

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

**BEFORE SMT DIVA SINGH, JUDICIAL MEMBER
AND
SHRI T.S.KAPOOR, ACCOUNTANT MEMBER**

**I.T.A .Nos.-5516 & 5517/Del/2012
(ASSESSMENT YEARS-2006-07 & 2007-08)**

ACIT, Central Circle-09, ARA Centre, Jhandewalan Extn., New Delhi (APPELLANT)	vs	Anil Khandelwal, G-40, Saket, New Delhi. PAN-AAKPK8113G (RESPONDENT)
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Appellant by:	Smt. A.Misra, CIT DR
Respondent by:	Sh. Ved Jain, CA

ORDER

PER DIVA SINGH, JM

These are two appeals filed by the Revenue against the order dated 28.03.2013 of CIT(A)-XXVIII, New Delhi pertaining to 2006-07 & 2007-08 assessment years. Both these appeals are being decided by a common order as it was a common stand of the parties before the Bench that identical grounds have been raised by the Revenue in both the years and the facts, circumstances and the arguments are identical except for the difference in the amounts. Accordingly the joint stand of the parties has been that the arguments advanced by both the sides in ITA No-5516/Del/2012 for 2006-07 assessment year would cover both the years.

2. The grounds raised in ITA No-5516/Del/2012 are reproduced hereunder for ready-reference:-

"1. That the Commissioner of Income Tax (Appeals) erred in law and on facts of the case in deleting the addition of Rs.27,00,000/- (in ITA No-5517/Del/2012 the amount is Rs.1,14,80,000/-) made on account of peak amount of unexplained cash.

2(a) The order of the CIT(A) is erroneous and not tenable in law and on facts.

(b) The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.”

2.1. The relevant facts of the case as borne out from the assessment order are that the search & seizure action was conducted on 12.12.2006 at the business and residential premises of Shri. S.K.Gupta alongwith various concerns in which he and his family members were interested. Similarly action u/s 132 of I.T. Act, 1961 is stated to have been conducted in the case of various companies owned or controlled by him and also in the case of different individuals connected with the said companies. The present assessee as per the assessment order is one of these companies covered under search & seizure action.

2.2. Consequent to the search action, notice u/s 153A of the Income Tax Act, 1961 was issued to the assessee on 24.10.2008. A perusal of the assessment order shows that the AO records that the assessee is an individual who had filed return of income in response to notice u/s 153A of the Income Tax Act, 1961 on 05.11.2008 at Rs.1,54,343/-. He required the assessee in the course of the assessment proceedings u/s 143(3) r.w.s 153(A) to give information as per question no.10.2 & 10.3 of the questionnaire dated 07.11.2008 in regard to the transactions of the assessee and the family companies/concerns relatable to the documents seized during the course of search in S.K.Gupta Group of cases. He specifically confronted the assessee with the extract of page 25 of Annexure A-1 of party A-5 seized during the course of search and seizure operation in S.K.Gupta Group of cases at H-108, 2nd Floor, New Asiatic Building, Connaught Place, New Delhi. The reply of the assessee thereto however was not accepted by the AO which resulted in the addition of Rs. 27,00,000/-.

2.3. Similarly in 2007-08 A.Year pursuant to a similar notice u/s 153A return declaring an income of Rs.1,82,556/- was filed by the assessee. The AO after

issuance of notice etc. confronted the assessee with question No.10.1 requiring him to explain the entries in the seized documents in “S.K.Gupta Group of cases” where the assessee’s name appeared. The documents described as party Page -5 Annexure A-33 is extracted in the assessment order. Herein also the reply of the assessee was not accepted by the AO who proceeded to make the addition.

3. Aggrieved by this the assessee went in appeal before the CIT(A) in both the years. The CIT(A) considering the submissions advanced on behalf of the assessee deleted the additions made in both the years. Aggrieved by this, the Revenue is in appeal before the Tribunal on the afore-mentioned ground in both the years.

4. The Ld. CIT DR inviting attention to the assessment order referring to the observation made therein submitted that Sh.S.K.Gupta has admitted that he was a entry provider as a result of which the AO vide para 3.2 has proceeded to make the addition. The extract of hand ledger account of Sh. Anil Khandelwal i.e the assessee available at pages 30-33 of Annexure A-31 of party A-5 which was seized during the course of the search and seizure operation in S.K.Gupta Group of cases it was submitted has been extracted in the assessment order. It was submitted that the reply thereto of the assessee has been considered by the Assessing Officer and despite this fact the addition made has been deleted by the CIT(A), accepting the arguments advanced on behalf of the assessee and cross-examination referred to by the CIT(A).

4.1. Referring to the same it was her submission that the questions put forth were very vague and full facts have not come out in the order as such it was her submission that the issue should be restored to the AO and the impugned order be set aside. In order to support her assertion that answers to vague questions have been considered, attention was invited to page 16 of the impugned order wherein

vague responses to vague questions of Sh. S.K.Gupta have been relied upon in the cross-examination. Specific attention was invited the response given to question No.-14 & 15. Accordingly on the basis of the same it was her submission that infact the addition made by the AO deserves to be upheld as the reasoning taken into consideration for deleting the addition are not relevant. It was also her submission that since the reasons for making the addition and deleting the addition in 2007-08 are identical the arguments advanced in 2006-07 assessment year would fully apply in equal force to 2007-08 A.Year also and no separate arguments are required to be made.

