

**IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH "F",**

**MUMBAI**

**BEFORE SHRI B.R.BASKARAN, ACCOUNTANT MEMBER AND**

**SHRI PAWAN SINGH, JUDICIAL MEMBER**

I.T.A No.2808/Mum/2013 (AY 2009-10)

ACIT- 25(2), C-11, Pratyaksha Kar Bhavan, R.No. 108, Bandra Kurla Complex, Bandra (East), Mumbai-400051	Vs.	Shri Vivek Ramrao Paraskar, Ramlata Gas Agency, Shop No.1, Dattakrupa, Building, Datta Prasad, Housing Society, Near Gorai Bus Depo, Infront of Gorai Dumping Ground, Gorai Road, Borivali, Mumbai-400092 <b>PAN: AGUPP5590J</b>
(Appellant)		(Respondent)

Revenue by : Shri Vishwas S. Jadhav (DR)  
Assessee by : None

Date of hearing : 03.11.2015  
Date of Pronouncement : 06.11.2015

**ORDER**

**PER PAWAN SINGH, JM:**

1. The present appeal filed by the Revenue against the order dated 02.01.2013 passed by the Commissioner of Income Tax (Appeals)-35, Mumbai ('CIT(A)' for short) in respect of assessment years 2009-10 on the following grounds of appeal:

- i) *"On the fact and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition of Rs.27,83,327/- on account of non deduction of TDS without appreciating the fact that the assessee failed to deduct TDS as per provisions of section 194A of the IT Act in the case of Credit Co-op Society & Co-op Credit Society."*
- ii) *"On the fact and in the circumstances of the case and in law, the Ld.CIT(A) erred in accepting new evidence in violation of Rule 46A of Income Tax Rules,1962 relating to registration of Nishant Credit Co-op Society & Buldana Co-op Society without allowing opportunity to examine the evidence. Moreover the assessee has failed to prove that these societies are Non Banking Financial Institution."*

- iii) *The appellant prays that the order of the Ld.CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored."*
- iv) *The appellant craves leave to amend or alter any ground or add a new ground."*
2. The brief facts of the case are that the assessee who is individual and is proprietor of (i) Ramlata Gas Agency, (ii) M/s. Paraskar Developers, (iii) Paraskar Constructions, (iv) M/s. Motorbikes & (iv) M/s. hotel Ramlata Palace, engaged in the business of gas agency, building & construction, Civil Construction, dealer in Hero Honda Motorcycle and service/maintenance and running a hotel, filed his return of income on 29.09.2009 declaring total income of Rs.58,29,200/.
3. The return was selected for scrutiny and after giving an opportunity, a disallowance u/s 40(a)(ia) of the Act of Rs. 27,83,327/- was made while noting that assessee has availed a loan from Non-banking Financial Institution and had paid interest on the same. The assessee has availed loan of Rs. 8,17,401/- from Nishant Credit Co-op. Society and Rs. 19,65,926/- from Buldana Co-op. Credit Society and on the interest paid by the assessee, the assessee has not deducted TDS on the interest paid to Non-banking Financial Institution.
4. Further disallowance of Rs. 71,612/- was made on account of telephone and mobile expenses being 15% of the total of Rs. 4,77,413/- which was debited by the assessee and further a sum of Rs. 1,00,000/- was disallowed as sale promotion, advertisement expenses out of total sale promotion expenses of Rs. 7,31,926/- in the assessment order dated 29.12.2011 against which an appeal was filed before the First Appellate Authority (FAA)/CIT(A), the CIT(A) while dealing with the appeal of the assessee deleted the disallowance u/s 40(a)(ia), restricted to 5% of total telephone and mobile expenses and further restricted the disallowance of sale promotion expenses to 5% in the impugned order dated 02.01.2013 against which the present appeal is filed before us.

5. None appeared on behalf of the assessee despite repeated calls. We have heard the Departmental Representative (DR) of the Revenue and perused the material available on record.
6. DR of the Revenue has vehemently argued that the CIT(A) has accepted the evidence in violation Rule 46 A of IT Rule 1962.
7. The CIT(A) in paragraph 5.2 of its order reproduced the written comments of the assessee wherein the reference of the copy of registration of Societies (Nishant Credit Co-op. Society) and Buldana Co-op. Credit Society), the details of interest paid and copy of exemption granted to NBFC was mentioned .
8. The CIT(A) in paragraph 5.3 has observed as under:

*“I have considered the stand of AO as well as appellant's submissions. The AO has disallowed this amount because he was of the view that section 194A was applicable to the case of the appellant, Therefore he disallowed the interest paid to the tune of Rs.27,83,327/- u/s.40(a)(ia) of the I.T.Act, 1961. However, it is seen that the appellant was dealer in Hero Honda Motor bikes and had taken loan from Nishant Credit Co-operative Society and Buldana Urban Credit Co-operative Society for carrying out business activities. During the A.Y.2009-10, the appellant paid interest under consideration amounted to Rs.8,17,401/- and Rs, 19,65,926/- to both the Co-operatives Credit Society respectively, As per section 194A, the provision of TDS deduction shall not apply to such income credited or paid to any banking company to which the Banking Regulation Act, 1949 applies or any Co-operative Society engaged in carrying on the business of Banking (including a Co-operative Land Mortgage Bank). Hence the appellant was not unjustified in not deducting the TDS on interest paid to such Co-operative Society. I have also gone through section 194A and its various clauses and compared its applicability with difference to the facts of the case of the appellant and come to a conclusion that Section 194A is not applicable to the facts of the case of the appellant. Under the circumstances the disallowances made by the AO under section 40(a)(ia) of the I.T. Act cannot be sustained. Accordingly, the disallowance of Rs.27,83,327/0 is deleted. In the result the appellant's ground on the above issue is Allowed.”*
9. We have seen the order of the CIT(A), wherein the Ld. CIT(A) has not recorded in writing the reasons for admission of taking such document without giving an opportunity to the Revenue. The order of Ld. CIT(A) is totally silent about the evidence taken on record from the assessee.

10. Rule 46A of the Income-tax Rules, 1962 is read 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 under section 271.]*

11. We find that order of CIT(A) for accepting fresh evidence/document from assessee is in violation of Rule 46A of Income-tax Rules, 1962, and there is no satisfaction of the CIT(A) on record about the admission of evidence which was filed before him by the assessee, on the basis of which an addition of Rs. 27,83,327/- was deleted.

12. In the above circumstances, we accept the appeal of the Revenue on the ground nos. 1 & 2 and restore the matter to the file of AO to consider/analyze the document/evidence filed before the CIT(A).

13. The AO further directed to given an adequate opportunity to the assessee while considering the above directions.

14. In the result, appeal filed by the Revenue is allowed.

*Order pronounced in the open court on 06/11/ 2015*

Sd/-  
(B. R. BASKARAN)  
ACCOUNTANT MEMBER

Sd/-  
(PAWAN SINGH)  
JUDICIAL MEMBER

Mumbai; Dated : 06.11.2015

SK PS

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT- concerned
5. DR, ITAT, Mumbai
6. Guard File

/True Copy//

BY ORDER,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**