

Income Tax Appeals No.28 to 33 of 2014

28.11.2014

Shri R.L. Jain, learned Senior Counsel with Ms. Veena Mandlik, advocate for the appellant.

Shri Sumit Nema, advocate for the respondent - Assessee.

They are heard.

The controversy involved in these six appeals are identical in nature. They have been heard together and with the consent of the learned counsel for the parties, they are being disposed of by this common order.

2. Learned Senior Counsel for the appellant submits that no sufficient and reasonable opportunity to the Assessing Officer for admission and acceptance of additional evidence filed for the first time before the Commissioner of Income Tax (Appeals), as required under Rule 46 of the Income Tax Rules, 1962 has been granted. After the assessment order dated 29.12.2010, the respondent assessee filed an appeal before the Commissioner of Income Tax (Appeals) under Section 246(A) (1)(b)(a) of Income Tax Act, 1961 (in short 'IT Act'). During the pendency of the appeal, the respondent filed additional documents. The Appellate Authority, without granting reasonable time, admitted the aforesaid documents and set aside the assessment made by the Assessing Officer and allowed the appeal. The order of the Appellate Authority has been affirmed by the Income Tax Appellate Tribunal by impugned order dated 30.07.2013.

3. Now the question is whether Commissioner (Appeals)

granted reasonable opportunity to the Assessing Officer, as required under the sub-Rule 3 of Rule 46(A) of Income Tax Rules, 1962.

4. The learned Senior Counsel, to substantiate his claim, is raising the following substantial questions of law, which arise in all the appeals :-

“(i) Whether under the facts and circumstances of the case, order allowing the application for additional evidence, without according proper opportunity to submit its comments, as required under Rule 46-A of the Income Tax Rules is contrary to law?.

(ii) Whether the explanation offered by the Officer of Income Tax Department for not submitting the comments due to being busy in deciding limitation cases tantamount to sufficient cause for not submitting the report?”

5. We have also perused the affidavit filed by the appellant on 28.11.2014 i.e. during the course of hearing. Paragraphs No.4 and 5 of the affidavit, reads as under: -

“4. I state on oath that at the time of hearing of the matters Hon'ble Court directed to produce the evidence in regard to any Request or Application for extension of time filed before the learned CIT (A) for giving comments on additional documents filed before the learned CIT (A)-I, Indore by the assessee.

5. I state on oath that for the purpose record of the assessee available in the office, for the aforesaid period was examined and it was found that an Application dated 03.12.2014 was filed by the Erst-while Assessing Officer Shri Sachchidanand Dube, DCIT 1 (1), Indore in the Office of learned CIT (A)-I, Indore requesting therein for more than one month's time to offer comments on the admissibility of the appellants additional evidences

forwarded to him.”

6. It is submitted by the learned counsel for the parties that the issue involved in these appeals is squarely covered by the decision of this bench in the case of Commissioner of Income Tax-I, Indore v. Essence Commodities Limited (Income Tax Appeal No.06/2014) decided on 30th October, 2014. They submitted that in the same terms, these appeals be disposed of with direction to the learned Commissioner of Income Tax (Appeals). Paragraphs No.15 to 26 of order dated 30th October, 2014 passed in ITA No.06/2014 reads, as under: -

“15. *Rule 46-A of the Income Tax Rules of 1962 is relevant which reads as under :-*

[Rule 46A. Production of additional evidence before the [Deputy Commissioner (Appeals)] and Commissioner (Appeals)]. - (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.]”*

16. As per sub-rule 1 of Rule of 46A, the appellant shall not be entitled to produce any evidence except where the Assessing Officer has refused the additional evidence, which ought to have been admitted or where the appellant was prevented by sufficient cause from producing evidence which he was called upon to produce by the Assessing Officer. It is not the case of the

assessee that he was prevented by the sufficient cause from producing the additional evidence before the Assessing Officer. As per sub-rule 2 of Rule 46A, no evidence shall be admitted unless reasons in writing is recorded for its admission. As per Rule 3 unless the Assessing Officer has been allowed a reasonable opportunity to examine the evidence or documents, the appellate authority shall not take into account any evidence produced before him under sub-rule 1.

