
(2006) 11 GAU CK 0040
In the Gauhati High Court

Commissioner of Income Tax

APPELLANT

Vs

Ranjit Kumar Choudhury

RESPONDENT

Date of Decision : 09-11-2006

Acts Referred:

Income Tax Act, 1961 — Section 250, 251, 271

Citation : (2007) 1 GLT 188 : (2007) 288 ITR 179

Hon'ble Judges : B.D. Agarwal, J;A.H. Saikia, J

Bench : Division Bench

Final Decision : Allowed

Judgement

A.H. Saikia, J.—Heard Mr. U. Bhuyan, learned Counsel appearing for the Department/appellant as well as Mr. G.K. Joshi, learned senior counsel assisted by Mr. R.K. Joshi, and Mrs. U. Chakravorty, learned Counsel appearing for the assessee/respondent.

2. At the time of admission of this appeal on May 16, 2005, the following substantial question of law was framed:

Whether, on the facts and in the circumstances of the case, the order of the Commissioner of Income Tax (Appeals) as upheld by the Tribunal is legally tenable, the same being in violation of rule 46A of the Income Tax Rules, 1962?

3. In the backdrop of the above formulated substantial question of law, Mr. Bhuyan, learned Counsel for the appellant has submitted that the impugned order dated March 8, 2004, passed by the Income Tax Appellate Tribunal, Gauhati Bench (for short, "the Tribunal"), in I.T.A. No. 4 (Gauhati)/2004, for the assessment year 1998-99 is hit by the provision of law laid down u/s 46A of the Income Tax Rules, 1962 (for short, "the Rules").

4. It is submitted on behalf of the Revenue that the Tribunal while dismissing the appeal preferred by the Revenue and thereby confirming the order dated November 12, 2003, passed by the Commissioner of Income Tax (Appeals) (for

short, "the CIT"), failed to construe and interpret the provisions of rule 46A in its true perspective and resultantly arrived at an erroneous decision and that too on the basis of irrelevant considerations. According to him, the xerox copies of the sale bills and the receipts of an amount of Rs. 6,38,000, which was initially added by the assessing authority to the capital account under the cover of sale proceeds of utensils, being remained unexplained, was allowed to be adduced as an additional evidence by the appellate authority, i.e., Commissioner of Income Tax without following the procedural law prescribed under Sub-rules (1), (2) and (3) of Rules 46A.

5. For ready reference and also for the sake of convenience, it would be proper and relevant to refer to those provisions of law under the Income Tax Act, 1961 (for short, "the Act"), and the rules that would be necessary for proper adjudication of the appeal at hand.

Section 250 of the Act reads as under:

250.(1) The Commissioner (Appeals) shall fix a day and place for the hearing of the appeal, and shall give notice of the same to the appellant and to the Assessing Officer against whose order the appeal is preferred.

(2) The following shall have the right to be heard at the hearing of the appeal-

(a) the appellant either in person or by an authorised representative ;

(b) the Assessing Officer, either in person or by a representative.

(3) The Commissioner (Appeals) shall have the power to adjourn the hearing of the appeal from time to time.

(4) The Commissioner (Appeals) may, before disposing of any appeal, make such further enquiry 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).

7. Rule 46A of the Rules is quoted as under:

46A. (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 u/s 271.

8. A common reading of the provisions of law aforesaid would go to show that the Commissioner (Appeals) may exercise two options in disposing of the appeal u/s 250 of the Act; firstly, he may himself dispose of the appeal so preferred before him under the aforesaid provisions by making such inquiry as he thinks fit, when by the second option he may direct the Assessing Officer to make further inquiry and report the result of such inquiry to him.