5. The Ld. AR on the other hand heavily relied upon the impugned order. Supporting the same it was his submission that in the facts of the present case there is no allegation that either funds have been moved from the assessee to Sh.S.K.Gupta Group of companies who has issued cheques to the assessee nor is there any evidence that any cash was paid to the assessee by Sh.S.K.Gupta. Referring to the cross-examination of Sh.S.K.Gupta it was his submission that the cross-examination as the impugned order would show was in the presence of the AO and till date there is no statement by Sh.S.K.Gupta that he has ever received any cash or paid any cash to the assessee. The mere argument that he is an entry provider without any evidence was assailed. Referring to the specific questions 14 & 15 to which the Ld. CIT DR drew attention it was his submission that infact this is an extract from the statement of Sh. S.K.Gupta which was made at the time of search recorded on 13.12.2006 and is not a part of the questions put in the cross examination. Accordingly it was his prayer that since apart from making general and vague submission not borne out from the record, there is no concrete argument assailing the impugned order, the departmental appeals in the absence of any contrary fact or evidence deserves to be dismissed.

5.1. It was further submitted by him that although the issue is purely factual and relief is warranted on facts alone he would still in order to support the impugned order rely upon the judgement of Bombay High Court in the case of ACIT vs Lata Mangeshkar 97 ITR 696. Specific attention was invited to para 6 thereof for the proposition that the Court even where there was a statement of a managing partner that he had made payments to the singer in “black” even in such a situation, it was held by the Hon’ble High Court that suspicion cannot take the place of proof.

5.2. Reliance was also placed upon the decision of the Delhi Bench in the case of DCIT vs Yashpal Narender Kumar in ITA No-5340 to 5342/Del/2012 wherein by their order dated 07.02.2013, it was held by the Bench that addition on the basis of statement of the third party without any corroborative evidence is not tenable. Copy of the said order was also filed in the Court. It was argued that the department having used the ultimate weapon namely search and having failed to find any evidence against the assessee in the circumstances, it was contended that the arguments made without any evidence have no relevance. A perusal of the same shows that it was emphasized that it has been held therein that presumption u/s 132(4A) is only against the person in whose possession the search material is found and not against any other third person. Considering the judicial precedent it was held that the presumption is rebuttable and not conclusive and it cannot be applied to the third party in the absence of corroborative evidence as it goes without saying that the presumption available u/s 132(4A) can be drawn only against the person in whose case search is authorized and from whom and from whose possession or control books of accounts dairy or documents are found and presumption regarding correctness of the contents of the books of accounts etc cannot be raised against the third party.

5.3. Reliance was also placed upon CIT vs Ved Prakash Chaudhary reported in 305 ITR 245 (Delhi). Attention was invited to paras 12 & 13 thereof so as to contend that in the facts of the present case also no case had been made out to show that there was a transfer of money between the assessee and S.K.Gupta Group of Companies. The said judgement of the Delhi High Court it was submitted was confirmed by the Supreme Court as SLP filed against the said judgement was dismissed not only on grounds of delay but also on merit. Copy of the dismissal dated 09.01.2009 was filed. Accordingly on the basis of this fact it was his submission that the impugned order deserves to be upheld.

5.4. The Ld. CIT DR in reply reiterates that the issue is factual and full facts are not coming out. Referring to page 15 of the impugned order which contains an extract from the statement of Sh.S.K.Gupta. It was her request that the issue may be restored.

6. We have heard the rival submissions and perused the material available on record. Before addressing the issues it would be appropriate to refer to the specific observations made in the assessment order which led to the addition being made on which heavy reliance has been placed by the Ld. CIT DR:-

3. *“Transactions of the assessee and his family companies/concerns as per the documents seized during the course of search in S.K.Gupta Group of cases:-*

In this connection, the assessee was asked to give information as per question no.10.2 & 10.3 of the questionnaire dated 07.11.2008 as under :-

10.2. During the course of search and seizure operation in S.K.Gupta Group of cases at H-108, 2nd Floor, Nes Asiatic Building, Connaught Place, New Delhi, a hand ledger has been seized as per Annexure A-31, in which your account is reflected at page 30 to 33 of the said annexure. The extract of the same is reproduced hereunder for your explanation and giving nature, details and source of the entries mentioned therein. It is worth mentioning that name of certain companies in which you, your family members and your relatives are interested, are appearing in this account.

Extract of hand ledger account of Shri Anil Khandelwal in page 30-33 of Annexure-A-31 of party, A-5, seized during the course of search and seizure of operation in S.K.Gupta Group of cases at H-108, 2nd Floor, New Asiatic Building, Connaught place, New Delhi.

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<i>Date</i>	<i>Particulars</i>	<i>Debit</i>	<i>Credit</i>	<i>Balance</i>
28-7-05	Cash Received		100000	100000
28-7-05	North-SNG 361473 PO (HDFC	500000		500000
29-7-05	Cash received		70000	700000
30-7-05	Hi-SNG (PO) 226953	450000		250000
30-7-05	Hamara-SNG (PO) 257803	250000		0
30-7-05	Cash received		190000	190000
1/8/2005	BT (SCB)-SNG-	200000		10000
1/8/2005	Cash received		10000	10000
11/8/2005	Cash received		1000000	1000000
12/8/2005	Cash received		500000	1500000
13-8-05	SPG-SNG-002577UTI (PO)	600000		700000
13-8-05	Swen SNG-153999	700000		0
13-8-05	Cash received		484000	484000
13-8-05	Swen 1+ 80285488 + 579231		180000	180000
13-8-05	Swen 080252		180000	844000
13-8-05	Swen-716417		96000	940000
<i>Page-31</i>				
17-8-05	Swen-SWG-160110	500000		440000
19-8-05	Era-PBN-SNG (PO)-535102	250000		190000
19-8-05	SPG (HDFC)-SNG-160554	250000		60000
20-8-05	Godde-Swen-094622		96000	36000
20-8-05	V.K.Gadde Swen 0495804		96000	132000
20-8-05	Swen-773190		96000	228000
	44XA.5 Chas	71000		
3/9/2005	Cash received			250000
1/9/2005	Cash paid	3860		