17. Rule 46A merely provides an opportunity to the assessee to produce documentary evidence or witnessess, as the case may be. In other words, a duty is cast upon the assessee to produce all evidence both oral and documentary before the Assessing Officer.

18. When the assessee was not able to produce the said evidence or witnesses before the Assessing Officer, the Commissioner of Income-tax (Appeals) has to convince himself about the reasonable cause shown by the assessee for not producing them before the Assessing Officer and for placing it before the appellate authority for the first time.

19. In the case where the Commissioner of the Income-tax (Appeals) is convinced about reasonable cause then, he has to follow a procedure contemplated under rule 46A(3) by providing sufficient opportunity to the Assessing Officer to examine the evidence or document or to cross examine the witnesses, as the case may be.

20. The Commissioner of Income-tax (Appeals) should not ordinarily allow the new evidence to be adduced in order to enable the party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point

lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it.

21. It is not in dispute that additional evidence filed by the assessee could not be verified by the Assessing Officer because, he was engaged in the time bound matters involving more than 140 block assessments and also to the fact that he had been assigned the duties of expenditure in the U.P. State Election in Ghaziabad Constituency by the Election Commission of India and, therefore, it was practically impossible for him to offer the comments on the aforesaid additional evidence and, therefore, he sought one month further time for due verification of the same. The aforesaid facts are not disputed by the learned authorities nor by the assessee's.

22. The decision of Delhi High court cited by the learned counsel for the respondent in the case of Commissioner of Income - Tax v/s. Virgin Securities & Credits Pvt. Ltd, reported as 2011 (332) ITR 396 (Delhi) will not be applicable in the present facts and circumstances of the case, because in the case of Virgin Security and Credit Pvt. Ltd (supra) the Commissioner of Income Tax (Appeals) had obtained a remand report from the Assessing Officer. The Assessing Officer while submitting his report has not objected to the admission of the additional evidence but had merely reiterated contentions in the assessment orders.

23. In the case in hand, the reasons assigned by the Assessing Officer for asking for further time to verify the documents filed by the assessee was *bonafide* as he was on election duty

and number of cases of assessment in which limitation was going to expire was pending and, therefore, Assessing Officer was busy and thus, the reason assigned by him for asking more time was sufficient. He was prevented by sufficient cause from submitting the report. The learned Commissioner (Appeals) as well as learned ITAT have not been able to consider these relevant facts in their correct perspective before passing the impugned order. The discretion exercised by the Commissioner (Appeals) while refusing to grant further time to admit the additional evidence has not been based on sound judicial principles. The assessing authority had given satisfactory explanation and sufficient cause for not verifying the additional evidence filed before the appellate authority. The authorities ought to have granted some reasonable time to the Assessing Officer to verify the additional evidence.

24. On due consideration of the aforesaid, we are of the view that learned Commissioner as well as learned Tribunal erred in proceeding with the matter and admitting the additional evidence filed by the assessee without granting further time to verify the same and submit a report. Thus, we set aside the impugned orders dated 23.8.2013, 29.7.2013, 23.8.2013 passed by the Income Tax Appellate Tribunal, by answering the question of law in favour of the appellant / department and remit the matter back to the learned Commissioner (Appeals) with a direction that sufficient time be granted to the department to verify the documents and rebut that evidence and thereafter decide the controversy a fresh in accordance with law, as early as possible, and endeavour shall be made to conclude it within a period of six months from the date of receipt of certified copy of the order.

25. The substantial questions of law raised

in all these batch of appeals are answered in favour of the revenue and all the appeals are allowed.

26. We make it clear that the order passed will not stand in the way of the Commissioner of Income-tax (Appeals) / Assessing Officer to comply with the other direction of the Tribunal insofar as in consideration of the materials produced by the assessee is concerned.”

7. On the aforesaid reasoning, the substantial questions of law arise in this batch of six appeals are answered in favour of the Revenue and all the appeals are allowed.

8. We make it clear that the order passed will not stand in the way of the Commissioner of Income-tax (Appeals) / Assessing Officer to comply with the other direction of the Tribunal insofar as in consideration of the materials produced by the assessee is concerned.

9. In the result, Income Tax Appeals No.28 to 33 of 2014 are allowed on the same terms. No costs.

(P.K. Jaiswal)
Judge

(Smt. S.R. Waghmare)
Judge