IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

ITA No. 38 of 2005

Date of decision: 08.09.2009

Commissioner of Income Tax, Shimla .... Appellant

Versus

M/S Shree Kangra Steel Pvt. Ltd. ... Respondent

Coram :

The Hon'ble Mr. Justice Deepak Gupta, Judge.

The Hon'ble Mr. Justice V.K. Ahuja, Judge.

Whether approved for reporting?[1] Yes.

For the Appellant: Mrs. Vandana Kuthiala, Advocate.

For the respondent: Mr. K.D. Sood, Advocate.

Deepak Gupta, J. (Oral):

This appeal has been admitted on the following substantial questions of law:-

1. Whether on the facts and circumstances of the case the Hon'ble Tribunal was right in law holding that CIT(A) was justified in taking into account the fresh evidence produced by the assessee without confronting it to the Assessing Officer in disregard to the provisions of sub-rule 3 of Rule 46A of Income Tax Rules, 1962 wherein it has specifically been provided that CIT(A) could not accept such evidence unless the Assessing Officer has been given reasonable opportunity to examine the evidence so produced?

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[1]Whether reporters of Local Papers may be allowed to see the judgment? Yes.

2. Whether on the facts and in the circumstances of the case the Hon'ble Tribunal has misconstrued the material on records?

Briefly stated, the facts of the case are that for the assessment year 1996-97, the respondent (hereinafter referred to as the assessee) submitted a return showing loss of Rs.19,16,720/-, This return was filed on 27.11.1996. Thereafter, the Assessing Officer issued notices to the respondent under Sections 142(1) and 143(2) of the Income Tax Act, 1961, (hereinafter referred to as the Act), for hearing of the case. Admittedly, three hearings were fixed, but the respondent requested for adjournments and finally when the case was listed on 18.8.1998, neither the assessee appeared nor prayed for adjournment. Thereafter, the Assessing Officer exercising his powers under Section 144 of the Act framed the assessment. He made addition of Rs.7,17,747/- as unsecured loans which deduction had been claimed by the assessee. He also made addition of Rs.12,50,000/- on the ground that as compared to the previous year, the net sales and miscellaneous income of the company had decreased from Rs.2,62,41,138/- to Rs.1,29,37,683/-, whereas the expenses under the head "Other Charges" in the profit and loss account had only decreased from Rs.58,63,250/- to Rs. 44,24,830/-. According to the Assessing Officer, there should have been a pro rata decrease in these charges and he accordingly made an addition of Rs.12,50,000/-.

The assesseee filed an appeal before the Commissioner (Appeals).The assessee also produced books of accounts and other materials to show that it had taken a loan from M/S J.S. Enterprises to pay the electricity dues. Further according to the assessee, there could not have been a pro rata decrease in the other charges since most of

the charges related to electricity bills, which had been paid to the Electricity Board. The CIT accepted the material filed by the assessee to be correct and allowed his appeal.

Before the ITAT the main ground urged on behalf of the revenue was that even if evidence was to be permitted to be adduced by the assessee at the appellate stage, the Assessing Officer should have been given an opportunity to verify/rebut the evidence. This submission of the revenue was rejected by the ITAT on the ground that Rule 46A (4) does not warrant giving of any opportunity to the Assessing Officer. It also held that the power to admit additional evidence under Section 250 could not be circumscribed by the rules.

We have heard Mrs. Vandana Kuthiala, for the revenue and Mr. K.D. Sood, for the assessee.

To appreciate the rival contentions of the parties, it would be apposite to refer to Section 250(4) of the Income Tax Act, which reads as under:-

> "The Commissioner (Appeals), may, before disposing of any appeal, make such further inquiry as he thinks fit, or may direct the Assessing Officer to make further inquiry and report the result of the same to the Commissioner (Appeals)."

Rule 46A (3) and (4) of Income Tax Rules reads as under:-

> "(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 –
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> (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."

A bare perusal of the statutory provisions show that the Commissioner(Appeals) at the time of hearing of the appeal can make such further inquiry as it deems fit and may ask the Assessing Officer to make such an inquiry. This provision in the Act vests the appellate authority with the power to make further inquiry which would in our opinion include the power to admit further evidence.

The procedure and the manner in which such evidence is to be produced is laid down in Rule 46 A. Rule 46A(1) lays down the grounds on which the appellate authority can allow additional evidence. Sub rule-2 provides that the appellate authority while admitting such evidence must record its reasoning in writing. Sub rule, which has been quoted hereinabove, provides that no evidence produced under sub-rule(1) shall be taken into account unless the Assessing Officer has been given a reasonable opportunity of examining the evidence or documents produced or permitted to cross-examine the witnesses

examined or permitted to produce any evidence or document in rebuttal to the additional evidence produced by the appellant.

Sub rule (4) is more in the nature of suo moto power given to the appellate authority to direct the production of any document or witness to enable him to dispose of the appeal or for any other substantial cause. In the present case, admittedly the evidence was produced not on the direction of the Commissioner but by the appellant itself. Since the assessee could not produce this evidence because of his non-appearance before the Assessing Officer which was explained by him satisfactorily before the Commissioner (Appeals), the Commissioner was justified in permitting the assessee to lead additional evidence. However, once he permitted the assesee to lead evidence in terms of sub-rule (3) referred to hereinabove, he was bound to give an opportunity to the Assessing Officer to examine the documents and also an opportunity to produce any evidence to the contrary if he so desired. This is also in accordance with the rule of natural justice and we are of the opinion that this provision is a mandatory provision and non- compliance of the same would vitiate the order itself.

We, therefore, allow the appeal of the revenue, set aside the order of the learned Appellate Tribunal and set aside the findings of the CIT. We however, make it clear that the assessee's evidence already on record shall be read in evidence, but the CIT shall give a reasonable opportunity to the Assessing Officer to either counter the evidence or to produce any other evidence in rebuttal. Accordingly, question No. 1 is answered in favour of the revenue and against the assessee. As far as question No. 2 is concerned, in view of the observations made hereinabove, the same need not be answered.

In view of the above discussion, the appeal is allowed and the matter is remanded to the Commissioner, Income Tax, for disposal in light of the observations made hereinabove.

(Deepak Gupta),
Judge

(V.K. Ahuja),
Judge

September 08, 2009
(BSS)