2/9/2005	T&G ABG Bondwell (948929)	150000		
	1.5 lacs X2%	3000		
3/9/2005	Swen Bond 160361	150000		
5/9/2005	Bondwell SPG		100000	
	Cash paid	140		
2/9/2005	DD of Lingyas	500000		
2/9/2005	Lingyas 1038399	900000		
2/9/2005	Lingyas 038700	900000		
2/9/2005	Lingyas 387010	900000		
2/9/2005	Lingyas 038707	900000		
2/9/2005	Lingyas 038073	900000		
Page-32				
2/9/2005	Lingyas 038704	900000		
5/9/2005	Cash Received		100000	
6/9/2005	Bond-SPG TR		300000	
6/9/2005	Cash Received		100000	
7/9/2005	Cash Received		650000	
7/9/2005	Cash received		650000	
8/9/2005	Cash Received		685000	
8/9/2005	Cash Received		515000	
	Swen		21600	
	Swen		21600	
	Swen (21600X7)		151200	
	Swen (21600X4)		86400	
19-9-05	DD charges of 50 lac	75000		
19-9-05	Cash paid	205800		
19-9-05	Swen-443167		21600	
19-9-05	Swen-623626		21600	
19-9-05	Swen-425371		21600	
19-9-05	Swen-464062		21600	

19-9-05	Swen-396798		21600	
20-9-5	Cash Received		400000	
20-9-05	Cash paid	108000		
21-9-05	Swen Pert 167292	400000		
26-9-05	Cash Received		500000	
26-9-05	Hi bon fin 545463	500000		
28-9-05	Cash Received		1000000	
30-9-05	SPG Bond finan 165711	500000		
3/10/2005	SPG Bond Finan 165712	500000		
3/10/2005	DMC Bond 709349	500000		
4/10/2005	Cash paid	500000		
5/10/2005	Bond Finan North 43678		450000	
7/10/2005	Swen bond 171180	600000		
10/10/2005	Bond Swen		600000	

10.3. During the course of search and seizure operation in S.K.Gupta Group of cases at H-108, 2nd Floor, New Asiatic Building, Connaught Place, New Delhi, a document has been seized as per page 25 of Annexure A-1, in which investment entries of companies controlled by Shri. S.K.Gupta is mentioned. The extract of the same is reproduced hereunder for your explanation and giving nature, details and source of the entries mentioned therein. It is worth mentioning that name of certain companies in which you, your family members and your relatives are interested, are appearing in this account.

Extract of page 25 of annexure A-1 of Party A-5, seized during the course of search and seizure operation in S.K.Gupta Group of cases at H-108, 2nd Floor, New Asiatic Building, Connaught Place, New Delhi.

Sr. No.	Date	Company name	Cheq. No.	Amount	
1	15-01-2005	Era Advertising & mark. Co.	470221	250000	
2.	19-01-2005	Hightech Comvision Limited	190634	250000	
3.	15-01-2005	North India Securities Pvt. Ltd.	820708	250000	
4.	15-01-2005	P.G. Travels	184215	250000	
5.	03-04-2005	Glovextech	401442	800000	
6.	03.04.2005	Flovextech	401443	500000	
7.	03-08-2005	Cell Cell Technology	449110	1200000	
8.	03-11-2005	Power Gold Electronics	685071	1200000	
9.	19-03-05	Bolni Expenses	561557	750000	
10.	19-03-05	Power Gold Electronics	685073	1500000	
11.	10-03-2005	S.K.Gupta Ji	165712	500000	
12.	10-03-2005	S.K.Gupta Ji	709349	500000	7950000

Bondwell Insurance Brokers

1	30-04-05	T.G. Quality & Mamt. Consultants	596133	300000	
2	04-10-2005	S.K.Gupta	319711	226000	
3.	31-03-05	Era Advertising & Mkt. Pvt. Ltd.	472796	500000	1026000

E-Synergy Infosystem Pvt. Ltd.

1	17-01-05	Hitech Computech Pvt. Ltd.	190631	250000	
2	17-01-05	North India Securities Pvt. Ltd.	820707	250000	
3.	26-09-05	S.K.Guptaji		500000	1000000

Paradigm Advertising

1	22-01-05	P.G.Travels Pvt. Ltd. Quality & Mamt. Consultants	184218	250000	
2	22-01-05	Advertising Marketing Pvt. Ltd.	470222	250000	500000

You are requested to explain your connection with the investing companies and investee companies(your companies), with reference to the books of account and other documents.

3.1 In response thereto, the assessee has submitted following reply vide letter dated 23.12.2008 :

10.2) The assessee has already submitted that the said page 30-33 of annexure A-31 of party A-5 found and seized from the premises of Sh. S.K. Gupta do not belong to the assessee or his family members and concern. The assessee has no concern what so ever in the entries recorded in the said page 30-33 of annexure-A-31 of party A-5 found and seized from the premises of Sh. SK. Gupta. It is submitted further that search was also carried out at the assessee 's residence and office premises. These entries do not corroborate with any documents seized or books of accounts found from the assessee's residential or office premises searched by Income Tax Department. Sir, it will be of great help in identifying and explaining the entries if the author of this documents is summoned for the cross examination.

(emphasis provided by the Bench)

10.3) The assessee has already submitted that the said page 25 of annexure-A-1 found and seized from the premises of Sh. SK. Gupta do not belong to the assessee or his family members and concern. The assessee has no concern what so ever in the entries recorded in the said page 25 of annexure-A-1 of party A-5 found and seized from the premises of Sh. S.K. Gupta. It is submitted further that search was also carried out at the assessee 's residence and office premises. Theses entries do not corroborate with any documents seized or books of accounts found from the assessee's residential or office premises searched by Income Tax Department. Sir, it

will be of great help in identifying and explaining the entries of the author of this documents is summoned for the cross examination.

(emphasis provided by the Bench)

3.2 The assessee's submissions made in response to the specific questions asked on the basis of seized documents found during course of search in Sh. S.K. Gupta Group of cases, is nothing but an evasive reply for the following reasons:

(i) The assessee has claimed to be a friend of Sh. S.K. Gupta, during the course of statements.

