

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' BENCH
KOLKATA**

Before : **Shri P.M Jagtap, Accountant Member and
Shri S.S.Viswanethra Ravi, Judicial Member**

I.T.A. No. 1721/Kol/2013
A.Y: 2009-10

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| D.C.I.T, Cir-2, Kolkata (Appellant) | Vs. | M/s. Machine Tools (India) Ltd PAN: AABCM9740R (Respondent) |
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Appearances by:

Shri Sallong Yaden, Addl.CIT, Id. Sr.DR
Shri S.K. Tulsian. Sr. Advocate, Id.AR

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| Date of hearing | : 16-03-2017 |
| Date of pronouncement | : 07-06-2017 |

O R D E R

Shri S.S. Viswanethra Ravi, JM :-

This appeal by the Revenue is against the order dt. 01-03-2013 passed by the CIT-A, I, Kolkata for the A.Y 2009-10.

2. This appeal was filed with a delay of one day and we find that the reasons stated by the Id.DR are reasonable. Thus, delay of one day is condoned. We proceed to hear the case on merit

3. The revenue has raised two grounds of appeal challenging the action of the CIT-A in giving relief to the assessee by considering the fresh evidences filed by the assessee is against the Rule 46A of the I.T Rules, 1962.

4. Ground no. 1 is relating to deletion of additions made by the AO on account of personal expenses of Rs.17,500/- and Rs.15,000/-.

5. The AO in the scrutiny proceeding disallowed the expenses on account of personal capacity a sum of Rs.17,500/- and Rs.15,000/- on the ground that the said expenses are not allowable under the Act. The CIT-A deleted the said additions taking into consideration the business profile of the assessee and expenditure claimed as revenue expenditure. Relevant portion of finding of the CIT-A is reproduced herein below:-

" Next ground no. 2 relates to disallowance of expenses of Rs.17,500/- and Rs.15,000/- under the head personal expenditure. It is contended that by the assessee these expenses were incurred on account of consultation fees as assessee was doing the business of consultancy services and commission which were duly credited in schedule 7 of the P & L a/c and accordingly this expenditure was claimed as revenue expenditure. Therefore ground no. 2i is allowed."

6. The Id.DR submits that the CIT-A has given relief to the assessee by accepting the fresh evidences. The CIT-A did not give sufficient opportunity to the AO for verification of the said details of the assessee. The Id. DR argued that the CIT-A violated the Rule 46A of the IT Rules 1962 in admitting the fresh evidence.

7. On the other hand, the Id.AR submits that the assessee did not file any fresh evidence before the CIT-A. The CIT-A examined the schedule 7 of P & L account and found that the expenditure was claimed as revenue expenditure and deleted the additions. He relied on the order of the CIT-A.

8. Heard rival submissions and perused the material available on record. The main contention of the Revenue is that the violation of Rule 46A by accepting the fresh evidence by the CIT-A. But, the Id.DR did not bring on record anything to show that the CIT-A has accepted the fresh evidence from the assessee in allowing relief. We find that the CIT-A has given relief

taking into consideration the submission of assessee that the expenses were incurred during the course of business of the assessee. These expenses were revenue in nature. The CIT-A considering the business profile of the assessee i.e consultancy services and commission and by examining the schedule 7 of the P & L account, which was already available before the AO allowed the claim of assessee as revenue expenditure. We find that there was no fresh evidence before the CIT-A as such there was no violation under Rule 46A of the IT Rules. The order of the CIT-A is justified. Accordingly, ground no. 1 raised by the revenue is dismissed.

9. Ground no. 2 is relating to deletion of addition of Rs.63,90,500/- made on account of long term capital gain [LTCG].

10. The AO found that the assessee sold its house property (H.P) of Mumbai for a consideration of Rs.77,00,000/-. The AO on index cost determined the LTCG at Rs.63,90,500/-. According to the AO, the assessee did not disclose the same in its return. Accordingly, he added the sum of Rs.63,90,500/- to the total income of the assessee being LTCG.

