THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
And
THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

I.T.T.A.No.119 of 2015

ORDER: (per Hon'ble Sri Justice Ramesh Ranganathan)

Heard Sri J.V.Prasad, learned Senior Standing Counsel for the Income Tax Department, and Sri V.Ramakrishna Reddy, learned counsel for the respondent-assessee.

This appeal, under Section 260-A of the Income Tax Act, 1961 (for brevity, 'the Act'), is preferred against the order passed by the Income Tax Appellate Tribunal (for brevity, 'ITAT') in I.T.A.No.1081 of 2013 dated 21.03.2014. A best judgment assessment was passed under Section 144 of the Act by the assessing authority on 21.01.2013 disallowing deductions under Section 10-A of the Act. Aggrieved thereby, the assessee carried the matter in appeal to the CIT (A) who, in his order dated 29.04.2013, observed that the appellant had explained the reasons for non-appearance on some dates, on the ground that the company was in dire straits; they had also stated that the information, sought for by the assessing officer, was fully available; and, on the ground of exceptional circumstances, the assessee had prayed that an opportunity be given to them to submit all details requested for by the assessing officer. The CIT (A) also noted that the appellant had furnished the information that was called for by the assessing officer. After considering the documents so furnished, and the evidence placed on record by the appellant, he set aside the assessment order to the extent the appellant's claim for deduction, under Section 10-A of the Act, had been disallowed.

Aggrieved by the order passed by the CIT (A), the Revenue carried the matter in appeal to the ITAT which, in the order impugned in the appeal before us, referred to the judgments of the Allahabad High Court in **Smt.Mohinder Kaur v. Central Government**[1]; **CIT v. K.Ravindranathan Nair**[2]; the Calcutta High Court in **Rajkumar Srimal**

v. CIT[3]**;** the Gujarat High Court in **CIT v. Vali Mohamed Ahmedbhai**[4]; the Madhya Pradesh High Court in **CIT v. Babulal Jain**[5]; the Kerala High Court in **C.Unnikrishnan v. CIT**[6]**;** the Allahabad High Court in **Ramprasad Sharma v. CIT**[7]; and the Bombay High Court in **Smt.Prabhavati Shah v. CIT**[8]**;** and held that the first appellate authority had wide powers over orders of assessment; in the exercise of such power, the first appellate authority could direct the assessee to produce any evidence, information or material that was not produced before or considered by the assessing officer; the purpose of Rule 46-A of the Income Tax Rules (for brevity, 'the Rules') is to place fetters on the rights of an appellant to produce additional evidence before the first appellate authority, and not on the right of the first appellate authority to call for production of any fresh evidence or information; this aspect is clear from sub-rule (4) of Rule 46-A itself; the entire additional evidence came on record before the first appellate authority as he decided to examine the facts of the case in depth, and adjudicate upon the matter on the basis of the evidence and the material thus gathered; the CIT(A) was empowered to do so under Section 250(4) of the Act; the result of the enquiry, conducted by him, could cement the case made out by the assessing officer or to help the assessee against the findings of the assessing officer; the mere fact that the result of the enquiry, thus conducted, supported the case of the assessee had no bearing on the jurisdiction and powers of the CIT (A); the CIT(A) could have confronted the assessing officer with the evidence received and the material gathered; he could have allowed the assessing officer to have his say in the matter; if he had done so, no dispute would have arisen; there was, however, no requirement in law that the first appellate authority should invariably consult or confront the assessing officer every time additional evidence, that was not before the assessing officer, is obtained by the first appellate authority on its own motion; there is no requirement in law to consult/confront the assessing officer with such additional evidence; there may be cases where additional evidence is admitted by the first appellate authority on a request or application being made by the assessee; in such cases Rule 46-A (2) of the Rules requires the first appellate authority to allow the assessing officer a further opportunity to rebut the fresh evidence; even that requirement cannot be said to be a rule of universal application; if the additional evidence, furnished by the assessee before the first appellate authority, is in the nature of clinching evidence, leaving no further room for any doubt or controversy, in such a case no useful purpose would be served in performing the ritual or forwarding the evidence/material to the assessing officer and in obtaining his report; and, in such exceptional circumstances, the requirement of sub-rule (3) may be dispensed with. The appeal preferred by Revenue was dismissed.

In support of their claim for exemption under
Section 10-A, the assessee had filed, before the CIT (A), copies of the certificate of registration with STPI, Hyderabad and Goa, Softex forms submitted to STPI, reconciliation of export proceeds with invoices raised, FIRCs and bank statements. The fact that the documents, furnished by the appellant before the CIT (A), were not brought to the notice of the assessing authority is not in dispute.

Section 250 of the Act prescribes the procedure in appeal. Section 250 (1) of the Act enables the CIT (A) to fix a day and place for the hearing of the appeal, and to give notice of the same to the appellant, and to the assessing officer against whose order the appeal is preferred. Section 250 (2) of the Act stipulates that the appellant, and the assessing officer, shall have a right to be heard at the hearing of the appeal. Section 250 (4) of the Act stipulates that the Commissioner may, before disposing of any appeal, make such further enquiry as he thinks fit or direct the assessing officer to make further enquiry and report the result of the same to him.

Rule 46-A of the Rules reads as under:

> (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.]

While clause (1) of Rule 46-A of the Rules enables the appellant to produce, before the first appellate authority, any evidence, other than the evidence produced by him before the course of proceedings before the assessing authority, sub-rule (2) stipulates that no evidence shall be admitted, under sub-rule (1), unless the appellate authority records, in writing, reasons for its admission. Under sub-rule (3) the first appellate authority shall not take into account any evidence, produced under sub-rule (1), unless the assessing officer has been allowed a reasonable opportunity to examine the evidence or documents, or to examine the evidence.

While it is no doubt true that nothing contained in sub-rules (1) to (3) of Rule 46-A, affect the power of the first appellate authority to direct production of any documents, or the examination of any evidence, in order to dispose of the appeal, it is clear from sub-sections (1) and (2) of Section 250 of the Act itself that the assessing officer has a right to be heard at the hearing of the appeal.

Rule 46-A (3) of the Rules disables the CIT (A) from taking into account any evidence produced before him unless the assessing officer has been allowed a reasonable opportunity to examine the evidence or documents. In the present case, admittedly, no such opportunity has been afforded to the assessing officer. The Tribunal has held that, if the evidence is clinching in nature and does not leave any further room for doubt, no useful purpose would be served in performing the ritual. What the Tribunal failed to note is that Rule 46-A (3) requires the assessing officer to be given an opportunity to examine the documents produced by the assessee for the first time before the first appellate authority. This mandate of Rule 46-A (3) could not have been dispensed with, as it is a statutorily prescribed rule of natural justice. This mandate under Rule 46-A (3) is in tune with Section 250(2) of the Act which requires the assessing authority, or his representative, to be given an opportunity of being heard before the appeal is decided.

The Gujarat High Court in **Vali Mohamed Ahmedbhai**[4] rejected the view, similar to the one taken by the Tribunal, and held that the CIT (A) should not have taken into account any evidence produced under Rule 46-A(1) unless the Income-tax officer has been allowed a reasonable opportunity to examine the evidence or to cross-examine the witness whose evidence was taken on record or to produce any evidence in rebuttal of the additional evidence produced by the assessee; the CIT (A) could not have relied on the additional evidence without giving such opportunity to the Income-tax officer; even if no such rule was in existence, ends of justice and fair play demand that, when the assessee produces additional evidence in his appeal, an opportunity is given to the ITO to test the evidence or to counter the effect of the evidence by producing evidence in rebuttal or otherwise; the ITO had the right to object to the production of additional evidence; since something adverse to the ITO was sought to be done in the course of the appeal, by way of augmenting the record, the ITO ought to have been heard, and given an opportunity to meet the additional material, by way of cross-examination, counter-evidence and urging submissions in the context of the augmented record; when a prayer for additional evidence is made, it is an independent and substantive application seeking a new right; notice of such application was necessary to the ITO; he should have been afforded the opportunity to oppose it; no order granting the request for additional evidence could have been passed behind the back of the ITO in violation of principles of natural justice; and notice of the appeal cannot be equated with the notice of a future application to lead additional evidence.

The statutory obligation which the CIT (A) was required to discharge, under Rule 46-A(3) of the Rules, cannot be whittled down, or brushed aside as performing a ritual. While sub-rule (4) of Rule 46-A of the Rules, no doubt, confers power on the first appellate authority to cause production of documents, justice and fair play would require the assessing authority to be given the opportunity to examine such documents and put forth his objections, if any, thereto. The document which the assessee intends to place before the appellate authority, cannot be entertained by the CIT (A) except on fulfillment of the following conditions:- (1) recording reasons in writing for receiving such evidence; and (2) giving the assessing authority an opportunity to examine the documents.

The order under appeal must be, and is accordingly, set aside. As the CIT (A) has examined the documents, without giving the assessing officer an opportunity of being heard, his order must also be set aside. The CIT (A) shall make available copies of the documents, placed before him by the assessee, to the assessing officer and, after giving him an opportunity of being heard in this regard, pass orders afresh and in accordance with law.

As this dispute relates to the assessment year 2010-11, the CIT (A) shall dispose of the appeal, as directed hereinabove, with utmost expedition; and, in any event, not later than three months from the date of receipt of a copy of this order. The appeal of the Revenue stands allowed.

However, in the circumstances, without costs. Miscellaneous petitions pending, if any, shall stand disposed of.

RAMESH RANGANATHAN, J

M.SATYANARAYANA MURTHY, J

14th December, 2015.
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[1] 104 ITR 120 (All)

[2] 265 ITR 217 (Ker)

[3] 102 ITR 525

[4] 134 ITR 214 (Guj)

[5] 176 ITR 411 (MP)

[6] 233 ITR 485 (Ker)

[7] 119 ITR 867 (All)

[8] 231 ITR 1 (Bom)