

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D', NEW DELHI**

**BEFORE SH. BHAVNESH SAINI, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER**

ITA No.4002/Del/2013
Assessment Year: 2009-10

Income Tax Officer, Ward - 44(4), New Delhi	Vs.	Sh. Kailash Chand, N-60, First Floor, 1 st Type, Flast -01, Mr. Jagat Ram Park, Laxmi Nagar, Delhi
PAN : ABXPC5478Q		
(Appellant)		(Respondent)

Appellant by	Sh. Amit Jain, Sr.DR
Respondent by	Sh. Kailash Chand, Assessee

Date of hearing	02.11.2017
Date of pronouncement	07.11.2017

ORDER

PER O.P. KANT, A.M.:

This appeal by the Revenue is directed against the order dated 29/04/2013 passed by the Commissioner of Income Tax (Appeals)-XXX, New Delhi [in short ~~the~~ CIT-(A)] for assessment year, 2009-10 raising following grounds:

- (1) *On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in:*
 - (i) *deleting an addition of Rs.30.99.164/- out of addition .of Rs.32.99.164/- made by the A.O on account of unexplained cash credits and payments of credit cards from undisclosed source.*
 - (ii) *directing the A.O to re-compute the income of the assesses by making addition of Rs.2,00.000/- by clubbing business income of his wife in the hands of the assessee.*

(iii) admitting additional evidence filed before him in contravention of Rule 46A of the I.T. Rules and without providing an opportunity to the A.O as required under Rule 46A(3) of the I.T. Rules.

(2) The appellant craves leave to add, alter, and amend any ground of appeal raised above at the time of the hearing."

2. The facts in brief of the case are that the assessee, an individual was employed with M/s. Steel Authority of India Ltd. during relevant period. The assessee filed return of income on 30/07/2009, declaring income of Rs.5,42,414/-. The case was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short ~~the Act~~) was issued and served upon the assessee. During assessment proceedings, the Assessing Officer observed cash deposits in bank accounts as well as in credit cards and due to failure on the part of the assessee to satisfactorily explain those cash deposits, he made addition of Rs.32,99,164/- which consisted of Rs.23,04,266/- as unexplained deposits in bank accounts and unexplained repayment of credit card expenses of Rs.9,94,898/-. Before first appellate authority, the assessee submitted that said deposits were out of the trading operations of M/s Sai Garments, i.e., the proprietary concern run by his wife Mrs. Rani Chand, and submitted books of accounts of the said concern and other documents. The learned CIT-(A) admitted those documents as additional evidence and allowed the appeal of the assessee. Aggrieved, the Revenue is in appeal before the Tribunal raising the grounds as reproduced above.

3. In the grounds raised, the ground No.1(iii) is in respect of admitting additional evidences without affording opportunity to the Assessing Officer as required under its Rule 46A(3) of Income Tax Rules, 1962 (in short ~~the Rules~~).

4. The learned Sr. DR submitted that the learned CIT-(A) has not complied with requirements of Rule 46A(3) of the Rules and therefore, the matter may be restored back to the file of the Ld. CIT-(A).

5. On the other hand, the assessee appeared in person and submitted that the books of accounts and other documents were produced before the learned CIT-(A), however, he was not aware whether any remand report was called from the Assessing Officer on those additional evidences or not.

6. We have heard the rival submission and perused the relevant material on record. The additional evidences filed by the assessee before the Ld. CIT-(A) are in relation to the ground no. 1(i) and 1(ii) raised by the Revenue. The learned CIT-(A) has given his finding on the additional evidences as under:

*“5. I have considered written submissions, grounds of appeals and facts of the case, discussed the matter with the AR very carefully. Sh. Kailash Chand, Appellant appeared for hearing. The appellant is an employee of Steel Authority of India Ltd., and has been asses in ITO, Ward 44(4) New Delhi since long back. The appellant has filed his return at an income of Rs.5,42,410/- & the same has been selected for scrutiny under CASS. During the course of assessment proceedings, the AO has made an addition of Rs.32,99,164/- on account of unverified deposit transactions in bank account as well as unverified credit card expenses of Rs.9,94,898/- , the appellant has submitted all the evidences in support of his claim which was duly verified by the undersigned and found to be correct. **The A.O. had not demanded Cash Book, ledger of SAI Garments, proprietary business of Wife Mrs. Rani Chand. Hence, it is additional evidence at this stage. However, considering the whole process of assessment and attachment of appellant's salary income, the A.O. had not given justice to appellant at assessment stage. In view of above, I admit additional evidences and pass a speaking order after verifying all evidences. The CIT(A) has co-terminus power with A.O. in all proceedings of assessment. When the appellant gives a plausible explanation of source of***

deposit from wife's small business, we should not disbelieve it outright. We should enquire about truth of business from other departments of Govt., like Sales Tax, Service Tax, Excise Deptt. bank etc. If A.O. cannot collect any circumstantial evidence against appellant then he should have faith in appellant's story to some extent. We should not divide a family between husband & wife by making high pitched assessment. The appellant is AGM, SAIL, in a Senior Management position. His words and views cannot be outrightly rejected. Though they have made little mistake of non-auditing of books of accounts of M/s Sai Garments u/s 44AB (as T.O. was Rs.39,99,876/- for this A.Y. 2009-10) nor filed I.T. return of wife for this A.Y. 2009-10, her income can be clubbed to appellant's income u/s 44AF of I.T. Act @ 5% of T.O. of Rs.39,99,876/- (40 Lakhs) i.e. Rs.2,00,000/- to correctly assess the income of the family. The proprietary business of M/s Sai Garments had shown income of Rs. 81,775/- on T.O. of Rs.39,99,876/- and also produced Balance sheet of business activity. Appellant's wife had filed her I.T. return from A.Y. 2006 to 2008 and then from A.Y. 2010 to A.Y. 2013 but not filed any return for this A.Y. 2009-10. While computing the profit u/s 44AF of I.T. Act on retail business of appellant's wife. Section 44 AA & 44AB are not applicable. The A.O. is directed to recompute the income of appellant by making addition of Rs. 2 Lakh, the business income of wife, by clubbing it to appellant's hand."

(emphasis supplied externally)

7. Regarding admitting of the additional evidences, the relevant rule i.e. 46A of the Rules, is reproduced as under:

“[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.*
- (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 the²[Assessing Officer]) under clause (a) of sub-section (1) of section 251 or the imposition of penalty under section 271.]”*

8. We find that in sub-rule (3) of Rule 46A of the Rules, it is clearly specified that the Commissioner shall not take into account the additional evidences unless the Assessing Officer has been allowed a reasonable opportunity to examine those additional evidences.

9. It is evident from the above finding of the Ld. CIT-(A) that he has admitted the additional evidences by way of cash book and Ledger of Sai Garments i.e. the proprietary concern of wife of the assessee, for the first time in appeal without confronting the AO with the same and allowing him an opportunity to furnish his comments and without verification, sub-rule (3) of Rule 46A has not been complied with and, therefore, we feel it appropriate to restore the issue to the Id. CIT(A) to comply with the requirements of Rule 46A and take a fresh decision on merits in accordance with law. We order accordingly. The ground No. 1(iii) is allowed.

10. Since ground Nos. 1(i) & 1(ii) are dependent on outcome of ground No. 1(iii), same are accordingly allowed for statistical purposes.

11. In the result, appeal of the Revenue is allowed for statistical purposes.

The decision is pronounced in the open court on 7th Nov., 2017.

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Dated: 7th November, 2017.

RK/-(D.T.D)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Asst. Registrar, ITAT, New Delhi