11. Before the CIT-A, the assessee contended that basing on agreement of sale the AO determined the said LTCG. The said property was tenanted and legal proceedings were pending against tenants. The assessee could not handover the vacant portion of the said property. The said agreement of sale was not acted upon. The CIT-A examining the agreement on sale dt. 20-06-08 and deed of cancellation dt. 02-07-2011 found that the assessee refunded the amount of Rs. 77 lacs as per said agreement dt. 20-06-08 in FY 2011-12. The CIT-A taking into consideration the submissions of the assessee and examining the said agreement deleted the said addition by stating as under:-

" Next ground no.6 addition of Rs.63,90,500/- as Long term capital gains for sale of property situated in Mumbai. The appellant had executed an agreement for sale for property had 75, M.K Road, Mumbai as per agreement dated 20.06.2008 with M/s. Success Home (India) Ltd for Rs. 77.00 Lacs as full value of consideration the said property was tenanted property and legal proceedings against tenants were pending against Small Causes Court at Mumbai and consequently vacant possession of the premises could not be handed over. The relevant transaction was shown in schedule-3 and schedule -8 of the Balance Sheet as business asset in the gross block of assets. The agreement dated 20.06.2008 could not be transformed in sale deed because of cancellation agreement dated 02.07.2011 and accordingly Rs.77.00 Lacs was refunded to M/s. Success Home (India) Ltd. in FY 2011-12. Assessee paid further a sum of Rs.5,00,000/- as damages to M/s. Success Home (India) Ltd. Keeping in view these facts and circumstances no capital gain arose as the possession was not handed over as per agreement dated 20.06.2008 which was cancelled on 02.07.2011 and no transfer of capital asset could place and accordingly addition of Rs.63, 90,500/- is deleted."

12. The Id.DR before us agitated the violation of rule 46A of the IT Rules 1962 by the CIT-A in giving relief to the assessee. He also submits that the said agreement of sale and deed of cancellation were not before the AO and as such urged that the assessee filed fresh evidences before the CIT-A. Basing on which, the CIT-A has given relief to the assessee without giving an opportunity to the revenue by seeking the remand report from the AO and urged to allow ground no.2 raised by the revenue.

13. On the other hand, the Id.AR submits that the assessee filed the said agreement of sale before the AO. The AO examining the same determined the long term capital gain at Rs.63,90,500/-. He submits that the deed of cancellation was not before the AO during the assessment proceedings and urged to remand the ground no.2 to the file of AO.

14. Heard rival submissions and perused the material available on record. We find that the CIT-A examining the agreement on sale and deed of cancellation dt. 20-06-08 and 02-07-2011 respectively has deleted the said addition as made by the AO. Admittedly, the AO determined the LTCCG of the assessee by observing that the same was not disclosed by the assessee in the return. Therefore, it is clearly established that the agreement on sale was before the AO, on which basis he determined the said LTCCG. Therefore, the arguments as advanced by the Id.DR that the said agreement/evidence

was not before the AO appears to be incorrect. Regarding the deed of cancellation dt. 02-07-2011, by examining the same the CIT-A found that the assessee returned the value of consideration of Rs. 77 lacs to M/s. Success Home (India) Ltd in FY 2011-12. We find that the AO passed his order dt. 13-12-2011 and deed of cancellation dt. 02-07-2011 during the course of assessment proceedings and at the time of passing the assessment order the said deed of cancellation was not on record for AO's consideration. Therefore, we agree with the argument of the Id.DR that violation of rule 46A of the IT Rules 1962 by the CIT-A is valid in respect of accepting the additional evidence without giving any opportunity to AO. In such circumstances and discussion above, we remand the issue to the file of AO for his verification. Accordingly, ground no.2 raised by the revenue is allowed for statistical purposes.

15. In the result, the appeal filed by the revenue is partly allowed for statistical purposes.

Order Pronounced in the Open Court on 07-06-2017.

Sd/-
P.M Jagtap
Accountant Member

Sd/-
S.S.Viswanethra Ravi
Judicial Member

Dated: 07-06-2017

Copy of the order forwarded to:-

1. The Appellant/Revenue: The DCIT, Cir-2, Aaykar Bhawan, 7th Floor, P-7 Chowringhee Sq., Kol-69.
2. The Respondent/Assessee: M/s. Machine Tools (India) Ltd 56A Mirza Ghalib Street, Kol-16.
3. CIT Representative True Copy
4. CIT(A) By order
5. The Departmental Guard File
6. Sr.PS/H.O.O ITAT, Kolkata

** PRADIP SPS