

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : F : NEW DELHI
BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA Nos.6588 to 6590/Del/2018
Assessment Years: 2013-14, 2014-15 & 2015-16

Pawan Kumar Dua,
C/o RRA Taxindia,
D-28, South Extension, Part I,
New Delhi.

Vs

ACIT,
Central Circle-28,
New Delhi.

PAN: AACPD2040F

(Appellant)

(Respondent)

Assessee by	:	Dr. Rakesh Gupta, Advocate & Shri Somil Agarwal, Advocate
Revenue by	:	Smt. Sushma Singh, CIT, DR
Date of Hearing	:	24.02.2020
Date of Pronouncement	:	28.04.2020

ORDER

PER R.K. PANDA, AM:

The above three appeals filed by the assessee are directed against the separate orders dated 25th September, 2018 of the CIT(A)-26, New Delhi, relating to A.Y. 2013-14 to 2015-16 respectively.

2. Since common issues are involved in all these appeals, therefore, these were heard together and are being disposed of by this common order.

ITA No.6588/Del/2018 (A.Y. 2013-14)

3. Facts of the case, in brief, are that the assessee is an individual and filed his return of income on 31st July, 2013, declaring the total income at Rs.8,07,290/-. A search and seizure action u/s 132 of the Act was carried out in Dua group of cases including the assessee on 25th April, 2014. Dua group is headed by the assessee Shri Pawan Kumar Dua and his brother Shri Rajesh Dua who are engaged in trading of non-ferrous metals through various companies. Shri Himanshu Kohli is a close associate of Dua brothers, who, according to the AO, handles the unaccounted cash sale/purchase of metal business of the Dua family. The premises of Shri Himanshu Kohli was also searched and the statements of the assessee as well as Shri Kohli were recorded u/s 132(4) wherein they have admitted to have been indulged in out of the book sale/purchase of non-ferrous metals. In response to notice u/s 153A, the assessee filed the return of income on 29th August, 2016 declaring the income at Rs.8,07,290/- which was declared earlier.

4. During the course of assessment proceedings, the AO noted that Shri Himanshu Kohli in his statement recorded on oath u/s 132(4), on being confronted with the seized documents had admitted that out of the book sale/purchase of metals was done by Dua group through him for which he was paid commission of Rs.1 per Kg. He also admitted that 70% of the total turnover of this metal trading business belonged to Shri Pawan Kumar Dua and 30% belonged to M/s Kewal Metal Store, a proprietorship concern of his father, Shri Kewal Kohli. The AO,

therefore, confronted the assessee and asked him to explain the entries in the seized documents and income earned on various transactions related to out of the books sale/purchases of metals. The AO asked the assessee to explain the incriminating documents found/seized during the search which are as under:-

- i) Annexures A-1 & A-2 seized by party SA-8 from D-237, 3rd Floor, Ashok Vihar, Phase-I, New Delhi; and
- ii) Annexures A-13 to A-16, A-70 to A-89, A-91 to A-94, A-96 to A-99, A-100 to A-120 seized by party SA-10 from flat 1-B, Pocket-A, Near Satyawati College, Ashok Vihar, New Delhi contain Dharam Kanta slips showing weight of different types of metals weighed alongwith vehicle number and handwritten slips containing noting of receipt/delivery of purchase/sale of such metals along with dates.

5. He also confronted the statement recorded of Shri Himanshu Kohli and asked the assessee to explain the financial year-wise break-up of quantitative details of such purchase and sale undertaken by him outside the books of account.

6. The assessee submitted that Annexures A-1 and A-2 seized by the party SA-8 from D-237, 3rd Floor, Ashok Vihar, Phase-I, New Delhi and Annexures A-13 to A-16, A-70 to A-89, A-91 to A-94, A-96 to A-99, A-100 to A-120 seized by party SA-10 from flat 1-B, Pocket-A, Near Satyawati College, Ashok Vihar, New Delhi do not belong to him nor the premises from where these were found are in assessee's occupation. Therefore, the assessee is not in a position to explain the

transactions mentioned in Exhibit-1. So far as the statement of Shri Himanshu Kohli that 70% of the sale transactions pertained to the assessee and the remaining 30% transactions relating to him are concerned, it was submitted that during the course of search itself, the assessee had categorically stated that he was just a friend of Himanshu Kohli owing to being into the same business and the assessee knows his father Shri Kewal Kohli for quite some time. It was submitted that only occasionally they have done very little business on commission basis and whatever business was done was done through one of the family concerns, namely M/s Klaxon Trading (P) Ltd. which is duly recorded in the books of account. It was submitted that the commission so paid to him for the business done through him was subject to TDS and duly reflected in the TDS return as well. So far as the statement of Shri Himanshu Kohli that the transactions in question had been carried out by him for the assessee is concerned, the assessee submitted that he has no connection at all with these transactions. The assessee vehemently submitted that since the transactions do not belong to him, the assessee is not in a position to give any further details. The assessee also requested for cross-examination of Shri Himanshu Kohli.

7. However, the AO was not satisfied with the explanation given by the assessee for the following reasons as per para 10.1 of his order:-

10.1 The above replies to various queries filed by the assessee are not acceptable in view of the following facts:-

1. Vide answer to question no 13 of his statement recorded u/s 132(4) on 25.04.2014 the assessee deposed as under (English version as statement was recorded in Hindi):-

Q.13. What is your relation with Sh Himanshu Kohli who is Director in M/s Kohli Homes Pvt Ltd ?

Ans Sh Himanshu Kohli is my friend and there is no business relationship with him.

2. Vide answer to question no 5 of his statement recorded on 24.06.2014 the assessee deposed as under (English version as statement was recorded in Hindi).

Q.5. Whether Sh Himanshu Kohli has relationship with you in business activities and if so please explain his activities ?

A.5. Yes, Sh Himanshu Kohli sells my material on commission @25-30% per kg.

3. Vide answer to question no 5 of his statement recorded on 09.09.2014 the assessee deposed as under (English version as statement was recorded in Hindi).

Q.5. Please tell since when you know Sh. Himanshu Kohli and how?

A.5. I know Sh. Himanshu Kohli through his father Sh Kewal Kohli who is in metal business. Sh. Himanshu Kohli sells the material of one of our companies M/s Klaxon Trading Pvt. Ltd.

4. Sh. Himanshu Kohli who handled the metal business of the assessee not only admitted u/s 132(4) that 30% of Metal business belongs to his firm M/s Kewal Metals but also surrendered 30% of the income alongwith commission from the very metal trading business received from the assessee and paid tax thereon.

5. Action u/s 132 of the Act was carried out in Dua Group only on the ground that they were doing sale purchase of metal business out of books of account.

From the above peculiar facts it can be seen that the assessee is every time changing his statements but the fact remains that he had been doing metal business with and with the help of Sh Himanshu Kohli to whom the commission was also paid by him.ô

8. He noted that during the assessment year the total metal transactions recorded in the books of companies of Dua Group worked out to Rs.88,22,18,942/- the details of which are as under:-

Name of the Company	Turnover during F.Y. 2012-13
Salasar Metallurgicals Pvt Ltd	102738987
Klaxon Trading Pvt Ltd	348540117
Charvak Trading Pvt Ltd	344628149
Baisakhi Ram Girdharilal Pvt Ltd	86311689
Total	882218942

9. The AO on the basis of the seized documents worked out 70% of the total unaccounted turnover in respect of metal trading business of Dua group along with value @ 324 per Kg. as under:-

Assessment Year	Total Qty (revised as per discussions above)	70% of Qty mentioned in Col 2 (belonging to Dua Group)	Value of stock in Col 2 @ Rs 324 per KG as per DGS&D rates (Rs)
1	2	3	4
2013-14	3920560.10	2744392.07	88,91,83,008
2014-15	14093661.30	9865562.91	3,19,64,42,088
2015-16	361287.22	252901.05	8,19,39,924
Total	18375508.62	12862856.03	4,16,75,65,020

10. Since the assessee had undertaken unaccounted transactions to the tune of Rs.416.7 crores the AO, applying the GP rate of 1.92% on the stock value of Rs.88,91,83,008/- for the year under consideration, determined the taxable income in the hands of the assessee at Rs.1,70,72,313/-. Similarly, the AO made addition of Rs.1,31,95,532/- being the unaccounted investment in the metal trading business. The AO also made an addition of Rs.27,44,392/- being the commission

paid to Shri Himanshu Kohli as per his statement that he is being paid commission @ Rs.1 per Kg. The AO accordingly determined the total income of the assessee at Rs.3,38,19,530/-.

11. Similar addition has been made by the AO in A.Y. 2014-15 wherein he made addition of Rs.6,13,71,688/- on account of GP on unaccounted metal trading business and Rs.98,65,563/- being the commission paid in cash to Shri Himanshu Kohli.

11.1 For A.Y. 2015-16, the AO made addition of Rs.5,40,803/- being GP on account of unaccounted metal trading business and Rs.2,52,901/- being unaccounted investment in metal trading business and Rs.55,08,739/- on account of unaccounted commission received from MCX Trading.

12. In appeal, the Id.CIT(A) upheld the addition so made by the AO for all the three years.

13. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:-

1. (a) That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in assuming jurisdiction u/s 153A and further erred in passing the impugned assessment order.

1(b) That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in assuming jurisdiction and framing the impugned assessment order u/s 153 A, is bad in law and against the facts and circumstances of the case and the same is not sustainable on various legal and factual grounds.

2. (a) That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making addition of Rs. 1,70,72,313/- on account of alleged gross profit calculated on the basis of material allegedly found during the course of search of third person by treating it as alleged unaccounted income of assessee and that too by recording incorrect facts and finding and without observing the principles of natural justice.

2(b) That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in making addition of Rs. 1,70,72,313/- on account of alleged gross profit, is bad in law and against the facts and circumstances of the case.

2(c) That in any case and in any view of the matter, impugned addition has been made without confronting the entire adverse material available on record and without providing the opportunity of cross examination of Sh. Himanshu Kohli.

3. (a) That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making addition of Rs.1,31,95,532/- on account of alleged unaccounted investment on the basis of material allegedly found during the course of search of third person by treating it as alleged unaccounted income of assessee and that too by recording incorrect facts and findings and without observing the principles of natural justice.

3(b) That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in making addition of Rs. 1,31,95,532/- on account of alleged unaccounted investment, is bad in law and against the facts and circumstances of the case.

3(c) That in any case and in any view of the matter, impugned addition has been made without confronting the entire adverse material available on record and without providing the opportunity of cross examination of Sh. Himanshu Kohli.

4. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making addition of Rs.27,44,392/- on account of alleged commission paid and that too by recording incorrect facts and findings and without observing the principles of natural justice.

5. That in any case and in any view of the matter, addition made in the impugned assessment order are beyond jurisdiction and illegal also for the reason that these could not have been made since no incriminating material has been found as a result of search.

6. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not reversing the action of Ld. AO in charging interest u/s 234B of Income Tax Act, 1961.

