



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER AND LAXMI
PRASAD SAHU, ACCOUNTANT MEMBER**

ITA No.130/CTK/2014

Assessment Year : 2009-2010

ACIT, Circle 2(2), Cuttack	Vs.	M/s. Kandoi Transport Ltd., Kandoi House, Math Sahi, Cuttack
PAN/GIR No.AAACK 7197 B		
(Appellant)	..	(Respondent)

Assessee by : Shri P.R.Mohanty, AR
Revenue by : Shri S.M.Keshkamat, CIT DR

Date of Hearing : 13/11/ 2019
Date of Pronouncement : 10 /02/2020

ORDER

Per C.M.Garg.JM

This is an appeal filed by the revenue against the order dated 2.1.2014 of the CIT(A), Cuttack for the assessment year 2009-2010.

Application of the appellant/revenue dated 16.8.2019 seeking admission of additional grounds.

2. We have heard the rival submissions on the application of the revenue, wherein, the revenue has sought admission and consideration of following additional grounds of appeal:

“(i) Whether in the facts and circumstances of the case, the Ld. CIT(A) justified to decide the appeal of the assessee on merit without disposing the assessee's application under Rule 46A in terms of decision of Hon'ble Jodhpur High Court in the case of ACIT Vs. Mohar Singh- 2009 (16 taxmann.com 37) (49 SOT 129) (137 TTJ 654).

(ii) In the facts and circumstances of the case while deleting the addition u/s. 68 of the Act, the Ld. CIT(A) ignore the decision of Hon'ble Delhi High

Court - 2015 (375 ITR 373) in the case of CIT Vs. Jansampark Advertising & Marketing (P) Ltd. in which it is held that in case of unaccounted entries found in the books of account of assessee, though it is obligation of Assessing Officer to conduct proper scrutiny of material, in event of Assessing Officer failing to discharge his functions properly, obligation to conduct proper enquiry shifts to CIT(A) and Tribunal and they cannot simply addition made by the Assessing Officer on ground of lack of inquiry."

3. Ld CIT DR submitted that on verification of records, it appears that there is violation of Rule 46A of the Income tax Rules, 1962 (hereinafter in short 'the Rules'). Therefore, as per the direction of Pr. CIT, Central, Visakhapatnam issued under section 253(2) of the Income tax Act (hereinafter in short 'the Act'), the revenue is submitting additional grounds of appeal for admission, consideration and adjudication. Placing reliance on the decision of Hon'ble Supreme Court in the case of NTPC, 229 ITR 363 (SC) submitted that the objection raised in additional grounds is legal being challenging the order of the Id CIT(A) on account of non-compliance of Rule 46A of I.T.Rules. Therefore, the additional grounds of the appellant/revenue may kindly be admitted for consideration and adjudication.

4. Replying to above, Id counsel for the assessee submitted that there is no non-compliance of Rule 46A of I.T.Rules and the assessee submitted all relevant documents before both the lower authorities i.e. during the assessment stage as well as first appellate stage and no new material was placed before the Id.CIT(A). Therefore, the allegation of non-compliance of Rule 46A of Rules cannot be alleged against the first appellate authority. Thus, there is no need to admit the additional grounds of the appellant/revenue. Hence, Id counsel prayed that the application for additional ground may kindly be dismissed.

5. Placing rejoinder to above, Id CIT DR submitted that under the direction of the Bench, assessment records were called for and inspected by Id counsel for the

assessee before the Bench, wherein, no documents or enclosures listed at page 10 of the first appellate order were found therein. Therefore, the issue of non-compliance of Rule 46A of the Rules being legal deserves to be adjudicated by the Tribunal as additional ground and thus, same may kindly be admitted for consideration and adjudication.

6. On careful consideration of the rival submissions, we are of the considered opinion that Hon'ble Supreme Court in the case of NTPC (supra) held that any legal ground which can be decided on the basis of facts already available on record should be admitted for adjudication. The aforesaid additional ground of appeal raises a purely legal issue which does not require any fresh investigation into facts; facts already being on records.

7. The main controversy agitated by the appellant/revenue revolves around non-compliance of Rule 46A by the Id CIT(A) and this ground of the revenue is a legal ground, which can be agitated on the basis of material already available on record without any extraneous documents or exercise beyond the record. Compliance of Rule 46A of I.T.Rules is a mandatory by the Id CIT(A) while admitting any new documents which were not submitted during the assessment proceedings before the AO. Further the additional ground seeks to raise purely a question of law viz., being challenging the order of the Id CIT(A) on account of non-compliance of Rule 46A of I.T.Rules. The aforesaid additional ground of appeal is therefore admitted for adjudication on merits in view of the discretion conferred on the Tribunal under Rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963 and the decision of the Hon'ble Supreme Court decision in the case of NTPC (supra).

