ADMISSION OF ADDITIONAL EVIDENCE BY THE CIT(A)- BACK TO SQUARE ONE AT TRIBUNAL STAGE

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Introduction

1. The first appellate authority viz., CIT(A) enjoys wide powers under the statute. Though he sits in appeal preferred by the assessee against the order of assessment framed by the AO., his powers are plenary and coterminous with that of the assessing officer (AO.). He can do what the AO. could do and can also direct him to do what he has failed to do. Thus his powers are not akin to the powers possessed by a court of appeal under the Code Of Civil Procedure. An aggrieved assessee filing an appeal before the CIT(A) may be taken aback when he chooses to enhance the assessment made by the A O. (such power has been specifically conferred by the statute upon him.) rather than addressing the grievance of the assessee.

But surprisingly, when it comes to granting relief to the assessee by admitting evidence which could not be produced before the A O. at the time of assessment proceedings, he does not enjoy unbridled power.

CIT(A)'s right to take additional evidence- not unfettered

2. Lawmakers perhaps thought that the unfettered powers of the CIT(A) to admit additional evidence would lead to leakage of revenue. Therefore, clause (mm) was introduced in section 295(2) to empower the rule making authority to prescribe the circumstances in which, the conditions subject to which and the manner in which, the CIT(A) may permit an appellant to produce evidence which could not be produced before the AO. Armed by the said power, CBDT framed rule 46A in the Income tax Rules, 1962 w.e.f 1.4.1993. Under the said rule, CIT(A) was permitted to admit fresh evidence only under the following circumstances-

(a) where the Income-tax 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 Income-tax Officer; or
(c) where the appellant was prevented by sufficient cause from producing before the Income-tax Officer any evidence which is relevant to any ground of appeal;
(d) where the Income-tax Officer has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal."

Under sub rule (3) to rule 46A, a condition was imposed that such evidence shall not be taken into account by the CIT(A) unless the AO. was confronted with the same.

Rule 46A-whether ultra vires the Act.

3. The validity to rule 46A was under challenge before the Allahabad High Court in ***Smt Mohindar Kaur vs. Central Govt*** **(1976)** ***104ITR 120.***
The Court analysed the provisions of section 250(4) and section 250(5) of the Act and observed that no part of Rule 46A whittles down or impairs the power to make further inquiry conferred upon the first appellate authority by section 250(4).
Similarly, section 250(5) confers power upon CIT(A) to permit the appellant to raise a fresh point which has not been even touched by rule 46A The Court finally held that rule 46A is not ultra vires section 250 or 251 of the Act. On the contrary, it gives a right to the appellant to produce additional evidence which was earlier not available to him.

Notice of hearing to A.O.-whether is tantamount to compliance under Rule 46A.

4. As per section 250(1), the CIT(A) has to give notice of hearing to the AO. against whose order appeal is preferred. When such a notice is given, often a plea is raised on behalf of the assessee that there is sufficient compliance of rule 46A as the A O. has been given opportunity of being heard and such an opportunity may also be construed to be an

opportunity to rebut the additional evidence produced by the assessee. This view has not found favour with the courts. The Gujarat High Court in ***CIT vs. Valimohmed Ahmedbhai (1982) 134 ITR 214 (Guj.)*** held that by the admittance of additional evidence, something adverse to the ITO is sought to be done in the course of appeal by way of augmenting the record. Therefore, ITO need to be heard for the purpose and be given an opportunity to meet with the additional material by way of cross examination, counter evidence and urging submissions in the context of the augmented record. Any order admitting additional evidence behind the back of the ITO is the order passed in violation of the principles of natural justice.

Violation of Rule 46A-consequences

5. Any order passed by the CIT(A) granting relief to the appellant by admitting additional evidence but without giving a specific opportunity of being heard to the A O. to rebut the same is in contravention of rule 46A(3). Such orders are liable to be set aside and the matters are normally restored back to the file of the AO. for fresh examination.

Materials clarificatory in nature-whether amounts to additional evidence

6. Courts have held that clarificatory nature of materials are not additional evidence. This issue arose before the Karnataka High Court in ***Sri Shankar Khandasari Sugar Mills vs. CIT (1992) 193 ITR 669***. The issue before the court, in brief, was that the ITO framed the best judgement assessment U/S 144 relying upon the material from the Commercial Tax Department relating to the turnover of the assessee. Before the CIT(A), the assessee produced S.T. assessment order for the first time who refused to look into the same on the pretext of additional evidence. Holding the action of the CIT(A) to be unjustified, the court observed-

"The appellate authority should have accepted the material produced by the assessee as *clarificatory in nature* and considered the same to test the fairness and propriety of the estimate

of income made by the Income-tax Officer. Though it was belated production of very relevant material, no prejudice (in its legal sense) would have resulted to the Revenue by considering the material produced by the assessee"

"In the absence of any prejudice to the Revenue, and the basis of the tax under the Act being to levy tax, as far as possible, on the real income, the approach should be liberal in applying the procedural provisions of the Act. *An appeal is but a continuation of the original proceeding* and what the Income-tax Officer could have done, the appellate authority also could do." (emphasis supplied)

Recently, in a Third Member case before the Gauhati Bench of the Tribunal in ***DCIT vs. New Manas Tea Estate (P) Ltd 73 ITD 157***, the relevant facts were that the assessee had purchased tea leaves from 'A' Ltd. under an agreement pursuant to which certain amount was debited in the purchase and expenses account at a certain rate plus 0.50p in respect of the cess imposed by the Government. At the end of the year, it was found that a certain amount of cess remained payable to 'A' Ltd. The AO. disallowed the same under section 43B. Before the CIT(A) for the first time the assessee produced a letter issued by 'A' Ltd. stating therein that it had deposited cess in full.

The Third Member on appreciation of these facts held that the evidence in the form of the letter could not be considered an additional evidence. The CIT(A) has rightly stated that this letter was only clarificatory in nature. He further held that even this clarification was not needed because the main and the only relevant evidence viz., agreement with 'A' Ltd. was already on the file of the AO.

Evidence received pursuant to an enquiry-whether rule 46A attracted

7. Section 250(4) gives wide discretion to the CIT(A) to make such further inquiry as he thinks fit or to direct the AO. to make further inquiry and report the result to him. Even, rule 46A(4) clarifies that nothing contained in rule 46A shall affect the CIT(A)'s power to direct the production of any document or the examination of any witness to enable him to dispose of the appeal. Even circular no. 108 dated 20.3.1973 explaining the amendment pertaining to

introduction of rule 46A echoes the same view. Therefore, additional evidences produced before the CIT(A) pursuant to his direction stand on a different footing than the new evidences produced before him suo motu by the assessee. Needless to say, in the former case, rule 46A shall not be applicable and there shall not be any necessity on the part of the CIT(A) to get them subjected to scrutiny by the AO.

The distinctive features of the two situations were appreciated by the Allahabad High Court in ***Smt. Mohindar Kaur vs. Central Govt. 104 ITR 120 (All.)*** which prompted the Hon'ble Court to uphold the validity of rule 46A Before coming to the said conclusion the High Court held that prior to enactment of rule 46A, the appellant had no right to adduce additional evidence. The CIT(A) could permit the production of additional evidence if he thought it was necessary to enable him to dispose of the appeal or if he thought it fit to make further inquiry, but under rule 46A(I), the appellant has a right to produce additional evidence in the circumstances mentioned in its various sub-clauses (see paragraph 2 above).

Smt. Prabhadevi S.Shah's case-giving a new dimension

8. The Bombay High Court in ***Smt. Prabhavati SShah 's case (1998) 231 ITR 1*** has given a new dimension to the provisions relating to admission of new evidence before the CIT(A). The interesting facts in this case were that loans taken by the assessee were added as undisclosed income U/S 68. Before the CIT(A), the assessee wanted to produce additional evidences in the form of xerox copies of cheques, a certificate from the bank and copies of the bank statements which were not accepted by him holding that he was not obliged to accept additional evidences as the assessee's case did not fall in any of the four exceptions set out in rule 46A(l). The Bombay High Court negatived the contention of the CIT(A) and held that under section 250(4), he was empowered to make such further inquiry as he thinks fit and such power being quasi judicial power , it was incumbent on him to exercise the same if the facts and circumstances justify. It further held that if the first appellate authority failed to exercise his discretion judicially and arbitrarily refused to make inquiry in a case where the facts and circumstances so demand, his action would be open for correction by a higher authority.

In other words, the message from the Bombay High Court is that if prima facie an information! evidence is necessary to examine the claim of the assessee, the CIT(A) should consider the necessary evidence in exercise of powers u/s 250(4) even if the case of the assessee does not fall

within the four comers of the circumstances enumerated in rule 46A(l).

Following the ***Smt. Prabhavati SShah's case (supra),*** some benches of the Tribunal have rejected the technical objection raised by the Revenue in regard to the admission of additional evidence.

In a case before the Cuttack Bench in ***DCIT vs. Pradeep Oxygen (P) Ltd (2001) 71 TTJ 662***, the facts were that a Board Resolution in support of reimbursement of medical expenses to its managing director was produced for the first time before the CIT(A). The revenue raised the technical objection of admission by the CIT(A) of fresh evidence in violation of rule 46A. Tribunal dismissed the revenue's appeal following ***Smt. Prabhavati SShah's case (supra)*** holding that the CIT(A) was fully justified in examining the circumstances in which the medical reimbursement was made more particularly when disallowance was made without giving any opportunity of hearing to the assessee on that aspect of the matter.

In ***ITO vs. Bajoria Foundation (2001) 71 TTJ 343***, the Calcutta Bench of the Tribunal once again followed ***Smt. Prabhavati S Shah's case (supra)*** to reject the technical objection of the revenue and held that CIT(A) could consider the necessary evidence in exercise of his powers under section 250(4) if prima facie an information is necessary to examine the claim of the assessee.

Concluding Remarks

9. In a large number of cases, CIT(A) grants relief to the assessee by admitting additional evidence in violation of rule 46A i.e., without giving an opportunity to the AO to rebut the evidences produced by the assessee. Even in cases where he is admitting additional evidences pursuant to inquiries made by him, such facts are not properly brought on record or in his order. Therefore, the relief granted to the assessee by him remains on paper only inasmuch as the revenue invariably challenges such orders before the Tribunal taking the ground of violation of rule 46A The Tribunal in such cases has no option but to restore the issues back to the AO's file for examination. The assessee is a great sufferer in such cases not only in terms of cost but also because it becomes difficult for him to substantiate the evidences after a time lag. And all this happens to him for no fault on his part.