7. That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other.ô

14. The assessee has also raised the following additional grounds:-

ô1. That having regard to the facts and circumstances of the case, impugned assessment order passed u/s 143(3)/153A is bad in law more so when approval u/s 153D is not valid statutory approval.

2. That in any case and in any view of the matter, action of Ld. AO in passing the impugned assessment order u/s 143(3)/153A without obtaining the valid approval u/s 153D is bad in law and against the facts and circumstances of the case.ô

15. Referring to the decision of the Honöble Supreme Court in the case of *NTPC Ltd. vs. CIT*, 229 ITR 383 and various other decisions, the Id. Counsel submitted that these grounds being purely legal in nature and do not require fresh facts to be investigated and these go to the root of the matter, the same should be admitted.

16. After hearing both the sides, the additional grounds being purely legal in nature and no fresh facts are required to be investigated, therefore, the same are admitted for adjudication.

17. The Id. Counsel for the assessee submitted that the approval was given by the higher authorities in only one line. He submitted that these are search matters and in order to provide safeguard, the approval of the higher authorities have been provided u/s 153D. However, a perusal of such approval shows that there is

neither proper satisfaction nor proper justification given in the approval. Referring to the following decisions, he submitted that the approval given by the superior authorities being not in accordance with the law, such order passed by the AO should be quashed:-

- i) Smt. Shreelekha Damani vs. DCIT (2015) 125 DTR 263 (Mumbai) (Trib);
- ii) PCIT vs. Smt. Shreelekha Damani approved by the Hon'ble Bombay High Court vide ITA No.668 of 2016;
- iii) DCIT vs. Citimates Builders & Promoters (P) Ltd. (ITA No.3169/Del/2015).

18. The ld. DR, on the other hand, submitted that proper approval has been given by the superior authorities and the assessee cannot challenge such approval by stating that the superior authorities have not applied their mind.

19. After hearing both the sides, we find no merit in the arguments advanced by the ld. Counsel in so far as additional grounds are concerned. The ld. Counsel could not substantiate with evidence to our satisfaction that the AO has not obtained valid approval u/s 153D. Under these circumstances, and in absence of any material to substantiate his case, the additional grounds raised by the assessee are dismissed.

20. The ld. Counsel for the assessee did not press grounds No.1(a) and 1(b). Accordingly, the same are dismissed.

21. Grounds of appeal No.5 and 7 being general in nature are dismissed.
22. Ground of appeal No.6 relates to charging of interest u/s 234B of the Act which is mandatory and consequential in nature. Accordingly this ground is also dismissed.
23. So far as the remaining grounds are concerned, these relate to the order of the CIT(A) in confirming the addition of Rs.1,70,72,313/- as unaccounted income outside the books of account and Rs.1,31,95,532/- on account of unaccounted investment and Rs.27,44,392/- on account of alleged commission paid to Shri Himanshu Kohli.
24. The Id. Counsel for the assessee strongly challenged the order of the CIT(A) in sustaining the various additions made by the AO for different assessment years.
25. Referring to page 41 of the paper book, the Id. Counsel for the assessee drew the attention of the Bench to the statement recorded u/s 132(4)/133A on 25th April, 2014 of Shri Himanshu Kohli wherein he had stated his address as under:

óResident of D-237, 3rd Floor, Ashok Vihar, Phase-I, New Delhi.ô

26. Referring to page 59 of the paper book, he drew the attention of the Bench to the statement recorded u/s 134(4) of Shri Himanshu Kohli on 25th April, 2014 at 9 AM wherein, again, he has stated his address to be

ôD-237, 3rd Floor, Ashok Vihar, Phase-I, New Delhi.ö

27. Referring to page 287 of the paper book, the ld. Counsel for the assessee drew the attention of the Bench to the statement recorded u/s 132(4)/133A of Shri Himanshu Kohli on 21st June, 2014 at 5.20 PM wherein, again, in response to question No.1, he has introduced himself to be the resident of D-237, 3rd Floor, Ashok Vihar, Phase-I, New Delhi

28. Referring to page 40 of the paper book filed by the Revenue, the ld. Counsel for the assessee submitted that in his statement recorded u/s 132(4)/133A on 1st May, 2014, Shri Himanshu Kohli had given his residential address as D-237, 3rd Floor, Ashok Vihar, Phase-I, New Delhi. Similarly, referring to page 46 of the paper book filed by the Revenue, he drew the attention of the Bench to the statement recorded u/s 132(4)/133A of Shri Himanshu Kohli on 21st June, 2014, wherein he had given his residential address as D-237, 3rd Floor, Ashok Vihar, Phase-I, New Delhi. Referring to page 48 of the paper book filed by the revenue, he drew the attention of the Bench to the statement recorded u/s 132(4)/133A of Shri Himanshu Kohli on 24th June, 2014 wherein, again, he had given his residential address as D-237, 3rd Floor, Ashok Vihar, Phase-I, New Delhi. Referring to page 55 of the paper book, he drew the attention of the Bench to the statement recorded u/s 131(1A) of the IT Act of Shri Himanshu Kohli on 9th September, 2014 wherein again, he had given his residential address as D-237, 3rd Floor, Ashok Vihar, Phase-I, New Delhi. He accordingly submitted that the seized documents as per Annexure A-1 and A-2 seized by the party SA-8 from D-

237, 3rd Floor, Ashok Vihar, Phase-I, New Delhi are seized from the residence of Shri Himanshu Kohli and not that of the assessee.

29. The Id. Counsel for the assessee, referring to page 41 of the paper book, drew the attention of the Bench to the answer to Question No.2 recorded u/s 132(4)/133A wherein Shri Himanshu Kohli in his reply had stated that he deals in the business of metals like copper, zinc, brass, etc. Referring to page 44 of the paper book, he submitted that in his reply to question No.11 on the said date, he had mentioned that he owns two godowns out of which one is situated at Sadar Bazar and the second one is at Village Karala, Near Water Tank, Delhi. Referring to page 60 of the paper book, he submitted that Shri Himanshu Kohli in his reply to Question No.3, vide statement recorded u/s 132(4) on 25th April, 2014, had stated that his main source of income is from metal trading, commission income on metal trading and MCX trading/ödibbaö trading, etc. Referring to pages 288 and 289 of the paper book, the Id. Counsel for the assessee drew the attention of the Bench to answer to Question No.2 recorded u/s 132(4)/133A of the Act wherein Shri Himanshu Kohli had stated that the godown at 5723, Basti Harphool Singh, Sadar Bazar, Delhi, was sealed on 1st May, 2014 and eight seals were put on it and that the stock lying in the godown as per stock inventory is true and correct. Referring to page 43 and 44 of the paper book filed by the Revenue, the Id. Counsel for the assessee drew the attention of the Bench to reply given in response to Question

No.1, 2 and 3 in his statement recorded u/s 131(1A) on 16th May, 2014, which reads as under:-

Q.1 Please Identify yourself.

A.1 I am Himanshu Kohli, s/o Sh. Kewal Kohli, resident of D-237, Ashok Vihar, Phase-1, New Delhi.

Q.2 The godown at 5723 at Basti Harphool Singh, Sadar Bazar, Delhi-110006 was sealed with warrant u/s 132 of IT Act on the initial day of search i.e. 25.04.2014 as no one claimed the ownership of this premises. On 01.05.2014, this premises was de-sealed wherein Mr. Sudhir came with the keys to open the Premise. Inventory of physical stock was taken in the presence of two independent witnesses with technical expert M/s Narang Metallurgical & Spectro Services who identified the quality of the metal in the godown. This premise was re-sealed as Mr. Sudhir failed to substantiate about the ownership details of the stock lying in the godown. Mr. Sudhir told that he is an employee of M/s Kewal Metal Store and Shri Himanshu Kohli. Kindly acknowledge it and comment on the ownership of this godown & stock lying in it at 5723, Basti Harphool Singh, Sadar Bazar, New Delhi?

A.2 I acknowledge the same the above facts and hereby confirm & own the stock lying at 5723, Basti Harphool Singh, Sadar Bazar, New Delhi and this stock belongs to M/s Kewal Metal Store, the proprietorship concern of my father Sh. Kewal Kohli and I am the key person handling the affairs of the Kewal Metal Store due to ill health of my father.

Q.3 Why you have not owned the ownership of the godown and the stock lying at 5723, Basti Harphool Singh, Sadar Bazar, New Delhi, earlier on two occasions on 25.04.2014 and 01.05.2014?

Ans. This godown was under the knowledge of my father ,Sh. Kewal Kohli and he has been operated for heart ailment in the month of March 2014 itself, therefore, I was not aware of this godown earlier. Now I own the ownership of godown and stock lying thereat in 5723, Basti Harphool Singh, Sadar Bazar, New Delhi.

30. Referring to page 40 and 41 of the paper book filed by the Revenue, he submitted that Shri Himanshu Kohli in his statement recorded u/s 132(4)/133A on 1st May, 2014 has stated that his source of income was from metal business on commission basis and files his return of income regularly. Referring to pages 56

and 57 of the paper book filed by the Revenue, the Id. Counsel drew the attention of the Bench to the Question No.3, wherein Shri Himanshu Kohli, in his reply to question No.3 has stated that he does all the transactions of metal business on commission basis which were not recorded in the books of account. Referring to page 50 of the paper book, the Id. Counsel drew the attention of the Bench to the reply given in response to Question No.6 recorded u/s 132(4)/133A on 24th June, 2015 wherein he had explained the seized documents found regarding the copper ingots, number of pieces, etc. Referring to various other pages of the Revenue's paper book, the Id. Counsel drew the attention of the bench to the reply given by Shri Himanshu Kohli explaining the manner in which he does the metal trading business. Referring to page 42 of the paper book filed by the assessee, the Id. Counsel for the assessee drew the attention of the Bench to the reply given in response to Question No.4 recorded u/s 132(4)/133A on 25th April, 2014 wherein Shri Himanshu Kohli has stated as under:-

“I am taking part in running the business of M/s Kewal Metals by helping my father who is proprietor of this concern. Besides this I am Director in M/s Kohli Homes (P) Ltd.”

31. He accordingly submitted that when the documents were seized from the premises of Shri Himanshu Kohli who admitted that he does metal trading business on commission basis and his father also does similar trading in metal, therefore, merely on the basis of the statement of Shri Himanshu Kohli, huge additions could not have been made in the hands of the assessee. Referring to various pages of the

paper book and the reply given by Shri Himanshu Kohli in response to questions put by the Investigation Wing, the Id. Counsel for the assessee submitted that Shri Himanshu Kohli is not truthful especially when he says that he does not know anything about the movable and immovable property held by him and date of acquisition, the details of his bank account and lockers maintained by him. Even he had stated that cash found of Rs.44,00,200/- from his premises is the cash received from Metal trading done by Shri Kewal Metals which is not recorded in the regular books. Referring to the reply given by Shri Himanshu Kohli in response to Question No.40 in his statement recorded u/s 132(4)/133A on 25th April, 2014, the Id. Counsel submitted that Shri Himanshu Kohli had stated that he does not know the 11 companies who have purchased shares from his company at a premium of Rs.40 per share and who have invested more than Rs.1.2 crores in the share capital and share premium of M/s Kohli Homes (P) Ltd. He accordingly submitted that Shri Himanshu Kohli was not truthful. The Id. Counsel referring to the answer given by Shri Himanshu Kohli to various questions put by the Investigation Wing, submitted that Shri Himanshu Kohli was doing his business of dabba trading in different metals and is involved in cricket batting. He accordingly submitted that merely on the basis of statement of Shri Himanshu Kohli, who himself does metal trading business and also involved in MCX trading and dabba trading and who is not truthful, huge additions could not have been made in the hands of the assessee.

32. The Id. Counsel for the assessee submitted that the request of the assessee for cross-examination of Shri Himanshu Kohli was not accepted by the AO. Referring to the assessment order of Shri Kewal Kohli, Proprietor of M/s Kewal Metals, the Id. Counsel drew the attention of the Bench to the order passed u/s 143(3)/153A on 30th December, 2016 and drew the attention of the Bench to para 8 and 9 of the said order according to which Shri Himanshu Kohli along with his close associates Shri Gagan Arora and Sandeep Kwatra maintained the record of unaccounted transactions at flat 1-B, Pocket-A, Near Satyawati College, Ashok Vihar, New Delhi. Therefore, when both father and son were doing this unaccounted sale and purchase of metal trading from the premises owned by them at D-237, 3rd Floor Ashok Vihar, New Delhi and Flat No. 1-B, Pocket-A, Near Satyawati College, Ashok Vihar, additions could not have been made in the hands of the assessee on the basis of the seized documents found from the premises of Shri Kewal Kohli and Shri Himanshu Kohli.

33. He submitted that the Id.CIT(A) without appreciating the facts properly that Shri Himanshu Kohli was also indulged in unaccounted metal trading business and has given evasive reply to the questions put to him by the Revenue authorities and was residing in the premises from where the seized documents, which are the basis of addition, were found from the said premises has upheld the various additions made by the AO and, therefore, the same should be set aside.

34. The ld. DR, on the other hand, heavily relied on the order of the CIT(A). He submitted that the assessee in his statement has submitted that Shri Himanshu Kohli is just a friend and that his father is known to him and Shri Himanshu Kohli was doing business on commission basis. However, a perusal of the statement recorded of Shri Himanshu Kohli clearly shows that the assessee was doing business along with Shri Himanshu Kohli on commission basis which were not recorded in the books of account. He submitted that the Tribunal in the case of Shri Himanshu Kohli vide ITA Nos.6590 to 6592/Del/2017 for AYs 2013-14 to 2015-16 had accepted the return of income of Shri Himanshu Kohli and, therefore, there is no need to interfere in the findings given by the CIT(A) in the case of Shri Pawan Kumar Dua. So far as the arguments of the ld. Counsel that the assessee was not given an opportunity to cross-examine is concerned, the ld. DR referring to the decision of Hon'ble Allahabad High Court in the case of *Motilal Padampat Udyog Ltd. vs. CIT*, reported in 293 ITR 565 submitted that right of cross examination from whom the AO has collected the evidence is not required under the Income Tax Law and such assessment was valid under the Act. She submitted that the Revenue has to consider the surrounding circumstances and they are entitled to find out the reality of the recitals made in the said documents. Referring to the decision of the Hon'ble Patna High Court in the case of *Dr. Gauri Shankar Prasad v. ITO*, 393 ITR 635, she submitted that the Hon'ble High Court in the said decision has held that where the assessee had been given sufficient opportunity in the matter and at no point of time did he raise the plea that copies of the statements

of persons relied upon or such evidence ought to be supplied to him or that he intended to cross-examine them, therefore, it was not open to him to turn around and claim that he had been denied the opportunity of cross-examination and the statements in question could not be used against him. Relying on various other decisions, she submitted that the assessee had not specifically asked for the cross-examination of Shri Himanshu Kohli, but, has requested for the details of transactions relating to him, so that the same can be confronted and cross-examination from the parties entered into transactions with Shri Himanshu Kohli. Therefore, when the assessee has not specifically demanded the cross-examination of Shri Himanshu Kohli, therefore, the assessee now cannot claim that he was denied the opportunity of cross-examination.

35. The Id. Counsel for the assessee in his rejoinder submitted that on 25th April, 2014, the premises of both Shri Kohli as well as the assessee were searched. If at all the assessee was doing business of that much magnitude then how nothing was found from the premises of the assessee. Therefore, the preponderance of probability is not against the assessee, but, against Shri Himanshu Kohli who himself was doing such type of trading. He submitted that addition, if any, could only be made entirely in the hands of Shri Himanshu Kohli and no addition can be made in the hands of the assessee. He submitted that when the assessee was doing metal trading business in the name of the company M/s Klaxon Trading (P) Ltd., wherein he was a director and all the transactions were recorded in the said company, addition in the hands of the assessee cannot be made.

36. We have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the AO, on the basis of the seized documents found from D-237, 3rd Floor, Ashok Vihar, Phase-I, New Delhi and flat 1-B, Pocket-A, Near Satyawati College, Ashok Vihar, New Delhi, made the addition of Rs.1,70,72,313/- in the hands of the assessee being 70% of unaccounted profit on such unaccounted turnover in respect of metal trading business for the impugned assessment year. He also made addition of Rs.1,31,95,532/- on account of unaccounted investment in such metal trading business and Rs.27,44,312/- being the commission paid in cash to Shri Himanshu Kohli which was not recorded in the books of account. We find, the ld.CIT(A) sustained the addition made by the AO. It is the submission of the ld. Counsel that the so-called seized documents which are the basis of addition in the hands of the assessee are found either from the premises of Shri Himanshu Kohli or the premises of his father Shri Kewal Kohli and no document relating to the unaccounted trading in such metal was found from the premises of the assessee. It is also his submission that when Shri Himanshu Kohli and Shri Kewal Kohli are also engaged in metal trading business and the seized documents were found from their premises, merely because Shri Himanshu Kohli in his statement submitted that only 30% belongs to Shri Himanshu Kohli and 70% belongs to Shri Pawan Kumar Dua, no addition could have been made in the hands of the assessee without any corroborative evidence.

37. We find some force in the above argument of the ld. Counsel for the assessee. We find the AO made the addition in the hands of the assessee on the basis of the following seized documents:-

- a) Annexures A-1 & A-2 seized by party SA-8 from D-237, 3rd Floor, Ashok Vihar, Phase-I, New Delhi; and
- b) Annexures A-13 to A-16, A-70 to A-89, A-91 to A-94, A-96 to A-99, A-100 to A-120 seized by party SA-10 from flat 1-B, Pocket-A, Near Satyawati College, Ashok Vihar, New Delhi contain Dharam Kanta slips showing weight of different types of metals weighed alongwith vehicle number and handwritten slips containing noting of receipt/delivery of purchase/sale of such metals along with dates.
- c) Annexure A-34 to A-50, A-54, A-58, A-60 to A-65 and A-67 to A-69 seized by party SA-10 from Flat 1-B, Pocket-A, Near Satyawati College, Ashok Vihar, New Delhi in the form of small diaries/notepads contain details of various sale/purchase parties, quantity of different types of metals purchased/sold aggregating to 2,71,96,665 Kgs and the value of total sale in respect of these transactions noted in the said Annexures/diaries totaling to Rs 845,93,84,275. The printout of the same was provided to the assessee as Exhibit-2 with the questionnaire.
- d) Annexure A-18, A-20, A-22, A-24, A-27, A-29 and A-32 seized by party SA-10 from Flat 1-B, Pocket-A, Near Satyawati College, Ashok Vihar,

New Delhi in form of various Notepads/Diaries which contain the date-wise details of amounts received and paid. The total receipt comes to Rs 1466,40,76,135 and the total payments made comes to Rs 1224,01,14,255. The year wise detail of the above receipts and payments on the basis of material seized as per the above annexures was provided to the assessee as Exhibit-3 with the questionnaire. Further, the scanned image of one page each from Annexure A-22 was also displayed in the said questionnaire.

38. A perusal of the statement recorded of Shri Himanshu Kohli shows that on every occasion he has mentioned his residential address to be at D-237, 3rd Floor, Ashok Vihar, Phase-I, New Delhi. Similarly, Shri Himanshu Kohli had stated that he himself was in the business of metal trading which can be verified from various pages of the paper book filed by the assessee as well as the Revenue. Further, metal business was also being done by Shri Kewal Kohli, the father of Shri Himanshu Kohli. A perusal of the assessment order in the case of Shri Kewal Kohli passed u/s 143(3)/153A on 13th September, 2016 for A.Y. 2013-14 shows that the AO in the said order has mentioned as under:-

68. The pre-search enquiries that were conducted revealed as under:
 - i. That unaccounted sale & purchase of goods was done from the offices of the group situated in Sadar Bazar, Delhi.
 - ii. The unaccounted stock was kept in various godowns maintained by the group.

- iii. Cash against such unaccounted sale was mostly received at office of Shri Himanshu Kohli.
- iv. Reconciliation of cash transactions was done on daily basis by Shri Himanshu Kohli & Shri Rajiv(accountant of Dua family).
- v. Shri Himanshu Kohli and Shri Pawan Dua were regularly engaged in coordinating with various parties for collection of cash against sales to various parties.
- vi. Shri Himanshu Kohli alongwith his close associates S/Shri Gagan Arora & Sandeep Kwatra maintained the record of unaccounted transactions at Flat- IB, Pocket A, Near Satyawati College, Ashok Vihar, New Delhi.

38.1 Similarly, at para 9 of the said order, the AO of Shri Kewal Kohli has mentioned as under:-

69. On examination of seized documents as per Annexures A-1 & A-2 seized by party SA-8 from D-237, 3rd Floor, Ashok Vihar, Phase-I, New Delhi and Annexures A-13 to A-16, A-70 to A-89, A-91 to A-94, A.-96 to A-99, A-100 to A-120 seized y party SA-10 from Flat 1-B, Pocket-A, Near Satyawati College, Ashok Vihar, New Delhi (both premises of assessee son Sh Himanshu Kohli) which contain Dharam Kanta slips showing weight of different types of metals weighed alongwith vehicle number and hand written slips containing noting of receipt/delivery of purchase/sale of such metals, the assessment year wise breakup of 30% of total unaccounted turnover in respect of metal trading business of Kewal Metals as admitted by Sh Himanshu Kohli in his statement recorded u/s 132(4) alongwith value @ 324 per kg (being average rate of metals as per DGS&D rates) works out as under:-

Assessment Year	Total Qty (revised as per discussions above)	30% of Qty mentioned in Col 2 (belonging to Dua Group)	Value of stock in Col 2 @ Rs 324 per KG as per DGS&D rates (Rs)
1	2	3	4
2013-14	3920560.10	1176168.03	381078442
2014-15	14093661.30	4228098.39	1369903878
2015-16	361287.22	108386.16	35117116
Total	18375508.62	5512652.58	1786099436

39. Thus, a perusal of the statement of Shri Himanshu Kohli and assessment order of Shri Kewal Kohli conclusively shows that both the premises D-237, 3rd

Floor Ashok Vihar, New Delhi and Flat No. 1-B, Pocket-A, Near Satyawati College, Ashok Vihar, New Delhi are owned by Shri Himanshu Kohli who is also engaged in metal trading and was owning different godowns. Under these circumstances, merely because Shri Himanshu Kohli, in his statement has admitted only 30% belongs to him and 70% of the unaccounted turnover belongs to Shri Dua cannot be the basis for making addition in the hands of Shri Pawan Kumar Dua especially when the assessee in his statement had categorically stated that Shri Himanshu Kohli was doing some business through the family concern named M/s Klaxon Trading (P) Ltd. and the transactions were duly recorded in their books of account and payments were made by cheque and TDS was deducted from the said payments. We further find merit in the argument of the Id. Counsel for the assessee that had there been such huge unaccounted transactions outside the books of account by the assessee, at least some evidence in some form could have been found during the course of search from the premises of the assessee. However, not a single piece of evidence was found from the premises of the assessee so as to prove that the assessee was also engaged in some unaccounted metal trading business with Shri Himanshu Kohli. Since the documents relating to unaccounted trading outside the books of account along with Dharam Kanta slips showing weight of different types of metals weighed alongwith vehicle number and handwritten slips containing noting of receipt/delivery of purchase/sale of such metals along with dates were found from the premises owned by Shri Himanshu Kohli who himself along with his father are also engaged in such metal trading

business and not a single paper giving any hint of any unaccounted trading by the assessee outside his books of account was found from his premises, therefore, we are not able to agree with the finding of the CIT(A) that 70% of such unaccounted turnover belongs to the assessee for which the corresponding profit to be taxed in the hands of the assessee. In this view of the matter, we set aside the order of the CIT(A) and direct the AO to delete the addition of Rs.1,70,72,313/- being the profit on such unaccounted turnover outside the books of account.

40. Since the addition on account of unaccounted turnover outside the books of account is deleted, the question of initial investment in such unaccounted turnover does not arise and therefore the same cannot be sustained. Accordingly, the same is directed to be deleted.

41. So far as the addition on account of unaccounted commission is concerned, we have held in the preceding paragraphs that the assessee has not done any unaccounted trading in metal in his name and whatever trading has been done was done by Shri Himanshu Kohli from whose premises all the seized documents, which are the basis of addition in the hands of the assessee, were found and that Shri Himanshu Kohli has done some business of metal trading for the family concern, namely, M/s Klaxon Trading (P) Ltd. and all the transactions were recorded in the books of account of the said concern as stated and the commission so paid was through account payee cheque on which TDS has duly been deducted, therefore, no addition on account of unaccounted commission paid by the assessee

to Shri Himanshu Kohli is called for. Accordingly, the same is directed to be deleted.

ITA No.6589/Del/2018 (A.Y. 2014-15)

42. The grounds of appeal filed by the assessee read as under:-

2. (a) That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in assuming jurisdiction u/s 153A and further erred in passing the impugned assessment order.

1(b) That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in assuming jurisdiction and framing the impugned assessment order u/s 153 A, is bad in law and against the facts and circumstances of the case and the same is not sustainable on various legal and factual grounds.

2. (a) That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making addition of Rs. 6,13,71,688/- on account of alleged gross profit calculated on the basis of material allegedly found during the course of search of third person by treating it as alleged unaccounted income of assessee and that too by recording incorrect facts and finding and without observing the principles of natural justice.

2(b) That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in making addition of Rs. 6,13,71,688/- on account of alleged gross profit, is bad in law and against the facts and circumstances of the case.

2(c) That in any case and in any view of the matter, impugned addition has been made without confronting the entire adverse material available on record and without providing the opportunity of cross examination of Sh. Himanshu Kohli.

3. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making addition of Rs.98,65,563/- on account of alleged commission paid and that too by recording incorrect facts and findings and without observing the principles of natural justice.

4. That in any case and in any view of the matter, addition made in the impugned assessment order are beyond jurisdiction and illegal also for the

reason that these could not have been made since no incriminating material has been found as a result of search.

5. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not reversing the action of Ld. AO in charging interest u/s 234B of Income Tax Act, 1961.

6. That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other.ô

43. Grounds of appeal No.1(a), 1(b), 4 and 6 being general in nature are dismissed.

44. Ground of appeal No.5 relating to levy of interest u/s 234B being mandatory and consequential in nature is dismissed.

45. So far as grounds of appeal No.2(a), 2(b) and 2(c) are concerned, these are identical to ground of appeal No.2(a), 2(b) and 4 in ITA No.6588/Del/2018. We have already decided the issue and the grounds raised by the assessee have been allowed. Accordingly, these grounds by the assessee are allowed.

46. So far as the additional grounds are concerned, the same is identical to the additional grounds raised in ITA No.6588/Del/2018. We have already dismissed the additional grounds. Following similar reasonings, the additional grounds raised by the assessee are dismissed.

ITA No.6590/Del/2018 (A.Y. 2015-16)

47. The grounds of appeal filed by the assessee read as under:-

1.(a) That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making

addition of Rs.15,73,246/- (which has been wrongly mentioned as Rs.5,40,803/- in para 11 of the assessment order) on account of alleged gross profit calculated on the basis of material allegedly found during the course of search of third person by treating it as alleged unaccounted income of the assessee and that too by recording incorrect facts and findings and without observing the principles of natural justice.

1(b) That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in making addition of Rs.15,73,246/- on account of alleged gross profit, is bad in law and against the facts and circumstances of the case.

1(c) That in any case and in any view of the matter, impugned addition has been made without confronting the entire adverse material available on record and without providing the opportunity of cross examination of Shri Himanshu Kohli.

2. (a) That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making addition of Rs.2,52,901/- as commission allegedly paid to Shri Himanshu Kohli and impugned addition has been made by recording incorrect facts and findings and without observing the principles of natural justice.

2(b) That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in making addition of Rs. 2,52,901/- as commission allegedly paid is bad in law and against the facts and circumstances of the case.

2(c) That in any case and in any view of the matter, impugned addition has been made without confronting the entire adverse material available on record and without providing the opportunity of cross examination of Sh. Himanshu Kohli.

3. That having regard to the facts and circumstances of the case, the Ld. CIT(A) has erred in law and on facts in confirming the action of the Ld. AO in making addition of Rs.55,08,739/- on account of alleged commission received from MCX trading on the ground that ħpawanö is appearing in seized document as per Exhibit-4 and impugned addition has been made by recording incorrect facts and findings and without observing the principles of natural justice.

4. That in any case and in any view of the matter, addition made in the impugned assessment order are beyond jurisdiction and illegal also for the reason that these could not have been made since no incriminating material has been found as a result of search.

5. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not reversing the action of Ld. AO in charging interest u/s 234B of Income Tax Act, 1961.

6. That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other.ô

48. Grounds of appeal No.1(a), 1(b), 1(c), 2(a), 2(b), 2(c) are identical to grounds of appeal No.2(a), 2(b), 2(c) and 4 of ITA No.6588/Del/2018. We have already decided the issue and the grounds raised by the assessee have been allowed. Following similar reasonings, these grounds by the assessee are allowed.

49. Ground No.3 raised by the assessee relates to the order of the CIT(A) in confirming the addition of Rs.55,08,739/- on account of alleged commission received from MCX Trading.

50. Facts of the case, in brief, are that the AO, during the course of assessment proceedings, noted that the name ôPawanö appearing in the seized document as per Exhibit-4 is the assessee himself and the total commission on the basis of these documents comes to Rs.55,08,739/-. In absence of any proper explanation given by the assessee, the AO made an addition to the total income of the assessee by observing as under:-

ô10.5 Further, as discussed in detail above that the name ôPawanö appearing in seized documents as per Exhibit-4 is the assessee himself the total commission on the basis of these documents as per Exhibit-4 of the questionnaire comes to Rs 55,08,739. The same is being treated as undisclosed income of the assessee for the year under consideration.ô

51. Before the CIT(A), it was submitted that the interpretation taken by the AO has got serious ramifications as the name found in the seized documents from a third party is attributed to particular persons without corroborative evidence which would lead to miscarriage of justice and, therefore, no commission income of Rs.55,08,739/- can be attributed to the assessee.

52. However, the Id.CIT(A) was not satisfied with the arguments advanced by the assessee and upheld the addition made by the AO by observing as under:-

óç. Ground No.7:

This ground is against addition of Rs.55,08,739/- made by the AO on account of commission paid by the appellant to Shri Himanshu Kohli. This addition is basis the statement of Shri Himanshu Kohli that commission @ Re.1/kg of metal was given by Dua Group. Such commissions are normal trade practices in the context of unaccounted trade carried out and the confession of Sh Kohli further supports the conclusions of the AO. It was contended that the appellant in his individual capacity was not engaged in the unaccounted metal trading business of Shri Himanshu Kohli. This argument is sans any force as the appellant is the key functionary and it is quite likely that the parallel trading was carried out separately from the formal trade channels. This ground is also dismissed accordingly.ô

53. We have heard the rival arguments made by both the sides and perused the record. We find the AO, on the basis of the seized document as per Exhibit-4 where the name ôPawanö appears, made the addition of Rs.55,08,739/- which has been upheld by the CIT(A) and the reasons for which have already been reproduced in the preceding paragraphs. We have already held in the preceding paragraphs that when Shri Himanshu Kohli was himself engaged in such type of business and he has done some business for one of the concerns where the assessee

is a director, namely, Klaxon Trading (P) Ltd., therefore, merely because the name of the assessee appears in a code word, addition could not have been made in the hands of the assessee especially in absence of any other corroborative evidence. The submission of the Id. Counsel that the assessee in his individual capacity was not engaged in unaccounted metal trading business also has some force since in his statement recorded u/s 132(4), the assessee had categorically stated that his family concern, namely, Klaxon Trading (P) Ltd., was engaged in metal trading business and whatever commission has been paid to Shri Pawan Kumar Dua was paid by the company through proper banking channel which was duly recorded in the books of account and due TDS procedures have been followed. In this view of the matter, the order of the CIT(A) is set aside and the ground raised by the assessee is allowed.

54. Grounds No.4 and 6 being general in nature are dismissed.

55. Ground No.5 relates to levy of interest u/s 234B which is mandatory and consequential in nature. Accordingly, the said ground is dismissed.

56. In the result, all the three appeals filed by the assessee are partly allowed.

Order pronounced in the open court on 28.04.2020.

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 28th April, 2020.

dk

Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi