ORDER SHEET

GA NO.2274 OF 2016
WITH
ITAT NO.311 OF 2016

IN THE HIGH COURT AT CALCUTTA

SPECIAL JURISDICTION(INCOME-TAX)

ORIGINAL SIDE

THE PRINCIPAL COMMISSIOENR OF INCOME TAX-5,
KOLKATA
Versus
M/s.L.G.W.LIMITED

BEFORE:
The Hon'ble JUSTICE ANIRUDDHA BOSE
The Hon'ble JUSTICE AMITABHA CHATTERJEE
Date : 13th February, 2018.

MS.SMITA DAS DE, ADVOCATE FOR APPELLANT
MR.J.P.KHAITAN,SR.ADVOCATE, MR.ANANDA SEN, MR.ANURAN SAMANTA,
MR.SABYASACHI MANDAL, ADVOCATES FOR RESPONDENT

The Court :We have heard the learned counsel for the parties.

We admit the appeal on the following substantial question of law.

"Whether the Tribunal was right in law in confirming the decision of the Commissioner of Income Tax (Appeals), by

which the assessee's claim for deduction of business expenditure was allowed, on the basis of foreign exchange loss relying on certain documents, which documents according to the Revenue, ought not to have been admitted following the stipulations of Rule 46A of the Income Tax Rules 1962 ?"

The appeal pertains to the assessment year 2009-10. The only question which has been urged before us by the Revenue is in relation to a sum of Rs.21,01,52,576/- which was added to the assessee's income by the Assessing Officer. Assessee's contention is that it suffered loss to that extent in foreign exchange forward contract corresponding to certain export orders. The Assessing Officer in the assessment order had disallowed this expenditure treating the same as speculation loss under Section 43(5) of the Income Tax Act, 1961. The reason for this, according to the assessment order, is that the assessee could not establish before the Assessing Officer the loss in foreign exchange forward contract was occasioned by cancellation of export contract. Thus no nexus could be established. Before the Commissioner, admitted position is that the assessee had produced certain documents as additional evidence, which pertained to various contracts. The assessee had entered into a contract with its oversees customers and through these documents the assessee sought to establish nexus between the loss in foreign exchange forward contracts and cancellation of export orders. We find from the order of the

Commissioner that the Assessing Officer was given opportunity to give his comments as regards the additional evidence sought to be produced by the assessee. The response of the Assessing Officer to this exercise is contained in his communication dated 21st November, 2012 carrying memo No.DCIT, Cir-2/Appeal/2012-13/501. A copy of this communication was produced before us at the time of hearing of this appeal. Such response was in following terms:-

> *"As per direction given by your honour during the hearing of the above-mentioned case on 07.11.2012, I have made following submission for your kind perusal.*
>
> *It was claimed by the A/R of M/s. LGW Ltd. during the hearing on 07/11/2012 of its appellate proceedings before your honour for the assessment year 2009-10 that it had submitted four volumes of Paper Book, with a request to treat these as an "Additional Evidence" under Rule 46A(1). Your honour also directed the undersigned during that hearing to submit report/objection on admission of additional evidences. Your honour also gave the undersigned an opportunity to rebut the same before its admission and to produce further evidence in term of Rule 46A.*
>
> *Accordingly I am going to submit my objection against the admission of additional evidences as filed by the A/R of the assessee before your honour in four volumes. As per Rule 46A, the appellant shall not be entitled to produce before your honour, 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.

Here, A/R of the assessee did not furnish or specify any exceptional circumstances out of four above under which additional evidences have been filed by him before your honour. However, the undersigned has been verified the assessment records of the assessee in this effect and found that there is no such exceptional circumstances happened to the assessee to compel it to file these additional evidences by way of four volumes of paper book before your honour.

1. *There was no such refusal by the Assessing Officer to admit such additional evidences which ought to have been admitted during the course of assessment proceedings.*
2. *The appellant was never prevented from production of these evidences which was called upon to produce by the Assessing Officer during the course of assessment proceedings.*
3. *The appellant was never prevented from production before the Assessing Officer during the course of assessment proceedings any evidence which is relevant to any ground of appeal.*
4. *The Assessing Officer had passed the assessment order against which appeal was filed after giving sufficient opportunity to the assessee of being heard.*

Considering the above, it is a humble request before your honour not to admit these additional evidences as filed by the appellant by way of four volumes of Paper book."

The Commissioner, however, had taken cognizance of the additional evidence upon admitting them. On the question of admission, the Commissioner in his order opined:-

"The AO was confronted with the additional evidences on 07.11.2012 and AO filed written submission vide letter dated 21.11.2012 with a request not to admit the additional

> *evidences as per Rule 46A. The paper book pages 132 to 621 are relating to forex contract with reference to export orders and the relevant bank advices alongwith the month-wise inventory of stock of cotton. Since AO never asked for these evidences and disallowed the losses claimed in the assessment order, the principle of natural justice requires that these evidences should be admitted as per Rule 46A and moreover these evidences are relevant and essential to the matter under consideration as these evidences go to the root of matter therefore these additional evidences are admitted in terms of Rule 46A."*

The assessee's stand before the Commissioner was reflected in the following passages from the order of the Commissioner:-

> *"In course of assessment proceedings, the authorized representatives of the Assessee-company had appeared before the Assessing Officer and had furnished/filed/produced various documents, evidences and explanations raised and/or requisitioned from time to time. We had debited a sum of Rs.23,66,02947/- under the head "Forward Forex Contract in the Profit & Loss Account and the same was claimed as business loss. For the first*

time on 2nd December 2011, the Assessing Officer asked us to clarify "why Forward Forex Contract Loss has been claimed as Business expenditure". On 8th December, 2011, our authorized representative appeared before Assessing Officer and explained the aforesaid matter and produced before him the relevant documents and evidences relating to aforesaid claim. The explanation was also filed in letter dated 07.12.2011. Having been satisfied no further query was raised nor any evidences were asked to be filed or furnished upto the date of last hearing 22.12.2011.

The Ld. Assessing Officer, however, passed the assessment order by alleging that the assessee failed to furnish the details or export contracts which were cancelled by the foreign buyers to establish a nexus between export contracts cancelled vis-à-vis Forward contracts cancelled.

During the course of hearing the authorized representation appeared and explained and produced the details and evidences of export contracts cancelled by the buyers. Such details and evidences were never asked by the Assessing Officer to be filed before him. It is only in the assessment order Assessing Officer has alleged that such details were *not filed. We enclose the Xerox copy of the order sheet in respect of assessment proceedings, which would reveal all the aforesaid facts. In these circumstances, we submit that there was reasonable cause for not filing the evidences relating to claim of aforesaid loss as business loss, which have now been filed with a request to accept the same under Rule 46A of the Income Tax Rules, 1962.*

Sl. No.	*Paper Book Identification No.*	*Nature of documents*	*PB page Nos.*
6	*11*	*Statement of Profit & Loss on Forward Forex Contract during the previous year relevant to the Assessment Year 2009-10*	*132-150*
7	*12*	*Samples of documentary evidences in respect of major amount of losses incurred of Forward Forex Contract with reference to Sale invoices and Banks advices*	*151-595*
8	*13*	*Statement of gains in Forex Exchange Fluctuation included in Sales Account*	*596-606*
9	*14*	*Statement of month-wise inventory of Stock of Cotton*	*607-621*

We submit that the aforesaid additional evidences are vital and essential for rendering justice and in deciding the instant appeal and therefore the same may be admitted under Rule 46A of the Income Tax Rules, 1962. We refer to the decision of Hon'ble Third Member of

Patna Income Tax Appellate Tribunal in the case Abhay Kumar Shroff vs. Income Tax Officer reported in 631TD 144(Pat)TM. We refer to the following observations made by Hon'ble Tribunal in the said decision:

It was that the assessee as a matter of right could not file or filed them before the Tribunal as a matter of course. If the assessee produces some documents at the appropriate time, they have to be taken into consideration subject of course to all just exceptions, such as their relevance, etc. If not done at the assessment stage, the admission of documents has to be governed by rule 46A of the I.T rules, 1962, if produced for the first time before the first appellate authority. Having missed the bus and the matter having travelled to the Tribunal, the admission of documents is to be governed by Rule 29 of the Appellate Tribunal Rules. Hence, if the documents sought to be admitted even at the second appellate stage are of nature and quantitatively such that they render assistance to the Tribunal in passing orders or are required to be admitted for any other substantial cause, it would rather be the duty of the Tribunal to admit them. Therefore, if the receipt or admission of additional evidence is vital and essential for the purpose of consideration of the subject matter of appeal and to arrive at a final and ultimate decision, the Tribunal is amply empowered to admit additional evidence under rule 29. Therefore, the Tribunal had to admit additional evidence produced by the assessee since that was vital and essential for rendering *justice and in deciding appeals. However, it was necessary to give the department a reasonable opportunity of rebutting it according to the principle of nature justice and for that purpose the matter was restored to the file of the AO."*

Upon considering the materials disclosed, the Commissioner found that the losses in foreign exchange contract arose because of the cancellation of export orders and addition of the aforesaid sum made by the assessee was directed to be deleted.

The Revenue carried up this order to the Income Tax Appellate Tribunal. Before the Tribunal the question of legality of admitting additional evidence was raised by the Revenue. The Tribunal, examining that aspect of the dispute held :

"14. We have given a careful consideration to the rival submissions. We are of the view that under Rule 46A(3) of the Rules, the CIT(A) is only required to afford reasonable opportunity to the AO to examine the evidence or documents produced by the assessee as additional evidence before CIT(A). In the present case admittedly all the documents filed by the assessee as additional evidence were confronted to the AO. The AO has thus been afforded reasonable opportunity to examine the additional evidence or documents produced as additional evidence by the assessee. Rule 46A of the Rules does not contemplate the procedure whereby the CIT(A) should call for

objections regarding admissibility of additional evidence first and when such additional evidence are admitted again called for objections with regard to the veracity and relevance of the additional evidences filed by the assessee before CIT(A). It is also clear from the decision of the CIT(A) that the AO had not asked for the additional evidence filed by the assessee before CIT(A) in the course of assessment proceedings and therefore the admissibility of the additional evidence in terms of Rule 46A(1) of the Rules cannot be found fault with. Therefore, we are of the view that there is no merit in ground no.(vii) raised by the revenue. Consequently the same is dismissed."

Ms. Das De appearing for the Revenue has focussed her argument on admissibility of the additional evidence and it is her case that none of the four sub-clauses contained in sub-paragraph (1) of Rule 46A was attracted in the case of the assessee. On this ground, she wants the decision emerging from consideration of the additional evidence to be invalidated. Factual finding by the Commissioner and the Tribunal on the basis of such additional evidence that nexus could be established between the cancellation of the export order and the loss in foreign exchange forward contract has not been questioned before us.

Thus, we shall examine the question of legality of admission of the additional evidence only by the Commissioner in this judgment. The Assessing Officer in the assessment order had observed that during the course of the proceedings details of export contracts which were actually cancelled by the foreign buyers to establish nexus between export contract cancellation and the cancellation of foreign exchange forward contracts was not produced before him. This stand has been broadly reiterated by him in his above referred objection before the Commission. On this count, the assessee has taken a contrary stand. But we do not think we can examine this factual issue in this appeal. The Tribunal has observed that the assessing officer had not asked for the materials which were filed by the assessee before the CIT(A) in course of the assessment proceeding. This finding appears from the passage of the decision of the Tribunal quoted earlier in this judgement. Ms. Das De's contention, however is that it was the obligation of the assessee only to produce these materials by which it wanted to establish its claim for deduction. Failure on the part of the Assessing Officer to require production of these documents, she has argued would not automatically establish admissibility of the documents at the appellate state.