(ii) The assessee being a chartered accountant is auditor of various companies of the concerns of Sh. S.K. Gupta.

(iii) The description of the entries on the seized documents as referred to in question no. 10.3, very well indicates the specific names like Bondwell Insurance Brokers, E- Synergy Infosystems Pvt. Ltd. and Paradigm Advertising, which are the companies/concerns, in which assessee's family members or relatives are interested.

(iv) So far as the entries as per documents referred to in question no. 10.2,, is concerned, the same have been mentioned in the ledger account in the name of Sh. Anil Khandelwal, assessee and it bears the name of Bondwell on different dates. It also has pay order (P.O.) nos. clearly mentioned against the name of companies like Swen, Era, Hitech, DMC, SPG etc, which forms the part of Sh. S.K. Gupta Group of cases, so the assessee's claim that it has nothing to do that this document is incorrect.

(v) In fact the assessee, has taken accommodation entries for his family concerns/companies from tie concerns/companies of Sh. S.K. Gupta Group of cases. For this purpose assessee has made cash payments and also paid commission @ 2% which is very much evident from the entry dated 02.09.2005 at page 31 of annexure A-31 of Party A-5 seized during the course of search and seizure operation in Sh.S.K.Gupta Group of cases.

(vi) The assessee has made cash payments on various dates against which the group companies of Sh. S.K.Gupta has issued pay orders, obviously accommodation entries of investment. Even if it is considered that assessee has acted as conduit for getting accommodation entries for his group of companies by rotating the cash funds, the peak cash amount is worked out on 08.09.2005 at Rs.27,00,000/- (Rs. 1,00,000/- + Rs.1,00,000/- + Rs.6,50,000/- + Rs.6,50,000 + Rs.6,85,000/- + Rs.5,15,000/-) Since assessee has failed to give any specific information alongwith confirmation from his group companies/concerns who have taken accommodation entries from the group companies/concerns of Sh.S.K.Gupta, this peak amount of Rs.27,00,000/- is added to assessee's income as unexplained cash in the hands of the assessee.

Addition Rs.27,00,000/-

6.1. It is seen that the arguments advanced by the assessee in appeal before the CIT(A) are set out in the para 2.2 of the impugned order on a consideration of which the claim of the assessee has been allowed which has been assailed by the Ld. CIT DR as not relevant. The submissions are extracted hereunder for ready-reference :-

2.2. *“As against the above action of the AO, the appellant made detailed submissions which are summarized hereunder:-*

1. *It is submitted on behalf of the appellant that , while rejecting the explanation of the appellant, the AO has made addition based purely on doubts, suspicion, conjectures and surmises, and without bringing in any cogent material on record. The AO alleged in the impugned order that the appellant has made cash payments on various dates against which the group companies of Sh. S.K. Gupta has issued pay orders, obviously accommodation entries of investment and has added the peak amount of Rs. 27,00,000/- It is quite evident that the AO has treated the alleged cash payments appearing on Page 32 of Annexure - A - 31 on 08.09.2005 as unexplained cash in the hands of the appellant and rebutted the contentions raised by the appellant on the basis that the appellant claimed to be a friend of Shri S. K. Gupta and that the appellant being a Chartered Accountant was the auditor of various companies of Shri S.K.Gupta. The other two reasons are that the seized documents mentioned specific names like Bondwell Insurance Brokers, E-Synergy Infosystems Pvt. Ltd. and Paradigm Advertising, which are the companies / concerns in which assessee's family members or relative are interested and that the seized document reflects ledger account in the name of Anil Khandelwal and Bondwell on different dates and also shows numbers of pay orders issued by Swen Group of cases.*

2. *It is contended by the appellant that the appellant is a practicing chartered accountant and Shri S.K. Gupta is also a chartered accountant by profession. So, friendship between the two professionals can be possible. But mere friendship between the two chartered accountants cannot be basis of presumption that the said pages 30 to 33 of Annexure - A - 31 and Page 25 of Annexure - A - 1 seized from the premises of S.K. Gupta belonged to the appellant and sum appearing on the said pages were given by the appellant for taking accommodation entries.*

3. *It is also contended that the allegation made by the AD that the appellant being chartered accountant is auditor of various companies of the concerns of Shri S.K. Gupta is not factually correct. The appellant in his submission categorically stated that he had not carried out any audit for Shri S.K. Gupta*

in his personal capacity. No cogent evidence has been brought on record that the appellant is the auditor of the companies/ concerns of Shri S.K. Gupta.

4. It is further contended that the appellant and his family members or relatives are not interested in the said concerns except E - Synergy Infosystems Private Limited. However, it is pertinent to note that M/s E - Synergy Infosystems Private limited is a separate taxable entity and any transactions mentioned on certain pages about the said company cannot be treated as unexplained cash of the appellant. If any transactions related to the said company and any other concern were found recorded in the documents seized from Shri S.K. Gupta, the same cannot be added to the income of appellant merely on the basis that appellant and his family members or relatives are interested in those companies / concerns.

5. It is further contended that the AO himself alleged in the impugned order that transactions are related to Bondwell Insurance Brokers, E - Synergy Infosystems Private Limited and Paradigm Advertising. Hence, the said transactions are not related to the appellant and that can never be considered as evidence that the appellant is taking accommodation entries in the said companies / concerns. If the said companies / concerns have taken accommodation entries, the same can be added in their respective hands by initiating assessment proceedings under section 153C of the Income tax Act, 1961 as unexplained cash credit and not in the hands of the appellant. Instead of doing that the AO erred in law by making addition in the hands of appellant in respect of transactions related to other assessable persons instead or invoking provision of section 153C of the Income tax Act, 1961.

