed monetary limits prescribed by the CBDT, Circular No.17/2019 dated 08.08.2019. However, the justification is that since the addition is based on an information received from law enforcement agencies that the

assessee company had been allegedly suppressing its turn over to the Income Tax Department by way of not accounting for the sales by under invoicing the sales.

5. We are of the firm opinion that no substantial question of law is made out as contended. The factual background of the case would go on to show that on an information being received from the Directorate General of GST Intelligence, Ludhiana Zonal Unit, who had conducted a search on 05.08.2016 on the assessee company and its related parties on alleged suppression of turnover on account of unaccounted sales as well as under-invoicing of sales. Apparently from the premises of Shri Sanjay Dhawan 225 invoices were recovered, who was the Ex-President of the assessee company and had left the company in the year 2013. It is not disputed that even an FIR had also been lodged against said Sanjay Dhawan regarding the theft of documents of the company i.e. invoices, bilty books as well as rubber stamps. On account of the statements recorded of third parties under Section 14 of the Central Excise Act, 1944 of the said person and one Shri Shiv Charan Lal, the Ex-Dispatch Incharge of the assessee company, the reassessment had been done by making an addition of ₹31,40,021/- by applying the net profit of ₹4.42% and the undisclosed sales for the years computed at ₹3,62,60,331/- The Commissioner of Income Tax had applied the average net profit of 3.64% and reduced the addition and got it down to ₹16,02,706/-, vide order dated 24.12.2021.

6. The assessee being not satisfied preferred the appeals before the Tribunal. The Tribunal noticed that statements of four persons namely Gulshan Gaba, proprietor of M/s Amit Papers, Naveen Salley, proprietor

of M/s Ess Ess Sales Corporation, Sudhir Sethi, proprietor of M/s J.S. Enterprises and Manish Jain, proprietor of M/s B.M. Enterprises had been recorded, apart the statement of Shiv Charan Lal, an Ex-employee. Resultantly, it was noticed that in spite of request given for opportunity to cross-examine the said four persons, no such opportunity was granted and the request had been brushed aside by observing that the assessee had no explanation to offer and there was no requirement for giving any such opportunity. Resultantly, the Tribunal came to the conclusion that the impugned additions had been made on the basis of statements recorded behind the back of the assessee and without giving any proper opportunity to the assessee to rebut the same by cross-examination. Therefore, the cardinal principle having been violated for providing adequate opportunity for rebuttal evidence was the ground which prevailed with the Tribunal.

7. The fact that Sanjay Dhawan was an Ex-President of the company and there were criminal proceedings pending against him at an earlier point of time was a reason with the Tribunal to allow the appeal by holding that merely relying on the invoices as evidence which, was not of that character which could be accepted on stand-alone basis. The probability of the said person having forged documents to the disadvantage of the assessee company could not be ruled out had prevailed with the Tribunal. The factual narration regarding the vehicles involved and delivering goods at two different stations within short span of time on the same day was taken into consideration and the fact that the said vehicle could not be deployed for transporting the next consignment on the very same day. The contradiction between the statement of Shiv Charan Lal that parallel invoices were destroyed after the consignment of unrecorded

sales and the fact that there were recovery of such parallel invoices from the premises of Sanjay Dhawan was a contradiction which was noticed. The retraction of Manoj Kumar having accepted the fact of issuing parallel invoices and of making sales outside the books of account was also kept in mind.

8. It was noticed that for the subsequent year 2015-2016, 2016-2017 and 2017-2018 the basis of addition was e-mail communication received from the electronic records of M/s B.M. Paper Mart and the said e-mail was sent by one Sunil Kumar, part time employee of the assessee company. The said employee had been summoned by the Assessing Officer, who had denied the knowledge of the e-mail and that the e-mail ID from which the e-mail was sent did not belong to him. He had also stated that the signatures on the first and last page were taken under pressure and he was not agreed with its contents. Resultantly, a finding was recorded that the Assessing Officer did not make any independent inquiry prior to making the impugned additions but simply relied on the third party evidence without bringing on record any corroborative further evidence. The fact that the e-mail print out was for June, 2015, the bill numbers were running into series of 200, whereas as per the regular books of account the serial numbers of the invoices for the month of June, 2015 were in the series of 700, which was also a contradiction which was noticed by the Tribunal and it was in such circumstances the appeals have been allowed.

9. Counsel for the appellant has vehemently submitted that the judgment of the Apex Court passed in **Andaman Timbers Industries**

(supra) is a case under the Central Excise Act and, therefore, the principles would not be applicable.

10. The Apex Court in the said case while allowing the appeal had noticed that the Tribunal had rejected the plea of cross-examination that the statement of the dealer would not bring out any material which would not be in possession of the assessee. The Apex Court went on to hold that by not allowing the cross-examination of 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 as it amounted to violation of principles of natural justice by which the assessee was adversely affected. The argument whether the cross-examination would be relevant was also rejected, on the ground that it is not for the Tribunal to have guess work regarding the purpose of the cross-examination of the dealers and what was to come from it and thus, the appeals were allowed. Apart from that it was also noticed that to discredit the testimony the opportunity of cross-examination was necessary. Accordingly, it was observed as under:-

“6. 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.”

11. The Division Bench of the Delhi High Court in the case of **Rajesh Kumar (supra)** also has taken a similar view under the provisions of 1961 Act wherein the statements of one Maheshwari had been recorded wherein he had denied that he had nothing to do with the bank account from which the cheques were issued to the assessee. Resultantly, the order of the Tribunal had been upheld on the ground that the said person had not been cross-examined and no opportunity was granted by the Assessing Officer and there was violation of principles of natural justice.

12. Facts herein are similar as noticed above. A perusal of the order of Commissioner of Income Tax would go on to show the Commissioner had noticed that the Assessing Officer without bringing any record or evidence had made the addition on the basis of the statement of the third party which could not be considered as conclusive evidence. It is in such circumstances, we are of the considered opinion that the Tribunal has rightly interfered in the orders passed by the authorities below. Therefore, no question of law arises. Needless to say that the tax effect is also below the requisite limit, as per the circular of the Revenue.

Resultantly, we do not feel this is a fit case to consider the questions of law which are being raised, rather these are question of facts which have been adjudicated upon by the Tribunal while allowing the appeal.

13. Accordingly, there is no merit in the present appeals and the same are dismissed. All pending civil miscellaneous applications also stand disposed of.

(G.S. SANDHAWALIA)
JUDGE

09.11.2023
Naveen

(LAPITA BANERJI)
JUDGE

Whether speaking/reasoned :	Yes	
Whether Reportable :	Yes	