आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'B' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER AND SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA.No.1832/Ahd/2012
निर्धारण वर्ष/Asstt. Year: 2009-10

ITO, Vapi-Ward-4 Daman.	Vs	M/s.Gautam Enterprise Plot No.10, Hingraj Industrial Estate, Dabhel Nani Daman PAN : AADFG 2704 J
अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

Revenue by :	Shri Jagdish, CIT-DR
Assessee by :	Parimal Singh Parmar, AR

सुनवाई की तारीख/**Date of Hearing : 13/06/2016**
घोषणा की तारीख /**Date of Pronouncement: 03/08/2016**

आदेश/O R D E R

PER RAJPAL YADAV, JUDICIAL MEMBER:

The Revenue is in appeal before the Tribunal against the order of the ld.CIT(A), Valsad dated 22.6.2012 passed for the Asstt.Year 2009-10.

2. The Revenue has taken four grounds of appeal, but its grievance revolves around a single issue viz. Ld.CIT(A) has erred in deleting the additions made on account of sundry creditors and debtors by

entertaining additional evidence in violation to Rule 46A of the Income Tax Rules, 1962.

3. Brief facts of the case are that the assessee has filed its return of income electronically on 10.8.2009 declaring total income at Rs.4,65,520/-. The case of the assessee was selected for scrutiny assessment and notice under section 143(2) of the Act was issued on 208.2010 which was duly served upon the assessee. On scrutiny of the accounts, it revealed to the AO that the assessee has shown sundry creditors of Rs.1,75,04,250/-. There are 24 individuals/entities in the list of sundry creditors. The major amount was against the name of Marubeni Takmatex Corporation. From this concern, the assessee has shown advance of Rs.1,67,68,688/-. Similarly, the assessee has shown sundry debtors of Rs.46,56,011/-. In the list, the assessee has shown 20 individuals/entities as sundry debtors. According to the AO, the assessee has filed confirmation from few of creditors/debtors. Therefore, he AO has doubted the outstanding of creditors and debtors. He made addition of both these amounts while determining total taxable income of the assessee at Rs.2,26,55,510/-.

4. On appeal, the ld.CIT(A) has deleted both these additions. The finding recorded by the ld.CIT(A) on this issue read as under:

> *"5.3 DECISION :- I have considered the observation of the AO in the assessment order as well as the contention raised by the AR of the appellant in the written submission. I have also considered the facts of the case. I find force in the argument that once the creditors names, addresses and PAN are filed before the AO, then the onus cast upon the assessee is discharged. I find that the entire purchases made by the appellant from the creditors are fully*

vouched and hence genuineness of the same can not be doubted and even the AO has not disputed the purchase part as no glaring defect in any of the purchase bills has been pointed out in the assessment order. Secondly, from the bank statements and ledger accounts of the creditors of the subsequent financial year filed by the appellant, it is clear that payment towards the closing balance reflected in case of 24 parties of creditors aggregating to Rs.1,75,04,250/- has been made in the subsequent financial year. During the appellate proceedings, the appellant has also furnished confirmation of all these creditors. In these circumstances, the addition of closing balance of the creditors aggregating to Rs.1,75,04,250/- cannot be sustained. Based on the factual and legal matrix, I am inclined to agree with the contention raised by the AR of the appellant and the AO is directed to delete the addition of Rs.1,75,04,250/- as the same cannot be sustained. Thus, this ground of appeal is allowed."

….

6.3 DECISION :- I have considered the observation of the AO in the assessment order as well as the contentions raised by the AR of the appellant in the written submission. It has been established from the bank statements and ledger accounts of the debtors of the subsequent financial year filed by the appellant it is clear that payment towards the closing balance reflected in case of 20 parties of debtors aggregating to Rs.46,56,011/- has been received in the subsequent financial year and the same is cross-verifiable from the bank statements filed. During the appellate proceedings, the appellant has furnished confirmation of all these debtors as the appellant was not given sufficient opportunity by the AO during the assessment proceedings. I find that there is a force in the argument that the debit balance in debtors account is formed up due to sales made to them and revenue in respect of the same has been obviously booked and if the AO adds the debit balance of debtors account, it would tantamount to double addition of the same income and the same cannot be sustained. Sundry debtors cannot be termed as income. This addition is beyond the concept of income chargeable to tax. Based on the factual and legal matrix, I am inclined to delete the addition of Rs.46,56,011/-made by the AO towards debtors closing balance as the same cannot be sustained. Thus, this ground of appeal is allowed."

5. The ld.CIT-DR contended that the ld.First Appellate Authority has entertained fresh evidences in violation to Rule 46A of the Income Tax Rules, 1962, and therefore, finding of the ld.CIT(A) is not sustainable. The ld.counsel for the assessee, on the other hand, contended that the AO did not grant sufficient opportunity to the assessee. The confirmations were called for from the assessee on 12.12.2011, whereas the assessment order was passed on 28.12.2011. The time gap was only 16 days. It was quite difficult for the assessee to collect evidences, otherwise, the assessee has given list of sundry creditors as well as debtors which contained their names and addresses. The ld.AO could issue notices to them by exercising his power. No such step was taken by the ld.AO. Thus, the ld.CIT(A) has rightly admitted the evidence submitted by the assessee and has rightly deleted the addition.

6. We have duly considered rival contentions and gone through the record carefully. Rule 46A of the Income Tax Rules, 1962 has direct bearing on the controversy, therefore, it is imperative upon us to take note of this Rule. It reads as under:

> *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.]

7. A bare perusal of this rule would indicate that appellant i.e. assessee shall not be entitled to produce before the First Appellate Authority any evidence, whether oral or documentary, except evidence produced by him during the course of assessment proceedings, unless conditions enumerated in sub-clause (a) to (d) exists. These sub-clauses would indicate that the assessee could be able to furnish additional evidence, if the AO has refused to admit evidence, which ought to have been admitted, (b) the assessee was prevented by sufficient cause from

producing the evidences, or where the assessee was prevented by sufficient cause from producing evidence, which he was called upon to produce by the AO or where the assessee was prevented by sufficient cause from producing before the AO any evidence which is relevant to any grounds of appeal or where the AO has made order appealed against without giving sufficient opportunity to the assessee to adduce evidence relevant to any grounds of appeal. As far as fulfillment of these clause are concerned, in the present case, the assessee has demonstrated that the evidence in the shape of confirmation and other details are relevant to the grounds of appeal taken by the assessee before the ld.CIT(A). The assessee was prevented to produce such evidence for the reason that the AO did not grant sufficient time. The confirmation was specifically called upon on 12.12.2011 and the assessment order was passed on 28.12.2011. Thus, time gap was not sufficient. Though, the ld.CIT(A) has not passed any specific order as required under sub-rule-2 for admitting any additional evidence, but impliedly it can be construed that conditions mentioned in clause (a) to (d) were available, and therefore, the ld.CIT(A) has entertained the evidence filed before him. A perusal of sub-rule (3) would indicate that evidence was taken on the record as required under sub-rule (2) shall not be taken into account unless an opportunity has been given to the AO to rebut that evidence or produce any other evidence in rebuttal of that evidence. In the present case, procedure contemplated in sub-rule (3) has not been followed by the ld.CIT(A). Evidence, which were produced for the first time before the ld.CIT(A) could not be used in view of sub-rule (3) unless an opportunity is given to the AO. Therefore, we are of the view that the order of the ld.CIT(A) is not sustainable. It deserves to be set aside.

Normally, whenever any irregularity is crept in the proceedings, then that irregularity is to be removed from that level. In the present case, the irregularity has crept in at the level of ld.CIT(A) when additional evidence in violation of sub-rule 2 of Rule 46A was entertained by the ld.CIT(A). The proceedings deserves to be restored to the file of the ld.CIT(A). But to our mind that will only enhance multiplicity of litigation, because, the ld.CIT(A) will have to call for a remand report from the AO and a separate proceedings would be instituted before the AO for carrying out verification of these evidences. Considering this aspect, we deem it proper to set aside the issue to the file of the AO for re-verification and re-adjudication. The assessee will be at liberty to submit any evidence in support of its contentions before the AO. The ld.AO shall provide due opportunity of hearing to the assessee.

The observations made by us will not impair or injure the case of the AO and will not cause any *prejudice* to the defence/explanation of the assessee.

8. In the result, the appeal of the Revenue is allowed for statistical purpose.

Order pronounced in the Court on 3rd August, 2016 at Ahmedabad.

Sd/-	**Sd/-**
(N.K. BILLAIYA)	**(RAJPAL YADAV)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 03/08/2016