Additional Ground No.1

8. Apropos additional Ground No.1 of appeal, we have heard the rival submissions, carefully considered the relevant materials on the record of the Tribunal, inter alia, assessment order, first appellate order, paper book filed by the assessee spread over 141 pages, written submission filed by the appellant/revenue on the relevant material before the Bench.

9. Ld CIT D.R. reiterated the written submission in support of additional Ground No.1 and submitted that from relevant para 5, pages 2 to 15 of the first appellate order especially pages 9 & 10 reveals that the Id CIT(A) has admitted and considered enclosure Sl. No. 1 to 8, which were not submitted before the AO during assessment proceedings, without calling any remand report and comments of the AO. Therefore, the Id CIT(A) has granted relief to the assessee by considering additional new evidences, which were not placed before the AO. Therefore, there is clear violation of Rule 46A of I.T.Rules. Ld CIT DR submitted that in view of above non-compliance by Id CIT(A), the AO was not allowed to examine and verify the veracity of enclosures/documents at Sl. No.1 to 8. Therefore, additional Ground No.1 of the revenue may kindly be allowed and the matter may kindly be restored to the file of the Id CIT(A).

10. Replying to above, Id A.,R. placing reliance on the orders of ITAT Hyderabad 'A' Bench in the case of DCIT vs NE Technologies India Pvt Ltd. (2014) 151 ITD 783 (Hyd) and another decision of ITAT Delhi 'F' Bench in the case of ITO vs Jaidka Woolen & Hosiery Mills Pvt Ltd. & Anr (2018) 68 ITR (Trib) 0216 (Del) submitted that there is no violation of Rules 46A and the assessee submitted all the documents and enclosures at Sl. No.1 to 8 noted by the Id CIT(A) in the

impugned order. Ld counsel vehemently pointed out that even as per Rule 46A of IT Rules, the Id CIT(A) is empowered to ask the assessee to file all relevant documents which are necessary for just and proper disposal of the first appeal, even he can call the documents, which were not before the AO during the assessment proceedings. Therefore, there is no violation of Rule 46A of I.T.Rules.

11. Placing rejoinder to above, Id CIT DR submitted that on the request of Id A.R. assessment records were called for and the same were inspected by Id counsel for the assessee before the Bench and he failed to find any documents listed in the enclosures at Sl. 1 to 8 at page 10 of the impugned order. Therefore, it can be safely presumed that these documents were not placed before the AO and the same were additional evidences submitted for the first time before the Id CIT(A) during the first appellate proceedings. Ld CIT DR also submitted that Rule 46A of I.T.Rules empowered the Id CIT(A) to call upon any documentary evidences and explanation from the assessee, which is necessary for adjudication of the appeal before him but it is also incumbent upon the Id CIT(A) to confront the documents and evidences filed by the assessee to the AO for examination and verification and the AO should also be allowed to submit the remand report thereon. Since the same was not done, it makes the Id CIT(A) order is bad in law and not-sustainable.

12. On careful consideration of rival submissions, undisputedly, on the request of Id counsel for the assessee, assessment records were called for and inspected by Id counsel before the Bench and he could not show us that the enclosures/documents listed at Sl. No.1 to 8 at page 10 of the impugned order were submitted before the AO during assessment proceedings, which clearly

presume that these documents/enclosures were not in the assessment records and these were furnished by the assessee during first appellate proceedings.

13. Further, since the controversy revolves around non-compliance of Rules 46A of I.T.Rules, therefore, for the sake of completeness, we find it appropriate to reproduce Rule 46A of I.T.Rules, which reads as follows:

“46A (1) The appellant shall not be entitled to produce before the CIT(A), any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the AO, except in the following circumstances, namely:-

- (a) Where the AO 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 AO; or
- (c) Where the appellant was prevented by sufficient cause from producing before the AO any evidence which is relevant to any ground of appeal; or
- (d) Where the AO 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 DCIT(A) or, as the case may be, the CIT(A) records in writing the reasons for its admission.

(3) The DCIT(A) OR, as the case may be, the CIT(A) shall not take into account any evidence produced under sub-rule(1) unless the AO has been allowed a reasonable opportunity-

(a) to examine the evidence or document or to cross examine the witness produced by the appellant.

(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 DCIT(A) or, as the case may be, the CIT(A) 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 AO) under clause(a) of sub-section (1) of section 251 or the imposition of penalty under section 271.”