Mr. Khaitan, learned Senior Counsel appearing for the assessee, drew our attention to Rule 46A of the 1962 Rules. This Rule stipulates –

> "***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.

(4) Nothing contained in this rule shall affect the power of the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the [Assessing Officer]) under clause (a) of sub-section (1) of section 251 or the imposition of penalty under section 271.]"

Mr.Khaitan's submission is that sub-clause (c) of sub-paragraph (1) of the said Rules is attracted in the present case. He has relied on a decision of this Court in the case of <u>CIT vs. Soorajmull Nagarmull</u> reported in 129 ITR 169 and also a decision of the Bombay High Court in the case of <u>Commissioner of Income Tax vs. Badridas Gauridu (P.) Ltd.</u> reported in 261 ITR 256 to contend that foreign exchange loss having a direct nexus to loss suffered in export orders would not constitute speculative loss and would have to be treated as business loss or expenditure. But argument before us has been advanced primarily on the ground of admissibility of the evidence and the finding on the basis of consideration of such evidence has not been assailed before us. In our opinion the ratios laying down the proposition of law in both these authorities need not be dealt with in detail in this judgment as the question of law on which this appeal has been admitted does not require application of such propositions of law.

The Revenue has stressed on a legal default on the part of the first appellate authority purely on procedural ground but the two appellate fora have found the documents produced as additional evidence to be admissible. The provisions relating to production of additional evidence, in our opinion, calls for liberal construction in the facts of this case. The assessee's contention is that certain documents were produced before the Assessing Officer along with further explanation, but the Assessing Officer did not ask for filing of the documents. It is in this context the Commissioner (Appeals) accepted the additional evidence and considered the same. Application of mind of the Commissioner on the factors specified in Rule 46A(1)(c) of the 1962 Rules is implicit in his order. Moreover, under the provisions of Rule 46A(4), the appellate authority has independent power and jurisdiction to call for production of any document to enable him to dispose of the appeal. In the instant matter, the two appellate fora have considered the additional materials produced and found, upon analysing the same to be supporting the assessee's case. The first appellate authority also found the evidence to be relevant and material to the matter under consideration. Neither before the Tribunal nor before us any question has been raised as regards the factual finding based on the additional evidence. In these circumstances, having regard to the fact that both the Commissioner of Appeals and the Tribunal have given a concurrent finding both on admissibility of the evidence additionally produced at the appellate stage as well as on quality of such evidence, we do not find any reason to interfere with the decision of the Tribunal. The Revenue's stand on this issue is hypertechnical. Even if admission of additional evidence was found not to be in terms of the four situations contemplated in Rule 46A(1), the power or jurisdiction to call for and consider such evidence can be traced to Rule 46A(4). In our opinion, however, the decision of the first appellate authority on this count was in terms of the provisions of sub-clause (c) of the first clause of Rule 46A. We have discussed the relevant provisions of the said Rule in relation to factual basis of this case in the earlier part of this judgment.

The question formulated by us is accordingly answered in the affirmative, against the Revenue.

Another point was sought to be urged before us by the Revenue relating to computation of capital gain on sale of land by adopting stamp duty valuation of Rs.61,22,330/-. The agreed consideration was Rs.60,00,000/-. The Commissioner of Appeals had decided the question in favour of the Revenue confirming the assessment of capital gains on sale of such land at Ra.30,08,799/- relying on the provisions of Section 50C of the Income Tax Act, 1961. The Tribunal, considering the fact that the consideration received by the assessee was less than 2% over and above the same valuation, the addition sustained by the Commissioner of Appeal was directed to be deleted. This finding of the Tribunal is on a factual score and we do not find any reason to interfere with such finding.

The appeal is accordingly dismissed.

There shall be no order as to costs.

(ANIRUDDHA BOSE, J.)

(AMITABHA CHATTERJEE, J.)

sb/K.Banerjee