6. It is further contended that the appellant had categorically requested for photocopies of the pages 31 to 33 of Annexure - A - 31 and A - 25 of Annexure - A - 1 seized from the premises of Shri S.K. Gupta during the course of Search and seizure operation. However, AO did not provide the same and made the impugned addition in violation of principles of natural justice.

7. It is also contended that copies of the said documents and statement of Shri S.K.Gupta was provided by the AO during appellate proceedings in March 2011 from which it is seen that the documents found and seized from the premises of Shri S.K. Gupta did not have such clear cut evidence for making addition in the case of the appellant and evidence relied upon was vague and ambiguous. The alleged evidences are not related to the appellant as the learned assessing officer also failed to bring any evidence on record that Shri S.K. Gupta or other person has given statement or filed written submission that the said pages are related to transactions with Shri Anil Khandelwal, the appellant. Since, the said pages were neither accepted by the appellant to be belonged to him nor Shri S.K. Gupta accepted that the said transaction belonged to the appellant; the allegation made by the learned assessing officer did not have any basis except doubt, suspicion, conjecture and surmises. It is also pertinent to note that the cases of Shri S.K. Gupta

Group were also assessed by the learned assessing officer, but he failed to confirm the said facts from Shri S.K. Gupta during the course of assessment proceedings.

8. It is also contended that the right of natural justice is so fundamental that the failure to observe the principles of natural justice .cannot be made good in appeal and lack of opportunity before the Assessing Officer cannot be rectified by the appellate authority by giving such opportunity. Reliance was placed on the following decisions rendered by Hon'ble Supreme Court:

- (i) Shreeram Durga Prasad [RB vs. Settlement Commission (1989) 176 ITR 169 (SC)]*
- (ii) Nawaabkhan vs. State of Gujarat AIR 1974 SC 1471*
- (iii) CWT vs. Jagdish Prasad Choudhary (1995) 211 ITR 472 (Patna) [F.B.]*
- (iv) Appropriate Authority vs. Vijay Kumar Sharma (2001) 249 ITR 554 (SC)*
- (v) Tin Box Co. Vs. CIT (2001) 249 ITR 216 (SC)."*

6.2. The record shows that these submissions were forwarded by the CIT(A) to the AO as is evident from page 10-13 of the order under challenge wherein the Remand Report received by the CIT(A) from the AO has been extracted. For ready-reference, the same is also reproduced hereunder :-

2.2. "The appellant's submissions were forwarded to the AO for eliciting his comments or rebuttal, if any and the AO submitted his report dated 13/03/2012 reiterating the arguments contained in the Assessment Order . Relevant portions of his remand report is extracted hereunder:

"During the assessment proceeding, the assessee, vide question no. 10.2 and 10.3 of the questionnaire dated 07.11.2008, was asked to explain the connection with investing companies and investee companies, with reference to the books of account and other documents as per pages 30-33 of Annexure-A-31 and Page 25 of Annexure A-1 found and seized from S.K. Gupta Group of cases at H-108, 2nd Floor, New Asiatic Building, Connaught Place, New Delhi during the course of search and seizure operation under section 132 of the Income Tax Act, 1961.

The assessee submitted merely evasive replies devoid of any merits. The assessee failed to furnish any evidence to establish his contention that these transactions does not belong to the' assessee. It is worth mentioning that the names of the companies of the assessee clearly figure in the seized documents that were relied upon by the assessing officer. Further, the assessee failed to establish any business connection with the companies of Shri S.K. Gupta.

As far as the entries as per documents referred to in question no. 10.2, is

concerned, the same have been mentioned in the ledger account in the name of Shri Anil Khandelwal, assessee and it bears the name of Bondwell on different dates. It also has pay order (P.O.) nos. Clearly mentioned against the name of companies like Swen, Era, Hiech, DMC, SPG etc. which forms part of Shri S. K Gupta Group of cases. So the assessee's claim, that it has nothing to do with this document, is incorrect. The description of the entries on seized documents referred to in question no. 10.3, very well indicates the specific names like Bondwell Insurance Brokers, E-Synergy Infosystems Pvt. Ltd. and Paradigm Advertising which are the companies/concerns in which assessee's family members or relative are interested.

Regarding opportunity to cross examine the author of these documents (pages 30-33 of Annexure-A-31 and Page 25 Of Annexure-A-1 found and seized from S.K. Gupta Group of cases at H-108, 2nd Floor, New Asiatic Building, Connaught Place, New Delhi), it is stated that there is no material to show that the assessee was provided any such opportunity.

The submission of the appellant that a search and seizure operation was also carried out in the case of the appellant himself and no corroborative evidence was found from his business and residential premises, need not be given any importance as it is a matter of common sense that evidences that can establish unaccounted money (or money's worth 1) are kept to the minimum, in least number of hands/place and that too for the least possible time. Therefore, once evidences to establish the payment of cash for obtaining accommodation entry have been found at one place covered under search, non finding of the same from any other place is immaterial.

The submission of the appellant that no other corroborative evidences were found, is incorrect in the light of the following:-

a) It has been established that Shri. S.K. Gupta was providing accommodation entries with the help of his companies and entities.

b) The evidences relied upon were found from the premises of Shri. S.K. Gupta.

(c) The evidence relied upon mention the names of companies of Shri. S.K. Gupta which has been established to be bogus/paper companies having no real business activity and being maintained only for the purpose of providing accommodation entries.

d) The assessee failed to establish any business connection with the companies of Shri S.K. Gupta nor could the assessee file any evidence to explain as to why the name of his companies appear in the documents maintained by Shri S.K. Gupta who was, admittedly, an entry provider.

The contention of the assessee that he, in his individual capacity, had not

carried out any audit for Shri S.K. Gupta or companies controlled by him is incorrect, evasive and conceals the fact whether M/s Anil Khandelwal and Associates had carried out such audit of either Shri S.K. Gupta or any of his companies/entities. The assessee has admitted to be carrying out the profession of Chartered Accountant under this name. There is no material on record to show that M/s Anil Khandelwal and Associates is a separate person in the eyes of the law. The name suggests that it is a partnership firm in which partners have joint and several liability.