14. It is pertinent to note that the main legal ground and contention of the appellant/revenue is that the CIT (A) has admitted fresh evidence in the form of enclosures at Sl. No.1 to 8 mentioned at page 10 of the impugned order in violation of Rule 46A of I.T.Rules, 1962. A bare perusal of the Rule 46A of the I.T.Rules, 1962 clearly shows that the assessee is not entitled to produce fresh oral or documentary evidence, as a matter of right, in appeal. However, under certain circumstances as mentioned in clause (a)(b), (c) and (d) of sub-rule 1 of Rule 46A, additional evidence can be filed. Sub-rule (2) of Rule 46A provides that no evidence shall be admitted under sub-rule (1) unless the authority admitting it records in writing the reasons for its admission. Sub-rule (2) casts a duty on the authority concerned to record reasons in writing for admission of the additional evidence. Under sub-rule (3), the further requirement is that the appellate authority shall not take into account any evidence produced under sub-rule (1) unless the assessing authority has been allowed a reasonable opportunity to examine the evidence or the document or to cross examine witnesses produced by the assessee or to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the assessee.

15. However, sub-rule(4) of Rule 46A also provides that no bar is created by sub-rule (1), (2) & (3) or nothing contained in this rule 46A of the Rules shall effect the power of the first appellate authority to direct the production of any document to enable him to dispose the appeal. As we have observed above that from careful reading of relevant part of first appellate order, it is clearly noted that the CIT(A) never issued any direction to the assessee to produce documents listed

at Sl.No.1 to 8 at page 10 of the first appellate order under challenge and thus, sub-rule (4) cannot be pressed into service in favour of the assessee against legal ground of the appellant/revenue.

16. In the present case, as we have noted above that enclosures listed at Sl. No.1 to 8 at page 10 of the CIT(A) order were submitted by the assessee for the first time before the Id CIT(A) on his own without any direction from the Id CIT(A), therefore, the requirement of sub-rule (1) & (2) of Rules 46A has to be complied with and under sub-rule (3), the Id CIT(A) shall not take into account any evidence produced under sub-rule(1) unless the AO has been allowed a reasonable opportunity (a) to examine the evidence or document or to cross examine the witness produced by the appellant & (b) to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant.

17. Before reaching to any conclusion, it is necessary to consider the orders of the Tribunal relied by Id counsel for the assessee.

18. In the case of NE Technologies India Pvt Ltd (supra), the Hyderabad Bench of the Tribunal has held that there is no requirement in law that first appellate authority should invariably consult or confront the AO every time an additional evidence is called suo moto that was not before the AO. This proposition is not applicable to the present case in favour of the assessee as there is no iota of fact discernible from the relevant para of the Id CIT(A) order, that Id CIT(A) called additional evidence suo moto by invoking the provisions of sub-rule (4) of Rule 46A of the Rules. So far as the decision of ITAT Delhi in the case of Jaidka Woolen & Hosiery Mills Pvt Ltd & Anr (supra) is concerned, in this case, it was held that the

assessee filed reply before the AO in which several details as per query of AO were furnished at assessment stage including copy of cash book and all details were furnished before the AO including production of books of account. The Id CIT(A) called for production of books of account, ledger and vouchers at appellate stage for examination, there was nothing wrong to examine the books of account as per rule 46A(4) of the Rules. These facts are also not similar to the facts and circumstances of the present case. As we have already noted above that the Id CIT(A) did not invoke provisions of sub-rule (4) of Rule 46A, therefore, both the orders of the Tribunal as relied upon by Id counsel for the assessee, cannot be applied in the favour of the assessee in the peculiar facts and circumstances of the present case.

19. In view of foregoing discussion, keeping in view the totality of the facts and circumstances of the present case, we reach to a logical conclusion that the Id CIT(A) has admitted the additional evidences/enclosures at Sl. No.1 to 8 stated at page 10 of the impugned order without confronting the same to the AO and without obtaining comments/remand report from the AO on the said additional enclosures. Therefore, we hold that the Id CIT(A) has admitted and considered the additional evidences without complying with the mandatory provisions of Rule 46A of I.T.Rules and hence, the Id CIT(A) order granting relief to the assessee cannot be held as sustainable and valid as per mandatory provision Rule 46A of I.T.Rules.

20. We, therefore, set aside the order of the Id CIT (A) and restore the appeal to his file to the first appellate stage with the direction that he should allow proper opportunity of hearing to the AO as well as to the assessee and re-decide the appeal afresh in accordance with law. Ground No.1 of additional ground is allowed for statistical purposes.

21. Since, we have restored the matter to the file of the Id CIT(A) for fresh adjudication of first appeal as per law, while adjudicating additional Ground No.1 of appeal, other ground taken has become academic, infructuous and thus, the same are not being adjudicated.

22. In the result, appeal of the revenue is allowed for statistical purposes.

Order pronounced on 10 /02/2020.

Sd/-
(Laxmi Prasad Sahu)
ACCOUNTANT MEMBER

sd/-
(Chandra Mohan Garg)
JUDICIAL MEMBER

Cuttack; Dated /02/2020
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : ACIT, Circle 2(2), Cuttack
2. The respondent: M/s. Kandoi Transport Ltd., Kandoi House, Math Sahi, Cuttack
3. The CIT(A)-, Cuttack
4. Pr.CIT- , Cuttack
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack