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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA 352/2016**

KALATMAK CONSTRUCTIONS PVT.LTD. Appellant
Through: Dr.Rakesh Gupta, Advocate with
Mr.Ashwani Taneja, Mr.Somil Agarwal, Mr.Rohit
Kumar Gupta, Ms.Monika Ghai, Ms.Shyamalima
Borha, Advocates.

Versus

COMMISSIONER OF INCOME TAX Respondent
Through: Mr.Rahul Chaudhary, Sr. Standing
Counsel.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH**

ORDER
25.07.2017

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1.This is an appeal by the Assessee under Section 260A of the Income Tax Act, 1961 ('the Act') against the order dated 31st March, 2016 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 1071/Del/2011 pertaining to Assessment Year (AY) 2007-08.

2. **Admit.** The following question of law is framed for consideration:

'Should the ITAT have adjudicated a ground which was not specifically raised by the Revenue in its memorandum of appeal concerning the permission granted by the Commissioner of Income Tax (Appeals) [CIT(A)] to the Assessee to lead additional evidence at the appellate stage under Rule 46A of the Income Tax Rules, 1962

(‘the Rules’)?’

3. The facts in brief are that the return of income filed by the Assessee for the AY in question was picked up for scrutiny and the assessment was completed under Section 143(3) of the Act by the Assessing Officer (‘AO’) by order dated 24th December, 2009. The AO made an addition of Rs.37,05,741 to the returned income of the Assessee under Section 68 of the Act as unexplained cash credit.

4. In its appeal before the CIT (A), the Assessee filed an application under Rule 46A of the Rules seeking to lead additional evidence. The Assessee enclosed a large number of documents purportedly in support of its case that the addition under Section 68 of the Act by the AO, was unjustified. The CIT (A) allowed the application and permitted the Assessee to lead additional evidence. The CIT (A) ultimately allowed the appeal and deleted the addition by order dated 28th December, 2010.

5. Aggrieved by the above order of the CIT (A), the Revenue went in appeal before the ITAT by filing ITA No.1071/Del/2011. The grounds raised by the Revenue in its appeal read as under:

“1. The order of the learned CIT (A) is erroneous & contrary to facts and law.

2. On the facts and in the circumstances of the case and in law, the learned CIT (A) has erred in deleting the addition of Rs.37,00,000/- made u/s 68 of the Act being the unexplained cash credits

2.1- The Id. CIT (A) ignored the findings recorded by the A.O. and the fact that the assessee did not discharge the onus of

proving the existence / credit worthiness of the creditors and genuineness of the transactions.

3. The appellant craves leave to add, to alter, or amend any grounds of the appeal raised above at the time of the hearing.”

6. In other words, no ground was urged by the Revenue that the CIT(A) should not have permitted the Assessee to lead additional evidence by allowing its application under Section 46A of the Rules.

7. In para 6 of the impugned order, the ITAT records the submission of the Departmental Representative (DR) that “the Id. CIT(A) was not justified in admitting the additional evidences on record and to consider the same for holding that the assessee has discharged the onus that lay upon him u/s 68 of the Act.” In para 7 of the impugned order, the ITAT held as under:

“7. Having considered the rival submissions in the light of factual matrix of the case, we find that the primary question which requires adjudication in the present appeal is whether the first appellate authority was justified in admitting the additional evidence u/r. 46A or not and if the answer to this question comes in affirmative, whether the Id. CIT(A) was justified to delete 'the addition holding that the onus u/s. 68 stood discharged on the part of the assessee or not.”

8. The entire discussion thereafter in the impugned order is on the aspect of the additional evidence led by the Assessee before the CIT (A) under Rule 46A of the Rules. Finally, ITAT came to the conclusion that the CIT (A) ought not to have allowed the said application. The Revenue’s appeal was allowed by setting aside the order of the CIT (A).

9. It is pointed out by Dr. Rakesh Gupta, the learned counsel appearing for

the Appellant Assessee, that the ground regarding the additional evidence led by the Assessee under Rule 46A of the Rules had not been raised by the Revenue in its memo of appeal before the ITAT. Therefore, the Assessee was taken by surprise when during the course of the hearing of the appeal before the ITAT the above ground was urged and considered by the ITAT. He, therefore, submitted that the impugned order of the ITAT should be set aside by this Court and the appeal remanded to the ITAT for a fresh disposal.

10. In reply, Mr. Rahul Chaudhary, the learned Standing Counsel for the Revenue, drew the attention of the Court to Rule 11 of the Income Tax Appellate Tribunal Rules, 1963 (ITAT Rules) which reads as under:

“11. Grounds which may be taken in appeal.- The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule:

Provided that the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground.”

11. An analysis of the above Rule reveals that it is open to the ITAT to consider a ground which has not been set forth in the memorandum of appeal before it or in respect of which leave has not been sought. However, the proviso makes it clear that the ITAT will not rest its decision on such ground unless the party affected thereby “has had a sufficient opportunity of being heard on that ground.”

12. As it transpires that the above ground regarding the additional evidence under Section 46A of the Rules was urged for the first time during the course of arguments before the ITAT. Therefore, it appears doubtful whether sufficient opportunity as contemplated under the proviso to Rule 11 of the Rules was in fact granted to the Assessee to respond to the above ground. The grievance that the Assessee was taken by surprise by a ground which was not included in the memorandum of appeal filed by the Revenue cannot be said to be improbable.

13. In the circumstances, the Court is of the view that the ITAT should be directed to once again consider the appeal of the Revenue on merits and also decide afresh the two issues, viz., the validity of the order of the CIT (A) allowing the additional evidence led by the Assessee under Section 46A of the Rules as well as the merits of the order that was challenged before the CIT (A).

14. Accordingly, the impugned order dated 31st March, 2016 passed by the ITAT is set aside and the Revenue's appeal being ITA No.1071/Del/2011 for AY 2007-08 is restored to the file of the ITAT for a fresh decision on merits on both the above grounds without being, in any manner, influenced by the order which has been set aside by this Court by the present order.

15. ITA No.1071/Del/2011 shall be listed before the ITAT on 8th September, 2017 for directions.

16. The appeal is disposed of in the above terms.

17. *Dasti* under the signature of the Court Master.

S.MURALIDHAR, J

PRATHIBA M. SINGH, J

JULY 25, 2017
'anb'