The contention of the assessee that the addition of unaccounted cash was made only the basis that assessee was a professional friend of Shri S.K. Gupta. is incorrect. Several evidences were gathered during the search to establish that the nexus between Shri S.K. Gupta and the assessee goes beyond a professional friendship. Notwithstanding the close nexus, the addition of unaccounted cash was not made on account of the nexus between the assessee and Shri S.K Gupta, rather, it was the basis of concrete evidences depicting transfer of amounts from bogus entities/companies of Shri S.K. Gupta who was an entry provider.

In fact the assessee has taken accommodation entries for his family concerns from companies of Shti. S.K. Gupta Group of cases. For this purpose, assessee has made cash payments and also paid commission @ 2% which is very much evident from the entry dated 02.09.2005 at page 31 of Annexure A-31 of party A-5 seized during the course of search and seizure operation in Shri S.K. Gupta group of cases.

The assessee has made cash payment on various dates against which the group companies of Shri S.K. Gupta has issued pay orders, obviously accommodation entries of investment. Even if it is considered that assessee has acted as conduit for getting accommodation entries for his group of companies by rotating the cash funds, the peak cash amount is worked out on 08.09.2005 at Rs.27,00,000/- (Rs.1,00,000/- + Rs. 6,50,000/- + Rs.6,50,000 + Rs. 6,85,000/- + Rs. 5, 15,000/-). Since assessee had failed to give any specific information along with confirmation from his group companies/concerns who have taken accommodation entries from the group companies/concerns of Shri. S.K. Gupta, this peak amount of Rs. 27,00,000/- was rightly added to assessee's income as unexplained cash in the hands of the assessee."

6.3. The impugned order further shows that thereafter the CIT(A) confronted the assessee with the remand report received. The assessee filed a Rejoinder thereto. The contents of the same have been brought out by the CIT(A) in para 2.2.1 to 2.2.2 of the impugned order. The same is reproduced hereunder for ready-reference:-

2.2.1 *In his rejoinder, the appellant has given detailed para-wise arguments against the observations made by the AO in his remand report. According to the appellant, the addition made by the AO was not justified in view of the facts that the documents on the basis of which the addition has been made was neither seized from the control and possession of the appellant nor belonged to the appellant and that no corroborative evidence was brought on record during the simultaneous search conducted in the case of the appellant himself. The appellant, in his rejoinder, has also mentioned that on being given an opportunity to cross-examine Shri S.K.Gupta, from whose possession and control the impugned seized material was found, Shri S.K.Gupta has categorically denied having entered into any transaction with the appellant or his concerns, which makes it clear that no addition on the basis of the impugned documents could be made in the hands of the appellant. However, the assessing officer has offered no comments on the Cross Examination of Sh. S.K. Gupta on 05.04.2011 which indicates that the contention of the appellant has been accepted by him.*

2.2.2 *Besides the above contentions, the appellant has also made detailed submissions regarding non-applicability of legal presumptions contained in section 292C in respect of documents found and seized from a third party. It has been contended that in a number of case laws it has been held that presumption under section 132(4A) is only against the person in whose possession the search material is found and not against any other person. It is further held that presumption is rebuttable and not conclusive and it cannot be applied in the absence of corroborative evidence. Reliance in this regard has been placed on various case laws as mentioned hereunder:-*

- i. *Straptex (India) Private Limited v Deputy Commissioner of Income tax [2003] 84ITD 320 (IT AT - Mumbai)*
- ii. *Assistant Commissioner of Income tax v Kishore Lal Balwani Rai [2007] 17 SOT 380 (ITAT - Chandigarh)*
- iii. *Sheth Akshay Pushpavadan v Deputy Commissioner of Income tax [2010] 130 TT J 42 (ITTA - Ahmedabad)*
- iv. *Rama Traders v First Income tax Officer [1988] 25 ITD 599 (ITAT Patna)(TM)*

6.4. In the above background the CIT(A) proceeded to decide the issue in the following manner, which has been challenged by the Revenue:-

2.3 *I have carefully considered the facts of the case, the arguments of the appellant and the position of law. The AO has made the impugned addition on the basis of documents found and seized from Shri S. K Gupta, a third party. His primary reasoning is that in these papers there are intelligible narrations signifying payments of cash on various dates by appellant to various group companies of Shri S.K.Gupta , who have issued accommodation entries for*

investment in the companies in which the appellant and his relatives are interested. The appellant on the other hand has contended that no presumption is available to the Assessing Officer u/s 132(4A)/292C of the I T Act with regard to the impugned seized documents as they were neither found and seized from the appellant nor do they belong to the appellant. Further, the appellant has also contended that despite a simultaneous search operation in the case of the appellant, no evidence whatsoever has been found which correlates with the impugned seized documents found from the premises of Shri S. K. Gupta ,a third party. The appellant has also taken the ground that Shri S. K. Gupta himself had denied the authorship/ ownership of the impugned documents during his statement on 13/12/2006 and reiterated the same even during his cross examination by the appellant before the AO on 05/04/2012. The appellant has also taken the ground that since Shri S. K. Gupta, during his cross examination by the appellant before the AO, has categorically denied having any transactions in cash with the appellant or his family members, companies or entities owned by him or them, the impugned addition made by the AO is based on no evidence but on presumptions, conjectures and surmises. I have perused copies of the statement of Shri S. K. Gupta recorded during the search operation on 13/02/2006 as well as the Cross- examination statement of Shri S. K. Gupta dated 05/04/2011 which was forwarded by the AO without any comments vide his remand report dated 02/11/2011 in respect of A.Y.2007-0S. It is seen from these statements that Shri S. K. Gupta has denied having authored the impugned seized material and has also denied that they are part of his books of accounts. He has also denied having made any cash transactions with the appellant or his family members or entities owned by them and has also denied having received any commission for the alleged accommodation entries given to such entities belonging to the appellant or his family members. The relevant portions of these statement are extracted hereunder for ready reference: -

A. Extracts from the statement of Shri S. K. Gupta at the time of search recorded on 13/12/2006 :

"Q-13 During the search & seizure operation u/s 132 of IT Act at the above premise certain Books of accounts & loose papers were found and seized and inventoried as Annexure 'A', sr. No, A-29 to A-36 of the said annexure is note books. Please explain the nature of these books and also explain the entries recorded therein. Please also explain as to which concern of your group these note books belong.

