

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

ITTA.No.608 of 2015

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

Heard Sri B.Narasimha Sarma, learned Senior Standing Counsel for Income Tax, and Ms.K.Vijaya Lakshmi, learned counsel for the respondent-assessee and, with their consent, the writ petition is disposed of at the stage of admission.

The Revenue has invoked the jurisdiction of this Court under Section 260-A of the Income Tax Act, 1961 (for short "the Act") against the order passed by the Income Tax Appellate Tribunal, Hyderabad in ITA.No.986/Hyd/2012 for the assessment year 2008-09 dismissing the Revenue's appeal against the order passed by the Commissioner of Income Tax (Appeals) allowing the assessee's claim for deduction of Rs.37,30,426/-.

The assessing authority passed an order of assessment, under Section 143(3) of the Act, on 31.12.2010 rejecting the assessee's claim for deduction of Wharfage and Demurrage charges for Rs.37,30,426/- on the ground that, though the assessee had claimed the expenses as Wharfage and Demurrage, no material evidence was produced in support thereof. The assessing authority noted the submission of the assessee that they had made payment to the Railways, and the expenditure incurred was reflected in their books of accounts. He, however, disallowed the said expenditure on the ground that no material evidence was produced for verification. Aggrieved thereby, the assessee carried the matter in appeal to the Commissioner of Income Tax (Appeals).

Ms.K.Vijaya Lakshmi, learned counsel for the respondent-assessee, would draw our attention to the statement of facts submitted by the assessee before the Commissioner of Income Tax (appeals) more particularly to paragraph (c) thereof, wherein the assessee stated that they had submitted vouchers and payment details for Rs.37,30,426/-,

being Wharfage and Demurrage charges paid to the Indian Railways, to the assessing authority. She would also draw our attention to the reply to the show cause notice, submitted by the assessee's representative on 26.12.2010, which refers to the assessee having enclosed ledger extracts of all expenditure incurred by them, including Wharfage and Demurrage paid to the Indian Railways. Learned counsel would submit that these documents show that the assessee had not only produced their ledger account before the assessing authority, but they had also produced before him the vouchers and details of payment to the Indian Railways towards Wharfage and Demurrage charges.

No finding has been recorded by the Commissioner of Income Tax (Appeals) that the money receipts produced by the assessee, as evidence of having incurred Wharfage and Demurrage charges and to have paid the amount to the Indian Railways, were placed before the assessing authority earlier during the course of assessment proceedings.

In the order under appeal, the Tribunal took note of the statement of facts submitted by the assessee before the Commissioner of Income Tax (Appeals), more particularly to paragraph (c) that vouchers and payment details of Wharfage and Demurrage(WD) charges paid to the Indian Railways were submitted before the assessing authority and, therefore, no fresh evidence had been furnished by the assessee before the first appellate authority. Curiously, the Tribunal without recording any finding on the assessee's claim that they had produced evidence, including payment vouchers, before the assessing authority, proceeded to hold that the assessee had produced the relevant vouchers before the first appellate authority examining which, and being satisfied with the validity of the assessee's claim, the said authority had allowed the relief thereto; and while a better course for the learned Commissioner of Income Tax (Appeals) would have been to confront the Assessing Officer with the same, the assessing officer had not appeared/participated before the Commissioner of Income Tax (Appeals) thus waiving his right of attendance before him.

It is evident from the order under appeal before us, that not only has

the Tribunal failed to examine the petitioner's claim that this documentary evidence was produced before the assessing authority but they, on the other hand, have recorded a finding that these documents were produced before the Commissioner of Income Tax (Appeals) and that the assessing authority had waived his right to object thereto. The statutory requirement of Rule 46-A of the Income Tax Rules (for short "the Rules") was ignored by the Tribunal in holding that the assessing authority had waived their right.

A Division Bench of this Court, in ***Commissioner of Income Tax-IV vs. Ne Technologies India Pvt. Ltd***^[1], examined the scope of Rule 46-A(3) of the Income-tax Rules and, following the judgment of the Gujarat High Court in ***Commissioner of Income Tax vs. Vali Mohamed Ahmedbhai***^[2], observed that the statutory obligation cast on the Commissioner of Income Tax (Appeals), 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 documents which the assessee intends to place before the appellate authority, cannot be entertained by the Commissioner of Income (Appeals) except on fulfilment 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. On the ground that the Commissioner of Income Tax (Appeals) had examined the documents, without giving the assessing officer an opportunity of being heard, the Division Bench set aside not only the order of the Tribunal but also the order of the Commissioner of Income Tax (Appeals) directing him to 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, to pass orders afresh in accordance with law. The time frame, for disposing of the appeal, was

fixed as three months from the date of receipt of a copy of the order, as the assessment year was 2010-11.

If, as has been held by the Tribunal, the vouchers, regarding payment made to Indian Railways towards Wharfage and Demurrage, was submitted for the first time before the Commissioner of Income Tax (Appeals), he was obligated, in terms of Rule 46-A of the Rules, to afford the assessing authority an opportunity of being heard. If, on the other hand, as is now sought to be contended before us by Ms.K.Vijaya Lakshmi, learned counsel for the respondent-assessee, these documents had already been filed before the assessing authority himself, then, of course, Rule 46-A of the Rules would have no application.

In such circumstances, we consider it appropriate to set aside not only the order under appeal passed by the Tribunal but also the order passed by the Commissioner of Income Tax (Appeals) who shall, in the first instance, examine the assessee's claim that all the documents before him were, in fact, produced earlier before the assessing authority. If the Commissioner of Income Tax (appeals) is satisfied that these documents were placed earlier before the assessing authority, he shall record a finding in this regard and then proceed to pass an order afresh in accordance with law. If, on the other hand, the Commissioner of Income Tax (Appeals) is satisfied that these documents were placed before him for the first time in appeal, he shall record a finding, give the assessing officer an opportunity of being heard, and thereafter pass an order afresh in accordance with law. As the assessment year in the present case is 2008-09, we consider it appropriate to direct the Commissioner of Income Tax (Appeals) to hear the appeal with utmost expedition and, in any event, within three months from the date of receipt of a copy of this order.

The appeal stands disposed of accordingly. The miscellaneous petitions pending, if any, shall also stand dismissed. There shall be no order as to costs.

RAMESH RANGANATHAN, J

M. SATYANARAYANA MURTHY, J

Date: 29.06.2016

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THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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[\[1\]](#) (Judgment in ITTA.No.119 of 2015 dated 14.12.2015)

[\[2\]](#) 134 ITR 214 (Guj)