9. On the other hand, the provision of Rule 46A(1) above noted clearly bars the production of any additional evidence. It would go to show that the production of additional evidence is not a matter of right. However, in exceptional cases, on the basis of any one of the grounds which have been manifestly and apparently set out in Rule 46A(1) itself, the appellant is permitted to produce additional evidence subject to approval/admission of the same by the appellate authority. This provision enumerates four circumstances allowing the appellant/assessee to produce additional evidence, namely, (i) if the Assessing Officer refuses to admit the evidence which ought to have been admitted; (ii) when the appellant was prevented by sufficient cause from producing such evidence which he was called upon to produce by the Assessing Officer; (iii) in case where the appellant was prevented by sufficient cause from producing before the Assessing Officer any evidence which is relevant to any ground of appeal and lastly (iv) when no sufficient/reasonable opportunity of hearing to the appellant was given to adduce

any relevant evidence by the Assessing Officer at the time of passing the order impugned. Therefore, it is clear and unambiguous that only in case of availability of any one of those four grounds mentioned in Sub-rule (1) of Rule 46A, the production of additional evidence is permitted.

10. Accordingly, if the production of additional evidence is permitted under Sub-rule (1) of Rule 46A, it is obligatory on the part of the appellate authority to record the reasons in writing for allowing/admitting the production of such additional evidence and that has been clearly provided under Sub-rule (2) of Rule 46A when Rule 46A(3) provides, as already noted above, for affording the reasonable opportunity to the Revenue to examine the evidence or document and/or to cross-examine the witness so produced by the appellant and also to allow the Revenue to produce any other such evidence or document or witness in rebuttal of such additional evidence so permitted by the authority in terms of Rule 46A(1).

11. In view of the above legal position, there is no doubt that the procedure of Rule 46A(1) as regards the production of additional evidence needs to be guided and controlled by Sub-rules (2) and (3) of Rule 46A. In other words, if additional evidence is permitted to be produced, then firstly there must be reasons to be recorded in writing and secondly reasonable opportunity has to be given to the assessing authority to refute and reject such production.

12. Now coming to Sub-rule (4) of Rule 46A, it would go to show that this power can be exercised by the Commissioner (Appeals) suo motu when there is no such available documents placed before the appellate authority for purposeful and effective adjudication of the appeal. On that occasion only by exercising the power bestowed upon him by Sub-rule (4) of Rule 46A of the rules read with Section 250(4) of the Act which empowers him to make further inquiry as he thinks fit, the Commissioner (Appeals) shall direct for production of any document or 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.

13. None the less, relying heavily upon the provision so laid down under Sub-rule (4) of Rule 46A, Mr. Joshi, learned senior counsel has tried to impress upon this Court that the provision so laid down in Rule 46A(4) is to be read harmoniously with Sub-rules (1), (2) and (3) of Rule 46A and such reading would clearly reveal that the provision of Rule 46A(4) can be exercised by the Commissioner (Appeals) independently without going through Sub-rules (1), (2) and (3) of Rule 46A, if he is satisfied that such provision of additional evidence is necessary. It is contended that those provisions of Rule 46A(1), (2) and (3) are co-terminous with the provision laid down under Sub-rule (4) of Rule 46A. According to him, nothing has been laid down in Sub-rules (1), (2) and (3) to preclude the Commissioner (Appeals) from exercising his power under Sub-rule (4) to allow the assessee for production of additional evidence for the purpose of proper adjudication and disposal of the appeal and that is exactly what happened in the

instant case.

14. At this stage a brief narration of the factual matrix projected herein may be necessary to be reflected.

15. Initially by order dated March 30, 2001, the assessing authority for the assessment year 1998-99 found as follows:

(F) Cash amounting to Rs. 6,38,000 added to the capital account from alleged sales of utensils:

In the statement of accounts filed along with the return the assessee has shown receipts of Rs. 6,38,388 from sales of utensils up to March 31, 1998. The assessee has not however, furnished any details of the utensils so sold. No sale of receipt memos were produced. The name and address of the persons to whom the utensils were sold, places where sold, what amount was received against which particular utensils nothing was furnished. In the statement filed it is only mentioned that the sale proceeds were received by bank drafts and deposited to UBI savings bank account.

Rs. 1. On 10-2-1998 3,00,000 2. On 17-2-1998 2,00,000 3. On 20-2-1998 1,38,388

He has not disclosed the name and full address of the persons from whom the drafts were received nor the name and branch of the bank from which these were purchased. It is seen that the assessee declared, among others, the following utensils under the VDIS vide certificate dated November 22, 1997, issued by the Commissioner of Income Tax, Shillong, u/s 68(2) of the VDIS 1997.

Rs. 1. 48.320 kgs. silver utensils 8,215 2. 278 gms gold utensils 3,058 3. 32.610 kgs. silver utensils 7,012 4. 462 gms gold utensils 3,234 5. 194 gms gold utensils 1,940

It needs to be made clear that the genuineness of the declaration is neither questioned nor doubted. The genuineness of the declaration has already been accepted. There is no doubt that the assessee is having the gold and silver utensils as declared under the VDIS. The question is whether the assessee has sold the above utensils and received the sale proceeds in the extent of Rs. 6,38,000. The sale transaction of the utensils are not proved. No evidence or proof of the sale transactions could be furnished by the assessee in spite of opportunities offered. The amount claimed as sale proceeds of the utensils is a big sum of money and the assessee should have proved the genuineness of sale receipts with material evidence. But he failed to do so. In the circumstances, I could not accept the alleged sale transactions of the utensils as genuine. The cash brought in and added to the capital account under the cover of sale proceeds of the utensils therefore, remains unexplained and as such, treated as that assessee's income from other source.

16. From the perusal of the above findings, it transpires that the amount

mentioned in the order itself according to the Assessing Officer, was found to be unacceptable and accordingly, the same was added to the capital account for alleged sale of utensils. The assessee/respondent failed to prove such sale transaction by adducing any evidence. Even the sale transactions to the extent of Rs. 6,38,000 remained unproved. It is seen that before the assessing authority, no evidence oral or documentary whatsoever was ever placed explaining the receipt of the sale proceeds of the disputed amount. Being aggrieved, the assessee/respondent moved the appellate authority, i.e., before the Commissioner of Income Tax through Appeal No. Sil-6/ 01-02 who by his order dated November 12, 2003, in dealing with the question of addition of amount of Rs. 6,38,000 being the alleged non-disclosure income, directed for deletion of the said addition. In arriving at such a decision for deletion of addition of amount to the capital account in question, the Commissioner of Income Tax, wholly and solely based on xerox copies of the sale bills and receipts of disputed amount so produced by the assessee/appellant/respondent though, he failed, as recorded in the initial order dated March 30, 2001, to produce those before the assessing authority. It would be necessary and relevant to quote the finding of the appellate authority which reads as under:

Ground No. 3 relates to addition of Rs. 6,38,000 as undisclosed income. In the return of income, the assessee showed receipt of Rs. 6,38,388 for sale of utensils disclosed under the VDIS. The Assessing Officer stated that the genuineness of the disclosure was not doubted. He, however, held that the sale on transactions of the utensils were not proved and he, therefore, proceeded to treat the said amount as income from other source. It is submitted that all the particulars asked for by the Assessing Officer were submitted. The utensils were sold to M/s. Rara Brothers P. Ltd., Guwahati, and all the transactions were done through bank accounts of both the parties and there is no justifiable reason from the Assessing Officer to disbelieve the sale transaction and income arising out of the sale. Xerox copy of the sale bills and receipts of the amount by the party were filed. The fact that the assessee possessed those utensils was not disputed by the Assessing Officer. The sale bills clearly stated sale of the utensils and the transaction was done through bank accounts of both the party. It is not the case of the Assessing Officer that the utensils sold were not the ones disclosed under the VDIS by the assessee. In such circumstances, I agree with the learned authorised representative that there is no justifiable reason without any materials on the contrary, to disbelieve sale of the utensils. The addition is deleted.

18. This finding clearly goes to reveal that the said xerox copy of the sale proceeds and receipts was, at no point of time, ever called for by the appellate authority himself. In other words, it would go to show that the said document was produced by the assessee in order to prove the sale proceeds of the amount of Rs. 6,38,000 before the Commissioner of Income Tax. It also appears from the above finding that the assessee/respondent informed the appellate authority for the first time that those utensils were sold to one M/s. Rara Brothers and that

too all the transactions were done through bank accounts. In such circumstances, admittedly, the xerox copy was filed as additional evidence. None the less, the Commissioner of Income Tax did not record in writing any such reasons that prompted him to allow such additional evidence. It is manifest and apparent from the order of the assessing authority itself, as already noted above, "that before the assessing authority, the assessee failed to adduce any sort of evidence to accept the sale proceeds. That being the position, at the appellate stage, the appellant was allowed to permit to produce the xerox copy of the sale proceeds. The record does not reveal that there was any such compliance with Sub-rules (1), (2) and (3) of Rule 46A. It is not a case of the respondent that no additional evidence was produced. It also does not reflect that the principles of natural justice were ever afforded in terms of Sub-rule (3) of Rule 46A of the Rules mentioned above to the Department.

19. Mr. Joshi, learned senior counsel has once again made an attempt to highlight that the appellate authority exercised the power under Sub-rule (4) of Rule 46A and as such it would be optional to follow the procedure under Sub-rules (1), (2) and (3) of Rule 46A of the Rules. Hammering the same point home, he has argued that the provision of Rule 46A(4) can be exercised by the Commissioner (Appeals) without going through the Sub-rules (1), (2) and (3), if he is satisfied, of his own, that such production of additional evidence is necessary. The learned appellate authority is duty bound to dispose of the appeal u/s 250 of the Act read with Rule 46A(4) of the Rules and for disposing of such appeal under those provisions of law, he is required to make an inquiry and the same was the situation in this case. In the process of inquiry so made u/s 250 of the Act, the mandate of Sub-rule (4) of Rule 46A was complied with herein by the Commissioner of Income Tax and accordingly the appellate authority rightly allowed to examine those documents of sale proceeds. The impugned action is, therefore, not violative of Rule 46A of the Rules and there is no scope of raising any substantial question of law so framed.

20. On pointed asking on the point of veracity of the xerox copy, learned senior Counsel has replied that since it is the admitted position that the entire transactions was effected through bank draft, the same being transparent and open, the transaction did not cast any doubt or suspicion and that being the position, xerox copies were validly accepted.

21. However, this court, after close reading and careful perusal of Sub-rule (4) of Rule 46A, is hesitant to be persuaded by the submission of Mr. Joshi. According to us, this Sub-rule (4) would operate only when no such additional evidence has been adduced before the appellate authority and this power, given to the appellate authority under Sub-rule (4) of Rule 46A, can be exercised of his own, if he is of the opinion that it is necessary for disposal of the appeal to direct the production of any document or the examination of any witness. It is to be noted that Rule 46A(4) does not permit to do away with the procedural law prescribed under Sub-rules (1), (2) and (3) of Rule 46A, once additional evidence is

produced. It is pertinent to refer herein to Order 41, Rule 27, Civil Procedure Code, which is almost in pari materia with Rule 46A(1). It also does not allow the appellant to adduce any additional evidence until and unless such exceptional circumstances, as provided therein, are set out before the appellate authority. The language of Rule 46A is clear and loud to the effect that no additional evidence is permitted save and except in exceptional cases in terms of Rule 46A(1) and that too only after compliance of Sub-rules (2) and (3) thereto.

22. Mr. Joshi has placed reliance upon a decision in a case of Smt. Prabhavati S. Shah Vs. Commissioner of Income Tax, , wherein the Bombay High Court, in dealing with Sub-rule (4) of Rule 46A, at page 7, held that the restrictions placed on the production of additional evidence by the appellant under Rule 46A shall not affect the powers of the appellate authority to call for the production of any document or the examination of any witness to enable him to dispose of the appeal. It was also categorically held that the powers conferred upon the appellate authority under Sub-section (4) of Section 250 of the Act, being a quasi-judicial power, it was incumbent upon him to exercise the same, if the facts and circumstances justify and the purpose of rule 46A of the Rules was to ensure that evidence was primarily led before the Income Tax Officer.

23. Having gone through the above cited case, we find no indication that the power under Sub-section (4) can be exercised by the appellate authority ignoring and bypassing the restrictions imposed under Rule 46A(1) and procedure provided in Sub-rules (2) and (3).

24. On the other hand, Mr. Bhuyan, learned Counsel for the Revenue, has also relied upon the same judicial pronouncement, i.e., Smt. Prabhavati S. Shah Vs. Commissioner of Income Tax, as well as another judicial authority reported in Haji Lal Mohd. Biri Works Vs. Commissioner of Income Tax,

25. In Haji Lal Mohd. Biri Works Vs. Commissioner of Income Tax, by making an elaborate discussion on rule 46A of the Rules in paragraph 10 at page 500 and 501, it was held that under Rule 46A the authority is not permitted to act whimsically while exercising the jurisdiction under it and the additional/fresh evidence taken by the Commissioner of Income Tax (Appeals) dehors Rule 46A should be needed to be quashed.

26. We fully agree with the view taken by Haji Lal Mohd. Biri Works Vs. Commissioner of Income Tax, and on the other hand, in the backdrop of the facts and circumstances placed before us, the view expressed in Smt. Prabhavati S. Shah Vs. Commissioner of Income Tax, , in our considered opinion, would not help the assessee/respondent herein rather it would support the plea of the Revenue/appellant.

27. Given the facts and circumstances of the case at hand and also having carefully considered the aforesaid submissions of learned Counsel appearing for the rival parties as well as upon perusal of the impugned appellate judgments and orders, it is found that without recording any valid or plausible reason, the

Commissioner of Income Tax allowed the assessee to produce the additional evidence. More so, no opportunity of hearing was ever given the Revenue/appellant. It is admitted that the assessee produced the xerox copy of the sale bill and receipt only before the Commissioner of Income Tax when no such document was placed before the assessing authority as reflected from the order dated March 31, 2001. It was categorically held by the assessing authority therein that the sale transactions of the utensils were not proved in spite of opportunities afforded.

28. That being the position, we are constrained to hold that the appellate authority acted in violation of Rule 46A and the acceptance of the xerox copy of the sale proceeds as additional evidence de hors Rule 46A of the Rules, because the appellant is not entitled to produce oral or documentary evidence afresh before the appellate authority, as a matter of right. Under special and/or certain circumstances only, as mentioned, in Clauses (a), (b), (c) and (d) of Rule 46A(1) additional evidence can be adduced. Rule 46A itself contains the principles of natural justice. That being so, Sub-rule (4) of Rule 46A does not permit to accept any additional evidence in contravention of the provisions of Sub-rules (2) and (3) of Rule 46A. The appellate authority is not permitted to act whimsically while exercising the jurisdiction under Rule 46A of the Rules.

29. Accordingly, it is a fit case for remand for proper adjudication of the case by following the established procedure laid down under Rules 46A(1), (2) and (3) of the Rules which we order accordingly.

30. The impugned judgment and order passed by the Tribunal is hereby quashed and set aside.

31. The substantial question of law so formulated is answered accordingly.

32. The appeal is remanded to the Commissioner of Income Tax who shall make an endeavour to dispose of the entire appeal in accordance with law as indicated above as expeditiously as possible and in any case within a period of three months from the date of placement of this order before him.

33. LCR be sent down forthwith.

34. In the result, the appeal succeeds and stand allowed to the extent indicated above.