*Ans. I don't know about these **rough books** and how they are lying in my office premise.*

Q.14. How do you say these above annexure are rough books?

*Ans. **Apparently looks as rough books.** We are maintaining all our books on computer electronically.*

Q.15. Since the above annexure contain mostly daily record of cash receipts or cash payments and cheque payment, and have been seized from your premise, the onus lies on you to prove the presence of these annexures.

*Ans. As I have told earlier **I don't know about these annexures and I have come to this Office today only and these books were not seized in front of me.** I don't know about the where about of these books. These books **may be rough entries** of daily entries as shown to me in detail of our group companies & enter transfer and deposits. Further explanations will be given in your office".*

B. Extracts from the Cross Examination of Sh. S.K. Gupta dated 05.04.2011 as conducted before the AO:

"01. Mr. S.K. Gupta as per page 7 and other statements given by you to the Income Tax department during the course of search on your premises on 12-12-2006 you have disowned Annexure A, particularly Annexure A-31, A-33 and A-5. You have also said that these are rough books lying in your office. Do you still stand by these statements?

A 1. I still stand by my statement given on 13-12-2006.

02. Are you the author of annexure A-5, annexure A-31, or annexure A-33 found and seized from your premises?

A2. No. I am not.

Q3. Whether I have been given or taken cash as per or in lieu of any recordings done in the annexure A-5, A-31 or A-33?

A3. No I have not given or taken any cash from you and your office.

04. Did I pay or receive any commission out of any transactions referred to in any of the annexure A-1, A-31 or A-33?

A4 .. No, neither I received nor I paid any commission.

Q5. Do you know any other person by the name Anil Khandelwal?

A5. Yes, I know 2-3 more Anil Khandelwal belongs to my native place.

Q6. Did you ever receive or pay cash as per or in lieu of or commission or' any other transaction against any of my family members, companies or entities owned by me/them?

A6. No I have never received or paid any cash to above your connected persons."

(Emphasis supplied)

2.3.1 A perusal of the above extracts clearly indicates that in the absence of any corroborative evidence found during the search at the premises of the appellant, no adverse inference can be drawn against the appellant merely on the basis of the seized documents as found and seized from the premises of the third party. As has been held in a number of judicial pronouncements relied on by the appellant and extracted in para 2.2.2 hereinabove, presumption u/s 134(4A)/292C is available only in the case of the person from whose possession and control the documents are found and it is not available in respect of a

third party. Even in the case of such a person from whose possession and control any incriminating document is found, the presumption u/s 132(4A)/292C is a rebuttable one. Since in the case of the appellant, no corroborative documents or evidence has been found from the control or possession of the appellant, I hold that the legal presumption as incorporated u/s 132(4A)/292C will not be available to the Assessing Officer in the appellant's case.

2.3.2. Further, the appellant has also denied the contents of the impugned seized documents and the person from whom the impugned documents were seized has also stated during cross-examination that there has been no cash transactions between him and the appellant or his family members or entities in which they are interested. The AO has heavily emphasized on the fact that Shri.S.K.Gupta was an entry provider and since the names of the companies in which the appellant's family members or relatives were interested was found mentioned in the document seized from Shri S.K.Gupta, it is enough to conclude that the appellant must have paid cash to Shri Gupta to receive accommodation entries from his group companies. I am afraid, I cannot concur with such logic in the absence any corroborative evidence to suggest that the entries found in the seized documents were also reflected in the books of the appellant or his concerns. It is well settled in law that the loose papers, diaries and documents cannot possible be construed as books of account regularly kept in the course of business. Such evidence would, therefore, be outside the purview of Section 34 of the Evidence Act, 1972. Therefore, the revenue would not be justified in resting its case just on the loose papers and documents found from third party if such documents contained narrations of transactions with the assessee as decided by the Hon'ble Supreme Court in the case of Central Bureau of Investigation vs. V.C.Shukla (1988) 8 SSC 410 and Chuharmal vs. Commissioner of Income Tax (1988) 172 250/38 Taxman 190 (SC).

2.3.3 On a careful consideration of the totality of the facts and circumstances of the case and the evidence on record, it is clear that neither any document was found from the possession or control of the appellant during the simultaneous search operation which shows that any amount was transacted in cash by the appellant with the Companies of Shri. S.K.Gupta for getting accommodation entries from them so as to enable the Assessing Officer to draw adverse inference against the appellant on the basis of legal provision available u/s 132(4A)/292C nor the Assessing Officer has been able to bring out any material evidence to the effect that the appellant had actually earned such undisclosed income so as to rebut the denial made by the appellant. Further since on cross-examination by the appellant before the AO, Sh.S.K.Gupta categorically denied having received any cash from the appellant, his family members or entities in which they were interested, and the AO has not brought on record any adverse material

to controvert such denial, it would not be justified to fasten the impugned tax liability on the appellant. Accordingly the addition made by the AO cannot be legally justified or upheld. The only ground raised in this appeal is, therefore, decided in favour of the appellant.

