

****THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY
AND
*THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM
+I.T.T.A.No.260 of 2003***

% Dated 05.11.2014

Commissioner of Income Tax-III, Hyderabad

....Appellant

\$ Unique Plastics Pvt. Ltd.

....Respondent

! Counsel for the appellant : Sri S.R.Ashok

^ Counsel for respondent : ----

-

< GIST:

> HEAD NOTE:

? Cases referred:

1. (2011) 335 ITR 105(Delhi)
2. (2010) 327 ITR 577 (Madras)

***THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY
AND
THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM
I.T.T.A.No.260 of 2003***

JUDGMENT: (Per LNR,J)

In this appeal preferred by the Revenue, the scope and ambit of Rule 46-A of the Income Tax Rules (for short 'the Rules') falls for consideration:

The respondent is an assessee under the Income Tax Act

(for short 'the Act'). For the assessment year 1998-99, the respondent posted loss of Rs.66,32,239/-. The Assessing Officer passed an order dated 29.03.2001 disbelieving the version as to loss and recording a finding to the effect that the respondent has income of Rs.79,50,262/- and levied tax thereon. Aggrieved by that, the respondent filed an appeal before the Commissioner of Income Tax (Appeals)-IV, Hyderabad. In support of its contention, it placed some additional material/evidence before the Commissioner. Taking the same into account, the Commissioner partly allowed the appeal and permitted certain deductions. The Department carried the matter in appeal by filing I.T.A.No.660/Hyd/2002 before the Hyderabad Bench of the Income Tax Appellate Tribunal (for short 'the Tribunal'). One of the contentions urged before the Tribunal was as to alleged violation of Rule 46-A of the Rules by the Commissioner (Appeals). The Tribunal dismissed the appeal through order, dated 24.01.2003. Hence, this further appeal under Section 260-A of the Act.

Sri S.R.Ashok, learned senior Standing Counsel for the Department submits that the receiving of evidence by an appellate Commissioner is not a matter of course and it is only when the conditions stipulated under Rule 46-A of the Rules are complied with, that such evidence can be received and considered. He submits that no opportunity was given to the Assessing Officer, before the documents were admitted and even after the documents were admitted in evidence, the consideration thereof was almost unilateral. Reliance is placed upon the judgment of the Delhi High Court in ***DIT vs. Modern Charitable Foundation***^[1] and that of the Madras High Court in ***Commissioner of Income-Tax vs. Subbu Shashank***^[2]. He contends that the Tribunal did not take into account the serious violation of Rule 46-A of the Rules, which would have the effect of vitiating the very adjudication undertaken by the Commissioner.

None appeared for the respondent.

The controversy is more about the procedure adopted by the Appellate Commissioner, than on merits of the matter. Under the Act, adjudication takes place, firstly before the authority of the Department or quasi-judicial agency, which in turn is handled mostly by the officials of the Department, before the matter reaches High Court. Certain traits of ordinary adjudication by the Courts, are stipulated for the departmental appeals also. It is important to note that an order of assessment is the outcome of an exercise undertaken by the Department and an aggrieved party, if at all, can be only the assessee. Obviously for this reason, no appeal is provided to the Commissioner against an order of assessment, at the instance of the Department. The principle that an appeal is continuation of original proceedings gets attracted with added vigor as regards appeals before the Commissioner.

In a given case, the assessee may be able to prove his contention in the appeal, on the basis of the material, that formed part of the record of the Assessing Officer. In certain cases, he may feel like taking the aid of other material just as it is done in the civil appeals, to buttress the contention.

Receiving of additional evidence by an appellate authority for the first time, is not something new. However, it is not a matter of course and it is circumscribed by certain conditions. The general principle is that it is only when (i) a party, who intends to adduce additional evidence at the appellate stage, made an effort to place that very material before the original authority, but did not succeed; or (ii) such material was not available during the course of adjudication before the original authority, that the additional evidence can be received or admitted. Rule 46-A of the Rules deals with this aspect, and it reads:

Production of additional evidence before the Deputy Commissioner (Appeals) and Commissioner (Appeals).

46A.(1) The appellant shall not be entitled to produce before the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals), any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the Assessing Officer

except in the following circumstances, namely:-

- (a) Where the Assessing Officer has refused to admit evidence which ought to have been admitted; or
 - (b) Where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer; or
 - (c) Where the appellant was prevented by sufficient cause from producing before the Assessing Officer any evidence which is relevant to any ground of appeal; or
 - (d) Where the Assessing Officer has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.
- (2) No evidence shall be admitted under sub-rule (1) unless the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) records in writing the reasons for its admission.
- (3) The Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) shall not take into account any evidence produced under sub-rule (1) unless the Assessing Officer has been allowed a reasonable opportunity-
- (a) to examine the evidence or document or to cross-examine the witness produced by the appellant, or
 - (b) to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant.

From a perusal of this Rule, it becomes clear that the rule making authority maintained a clear distinction between the two concepts viz., admission and consideration. While 'admission' is subject to the conditions stipulated in clauses (a) to (d) of Sub-rule (1), 'consideration' or taking into account of the evidence so received, is dealt with under Sub-rule (3). Broadly, the procedure prescribed under this Rule is comparable to the one under Rule 27 of Order 41 C.P.C. The only difference is that under Rule 27 of Order 41 C.P.C., separate application is required to be made seeking permission to adduce additional evidence at the stage of appeal and it is only on the consideration of the objections that may be raised by the opposite party, that the additional evidence can be admitted. In the case of appeals under the Act, such a

procedure is not stipulated. Under Rule 46-A, all depends upon the satisfaction of the Commissioner as to the admissibility of the documents and no adversarial exercise needs to be undertaken at that stage.

Once the document is admitted as additional evidence, for the first time at the stage of appeal, the Department is entitled to put forward its own contention or objection vis-a-vis the same. Here again, two aspects become relevant. If the additional evidence is in the form of any document, the Department shall be entitled to examine or to make its own scrutiny of the same. On the other hand, if the evidence is in the form of deposition of any witness, it shall be entitled to cross-examine him. The first is provided for under Clause (a) and the second, under Clause (b) of Sub-Rule 3. Independently the Department can adduce its own oral or documentary evidence to contradict or rebut the additional evidence that was adduced by a party, for the first time, at the stage of appeal.

The record in the instant case does not disclose that the Department has raised any objection whatever, for the additional evidence that was produced by the respondent. On the other hand, arguments were advanced with reference to adduce additional evidence also, and the Commissioner dealt with the same. In other words, the Commissioner took into account, the additional evidence duly taking into account, the plea of the Department. At any rate, it was not even urged that the Commissioner did not take into account any objection, if any, raised by the Department, for the additional evidence.

The nature of objection raised by the appellant is evident from Ground No.5 of the Memorandum of Grounds filed in I.T.A.No.666/Hyd/2002, which reads:

“5. The CIT(A) ought to have afforded an opportunity to the Assessing Officer as per rule 47A(3) of I.T.Rules before admitting fresh evidence.”

They wanted opportunity to be given, before admitting the fresh evidence. This plea does not derive any support from Rule 46-A of the Rules. The opportunity to be given to the

Department is only in the context of “taking into account the additional evidence’ but not “admitting the additional evidence”. At the cost of repetition, we observe that the admission of additional evidence is the prerogative of the Commissioner and that in turn is circumscribed by Clauses (a) to (d) of Rule 46-A(1) of the Rules. Learned senior counsel is not able to point out as to which of the conditions have been violated in the process of adjudication by the Commissioner. The Tribunal dealt with the contention in detail and did not find any merit in the plea of the appellant.

In ***Modern Charitable Foundation***’s case (1 supra) relied upon by the learned counsel for the appellant, the Delhi High Court dealt with an objection raised by the Department about the receiving of additional evidence for the first time at the stage of appeal. A perusal of the judgment discloses that after the additional evidence was admitted, the Assessing Officer was given an opportunity and he made written submissions pointing out that the document ought not to have been filed at all. The Delhi High Court took the view that there is nothing wrong in receiving the evidence and that the Commissioner did not go deep into the document but simply relied upon it, and granted relief to the assessee. It is difficult to discern any principle of law or ratio from the said judgment. It was a typical observation made in the facts of the case. That is evident from the following sentence

“Therefore, in order to balance the equities, we are of the opinion that on the one hand, the assessee be permitted to rely upon the additional evidence produced before the Commissioner of Income-tax (Appeals) and at the same time, the Assessing Officer also be given an opportunity to verify these documents”

In ***Subbu Shashank***’s case (2 supra), the Madras high Court was dealing with the case, in which the assessee examined a witness for the first time before the Commissioner (Appeals) but the Department was not given opportunity to cross-examine the witness. Obviously for that reason, the adjudication undertaken by the Commissioner was held to be in contravention

of Rule 46-A of the Rules. The relevant portion reads:

“Admittedly, in the present case on hand, the Assessing Officer has not been given an opportunity to cross-examine the witnesses produced by the assessee. That is the reason why the Tribunal has observed that rule 46A of the Income-tax Rules has been violated.”

Naturally the violation is of Rule 46-A(3)(a) of the Rules. The facts of the case on hand are substantially different.

Therefore, the appeal is dismissed.

The miscellaneous petition filed in this appeal shall also stand disposed of. There shall be no order as to costs.

L.NARASIMHA REDDY, J

CHALLA KODANDA
RAM, J

Date: 05.11.2014

Note: L.R.Copy to be marked.

JSU

***THE HON’BLE SRI JUSTICE L.NARASIMHA REDDY
AND
THE HON’BLE SRI JUSTICE CHALLA KODANDA RAM***

—
—
—
—
—
—
—
—
—
—
—

-
-

I.T.T.A.No.260 of 2003

Date: 05.11.2014

JSU

-
- [\[1\]](#) (2011) 335 ITR 105(Delhi)
[\[2\]](#) (2010) 327 ITR 577 (Madras)