(Relief of Rs.27,00,000/-)

7. We have heard the rival submissions and perused the material available on record. On a consideration of the same, we find that the arguments of the Ld. CIT DR have no merit. We find that the specific questions put to Sh.S.K.Gupta extracted in the impugned order during the cross-examination cannot be termed to be vague where full facts have not come out. A perusal of the same shows that consistently Sh.S.K.Gupta states that no money has been received or paid by him relatable to the annexures shown. The other objection of the Ld. CIT DR that the questions put forth in the cross-examination specifically question 14 & 15 were also vague. We find that the arguments of the Ld. AR that these are the extracts of the statement of Sh.S.K.Gupta recorded at the time of the search are correct and the Ld. CIT DR is mistaken in her arguments to contend that the questions No-14 & 15 extracted in the impugned order are vague questions put forth during the cross examination. It is seen that the assessee in both the years has filed a Paper Books running into 71 pages and 87 pages respectively and none of the parties have considered it necessary or expedient to refer to any document or fact therein. As an illustration we extract the index from ITA No-5516/Del/2012 which is more or less identical to the index filed in ITA No-5517/Del/2012:-

IN ITA No-5516/Del/2012

S.No.	Particulars	Page No
01.	<i>Submission</i>	<i>01-09</i>
02.	<i>Statement of assessee recorded at Home</i>	<i>10-13</i>
03.	<i>Statement on assessee recorded at office of assessee</i>	<i>14-30</i>
04.	<i>Panchnama</i>	<i>31-34</i>
05.	<i>Statement of assessee recorded on 25.04.2007</i>	<i>35-39</i>
6.	<i>Annexure A - 31 of party 5 seized from the premises of</i>	<i>40-41</i>

	<i>S K Gupta during the course of Search & Seizure operation On 12.12.2006</i>	
7.	<i>Assessment order under section 143(3) of the I,T Act, 1961 of Anil Khandelwal for the assessment year 2006-07 passed by the Asst. Commissioner of Income tax, Central Circle - 9, New Delhi</i>	42- 47
8.	<i>Statement recorded on Cross Examination of Sh.S.K Gupta at the office 35 Of DCIT, CC-9, New Delhi.</i>	48-49
09.	<i>Copy of Remand Report</i>	50-52
10.	<i>Appellate order under section 143(3) of the Income tax Act, 1961 of assessee for the assessment year 2006-07 passed by the Commissioner of Income Tax (Appeals) - XXXII, New Delhi</i>	53-71

IN ITA No-5517/Del/2012

S.No.	Particulars	Page No
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04.	<i>Panchnama</i>	31-34
05.	<i>Statement of assessee recorded on 25.04.2007</i>	35-39
06.	<i>Annexure A - 33 of party 5 seized from the premises Of S K Gupta during the course of Search & Seizure operation at his premises on 12.12.2006</i>	40-62
7.	<i>Assessment order under section 143(3) of the I.T Act, 1961 of assessee for the assessment year 2007-08 passed by The Asst. Commissioner of Income tax, Central Circle - 9, New Delhi</i>	63-66
8.	<i>Statement recorded on Cross Examination of Sh. S.K. Gupta at the office of DCIT, CC-9, New Delhi.</i>	67-68
09.	<i>Copy of Remand Report</i>	69-70
10.	<i>Appellate order under section 143(3) of the Income tax Act, 1961 of assessee for the assessment year 2007-08 passed by the Commissioner of Income Tax (Appeals) - XXXII, New Delhi</i>	71-87

7.1. We find that no evidence has been placed before us nor any cogent argument has been raised before us so as to show that on facts the view taken by the CIT(A) was not correct. In the absence of any specific infirmity in the impugned order or reliance placed upon any evidence upsetting the view taken, we find that the department has failed to offer any meaningful argument in support of its claim. No reasons which can be legally accepted so as to remand

the matter have also been placed before us. Thus in the light of the arguments advanced before us being satisfied by the reasoning and finding arrived at in the impugned order, we are of the view that the departmental appeal has no merit. We further find that the finding arrived at in the impugned order is fortified by the principle laid down in the judgement of the Hon'ble Bombay High Court in the case of ACIT vs Lata Mangeshkar (1973) 97 ITR 696 (Bom.). A perusal of the same shows that in the facts of that case reliance placed by the Revenue on the statement of two witnesses was considered to be not relevant for making an addition in the hands of the assessee therein. It is seen that whereas one of the witnesses was considered to be a person who could not have any knowledge the other witness who though was a partner in the concerned firm had given a statement that he had made payments to the singer in "black". Their Lordships were pleased to observe in the facts of that case that the statement at best could arouse suspicion but suspicion could not take place of proof and in the absence of proof, the statement was discarded. We also find that the order of the Co-ordinate Bench dated 07.02.2013 relied upon by the assessee in DCIT vs Yashpal Narendra Kumar in ITA No-5340 to 5342/Del/2012 also supports the case of the assessee fully. The Co-ordinate Bench therein held that addition on the basis of statement of the third party without any corroborative evidence is not tenable.

7.2. Accordingly for the detailed reasons given hereinabove, we find that there is no merit in the departmental appeal and the same is dismissed accordingly.

8. In the result ITA No-5516/Del/2012 is dismissed.

8.1. No separate arguments have been advanced by the parties in ITA No-5517/Del/2012 as the consistent stand of the parties before the Bench has been that facts and circumstances remain identical to ITA No-5516/Del/2012 and the finding therein would apply to 2007-08 A.Year in equal force. Considering the facts which we have briefly touched in para 2.3 of this order following the

reasoning and finding arrived at in ITA No-5516/Del/2012 the finding arrived at in the impugned order is upheld. Accordingly ITA No-5517/Del/2012 is also dismissed.

9. In the result ITA Nos. 5516 & 5517/Del/2012 are dismissed.

The order is pronounced in the open court on 18th of July 2014.

**Sd/-
(T.S.KAPOOR)
ACCOUNTANT MEMBER**

**Sd/-
(DIVA SINGH)
JUDICIAL MEMBER**

Dated:- 18/07/2014

Amit Kumar

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI