

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'H', NEW DELHI  
Before Smt. Diva Singh, JM AND Sh. O.P.Kant, AM  
ITA No.4908/Del./2011 : Asstt. Year : 2007-08**

ACIT Circle-16(1) New Delhi  (APPELLANT)	Vs	Tulip Star Hotels Ltd., Indra Palace, H-Block, Connaught Circle New Delhi AAACC1072F (RESPONDENT)
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Appellant by :	Sh. J.P.Chandrekar, Sr. DR
Respondent by :	Sh. Shashwat Bajpai, Adv.

Date of Hearing : 15.09.2015	Date of Pronouncement :14.10.2015
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**ORDER**

**PER O.P.KANT, A.M.**

This appeal of the Revenue is directed against the order dated 25.08.2011 of learned Commissioner of Income-tax (Appeals) - XIX, New Delhi, raising following grounds of Appeal:-

- “1. On the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in setting aside the issue of disallowance of Rs.11,79,500/- u/s 14A the Act as calculated as per Rule 8D of the of I T Rules to the file of the AO for further examination without appreciating the fact that there are no such powers available to him under the IT Act.*
- 2. On the facts and circumstances of the case, the Ld. CIT (A) has erred in admitting fresh evidence under Rule 46A even though it was objected by the AO in his remand report.*

3. *On the facts and circumstances of the case and in law, the Ld: CIT (A) has erred in deleting the disallowance of professional fee expense of Rs.1,96,85,000/-."*

2. Facts in brief as culled out from the orders of the lower authorities are that the assessee is a domestic company which was incorporated on 10.09.1987 and was engaged in hotel consultancy and operation, money lending and trading in shares in the relevant year. The return of income declaring income of Rs.36,86,75,655/- was filed on 29.11.2007. The case was selected for scrutiny. During scrutiny the learned Assessing Officer (in short 'AO') observed that the assessee earned dividend income of Rs.3,08,500/- but no expenses corresponding to exempted dividend income were disallowed by the assessee out of the profit and loss account, therefore, the ld AO in assessment order, invoking rule 8D of the IT Rules, disallowed interest expenses of Rs.11,79,500/- out of the interest expenses of Rs.16,52,364/- claimed in profit and loss account. The ld. AO also observed that the assessee claimed professional fee expenses of Rs.1,96,85,000/- to three parties namely Jagmandi Finevest Pvt Ltd (Rs.44,91,000/-), Glider Holding Ltd. (Rs.45,09,000/-) and Agrawal Law Associates (Rs.1,06,85,000/) against sale of shares. The ld. AO concluded that the said expenses against sale of shares incurred on legal and financial due diligence, being responsibility of the buyer, same were not incurred wholly and exclusively in connection with transfer of asset. The ld. AO also conducted enquiries and found that 'Jagmandi Finevest Pvt. Ltd' declined to have provided any services to the assessee, 'Glider Holding Ltd.' did not respond to the letters of the ld. AO and "Agrawal Law Associates" did not receive any amount during the year.

In view of these finding, the ld. AO held that expenses of Rs.1,96,85,000/- claimed against capital gain were not genuine, and therefore, he disallowed the same. The assessment was completed on 23.12.2009 u/s 143(3) of the Act at total income of Rs.39,45,03,740/-.

3. Aggrieved, the assessee filed appeal before the learned Commissioner of Income Tax (Appeals) [in short 'CIT(A)']. As regards to the addition of disallowance of expenses against the dividend income, the ld. CIT(A) in para 10.5 of his order held as under:-

*“10.5 In the case of Godrej and Boyce Mfg Pvt. Ltd. 2010-TIOL-564-HC-MUM-IT, it was held that Rule 8D is applicable from the A.Y. 2008-09. Since Rule 8D is not applicable being assessment year 2007-08 in appellant's case, the AO is hereby directed to call for the details of expenditure and any of the expenditure found related to earning of dividend income and investments should be disallowed. The assessee is hereby directed to furnish the necessary details. For this limited direction, it is relied on the decision of Hon'ble ITAT in the case of Kodak India Ltd vs. ACIT (supra).”*

4. As regards to the disallowance of professional fees expenses of Rs.1,96,85,000/-, the assessee submitted additional evidences before the ld. CIT(A), wherein, he claimed that instead of 'Jagmandti Finevest Pvt. Ltd' and 'Glider Holdings Ltd.' services were taken from 'M/s. Market Share Securities Ltd.' and 'M/s. Gejendra Marketing Services' respectively. The assessee submitted that it was not communicated about the inquiries in respect of the parties, otherwise, the assessee would have explained the mistake in supplying the name of the parties. In his remand report sent to the ld CIT(A), the ld. AO objected to the admitting of additional evidences,

however, the Id CIT(A) admitted the additional evidences filed without providing any opportunity to the AO to examine those parties and allowed the addition of the professional fee expenses. Aggrieved, the Revenue has filed the appeal before us.

5. At the time of hearing, in respect of ground No.1, the learned Senior Departmental Representative (in short 'Sr. DR') submitted that in view of the amended provisions of the section 251 of the Act, the Id. CIT(A) was not having authority in law to set aside the matter to the Id. AO for adjudication and argued that the disallowance made by the Id. AO may be confirmed. Whereas, the learned Authorised Representative (in short 'AR') submitted that the Id. CIT(A) has actually not set-aside the issue for fresh adjudication but has given specific direction to disallow all the expenses related to earning dividend income. The Id AR also relied on the judicial pronouncements in the case of Godrej Boyce & Manufacturing Co. Vs DCIT 328 ITR 81, CIT Vs. Catholic Syrian Bank Limited (2012) 344 ITR 0259, Kodak India Limited Vs. ACIT (2010-TIOL-742-ITAT-MUM), Kankhal Investments and Trading Co. P Ltd Vs CIT 301 ITR 359, CIT Vs. Matalman Auto P Ltd 336 ITR 0434. However, both the parties were ultimately concurred that issue involved in ground No.1 is covered by the judgement of jurisdictional High Court in the case of Maxopp Investment Ltd. vs. CIT 347 ITR 272 (Delhi), wherein it is held that Rule 8D was inapplicable to the assessment year prior to 2008-09 and the AO shall determine the amount of expenditure incurred in relation to exempted income on the basis of any reasoned and acceptable method. The relevant part of the judgement is reproduced as under:-

*643 Thus, the fact that we have held that sub-sections (2) and (3) of section 14A and rule 8D would operate prospectively (and, not retrospectively) does not mean that the Assessing Officer is not to satisfy himself with the correctness of the claim of the assessee with regard to such expenditure. If he is satisfied that the assessee has correctly reflected the amount of such expenditure, he has to do nothing further. On the other hand, if he is satisfied on an objective analysis and for cogent reasons that the amount of such expenditure as claimed by the assessee is not correct, he is required to determine the amount of such expenditure on the basis of a reasonable and acceptable method of apportionment.....”*

6. In the instant case, the assessment year involved is prior to AY 2008-09, and the Id. AO has expressed his dissatisfaction with the correctness of the claim of the assessee with regards to the expenditure incurred against exempted income, we are of the opinion that the findings in the case of Maxopp Investment Ltd. vs. CIT (supra) are squarely applicable. Respectfully, following the findings, we remit the matter back to the file of Id. AO and direct to determine the amount of expenditure incurred towards earning exempted income, on the basis of a reasonable and acceptable method of apportionment. Needless to say that the assessee shall be provided sufficient opportunity in this respect. In view of the above directions to the Id. AO, the issue whether the Id. CIT(A) has exceeded his authority in directing the Id. AO to compute disallowance following the decision in the case of Kodak India Ltd vs. ACIT (supra), is in our opinion, rendered merely academic. Accordingly, the ground No.1 of the Revenue is allowed for statistical purpose.

7. In ground No.2, the Revenue has challenged the admitting of additional evidences in respect of professional fee expenses, by the Id CIT(A) without providing enough opportunity as per Rule 46A(3) of the Income-tax Rules. The Id Sr. DR submitted that the Id. AO objected to the admitting of the additional evidence in his remand report dated 02/08/2011, copy of which has been filed at the time of hearing before us, however after admitting the evidences, the Id CIT(A) did not call for the comment in respect of those evidences. Whereas, on the other hand, the Id AR submitted that the Id CIT(A) has already forwarded the additional evidences to the AO and therefore compliance of Rule 46A(3) has been made. In support of his claim, the Id AR placed reliance on the judicial pronouncements in the cases of Prabhavati Shah Vs. CIT (1998) 231 ITR 1 (Bom), CIT Vs. Kamlaben Sureshchandra Bhatti (2014) 367 ITR 692(Guj), Electra Jaipur P Ltd Vs. Inspecting ACIT (1988) 26 ITD 236(Del), CIT Vs. Jagjot Singh(2014)41taxman.com423(All), CIT Vs Unique Plastics P Ltd (2015) 60 Taxman.com ( AP& T), Jer Kersi Contractor V ITO Mum Trib ITA No. 1892/Mum/2009.

8. We have heard the rival submission and perused the copy of the additional evidences, which are placed at page No.66 to 78 of the paper book filed by the assessee, copy of remand report sent by the Id. AO and other material on record.

9. First of all it is relevant to have a look at the Rule 46A(3) of the Income-tax Rules, which reads as under:-

“46(1).....

(2) .....

(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.”*

10. A plain reading of the rule 46A(3), makes it clear that the Id CIT(A), before admitting additional evidences, is require to give an opportunity to the Id AO for examination of evidence/ documents, cross examined the witness produced by the assessee and produce any evidence/ documents for rebuttal of additional evidences.

11. In the instant case, the remand report which was sent by the AO on the additional evidences, which reads as under:

*“Report on merits on the case:*

*2. In this connection, with regard to merits of the additional evidence, the assessee vide his letter dated 30-09-2010, addressed to your good self, the assessee has contended that the proforma bills/debit notes of M/s Jagmandri Finvest Pvt. Ltd. and M/s Glider Holdings Ltd. were booked inadvertently instead of booking the expenses in name of M/s Market Shares-Securities Ltd. and M/s Gajendra Marketing Services Ltd. The persons who were handling the affairs committed these errors. Before passing the order u/s 143(3) of the I.T. Act, the then AO provided sufficient opportunities on 19/10/2009 , 11/12/2009 and a show cause letter dated 09/09/2009 specifically asking the assessee to file the relevant details, but the assessee company failed to file any*

*reply in this regard. Despite the fact that the case of the assessee company was pending for more than a year and that the then AO specifically asked the assessee to file documentary proof in support of their contention, the assessee company could not and did not reconcile the discrepancy at the time of assessment proceedings. Now whatever documents have been submitted before your goodself appear to a result of manipulation of documents by the assessee company.*

*3. As far as the assessee's contention of non asking of documentary regarding payment to M/s Agarwal Law associates Ltd is concerned, it is to inform you that the then A.O had specifically asked the assessee to file documentary proof regarding payment made to M/s Agarwal Law Associates filed any proof in this regard also. Now, the assessee company has filed a confirmation by the assessee company M/s. Agarwal Law Associates confirming the bill raised by the M/s Tulip Star Hotels Ltd. As per the confirmation filed by the M/s Agarwal Law Associates, the assessee company has received a sum of Rs.32 lakh on 22.09.2010 and balance is outstanding as on date. If we accept the said confirmation and contention of the assessee company, even then M/s Agarwal Law Associates company is a creditor as on 31/03/2007 and entire amount was outstanding. But as per list of creditors filed by the assessee company at the time of assessment (copy enclosed) no amount was due for payment to the company/ firm M/s. Agarwal Law Associates. Therefore, the submission of the assessee company is self contradictory as per the finding given above.*

*4. In view of the above, the submission filed by the assessee company deserves to be rejected. Additional evidence now produced by the assessee should not be entertained by your good self because the assessee has willingly ignored to submit any documents/ evidence/ explanation at the time of assessment proceedings.*

*Objections to admitting of additional evidence:-*

*5. It is pertinent to refer to Rule 46A which states the provisions related to production of additional evidence before the Commissioner (Appeals):*

*"Rule 46A. (1) The assessee shall not be entitled to produce before 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 to produce by the Assessing Officer; or*

*(c) where the appellant was prevented by sufficient cause from producing the 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 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 count any evidence produced under sub-rule(1) unless the Assessing Officer has been allowed a reasonable opportunity-*

*(a) To examine the evidence or documents or to cross-examine the witness produced by the assessee, or*

*(b) To produce any evidence or documents or any witness in rebuttal of the additional evidence produced by the assessee.*

*(4) nothing contained in this rule shall affect the power of 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 (l) of section 251 or the imposition of penalty under section 271."*

6. *The case of the assessee does not fall in any of the circumstances enlisted in sub rules (1) (a) to (1) (d) of Rule 46A of the Income Tax Rules, 1962 as explained below:*

*(a) The AO had not refused to admit evidence which ought to have been admitted; and*

*(b) the appellant has not given any justification or reasons that he was prevented by sufficient cause from producing the evidence which he was called to produce by the Assessing Officer; and*

*(c) The appellant has not given any justification or reasons that he was prevented by sufficient cause from producing the before the Assessing Officer any evidence which is relevant to any ground of appeal; and*

*(d) The Assessing Officer has made the order appealed against after giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.*

*As no reasons have been provided by the appellant for not producing the evidence before the lower authorities, the application for admission of additional evidence deserves to be rejected. If admitted, the provisions of Rule 46A have to be followed. As noted above, the facts of this case fail to fulfill the requirements of Rule 46A.*

7 *Reliance is placed on the case laws cited below:*

7.1 *In the case of Velji Deoraj & Co .v. Commissioner of Income-tax [1968] 68 ITR 708 (BOM.) The High Court of Bombay held that mere fact that the evidence sought to be produced is vital and important does not provide a substantial cause to allow its admission at appellate stage especially when evidence was available to party at initial stage and had not been produced by him.*

7.2 *In the case of C. Unnikrishnan v. Commissioner of Income-tax [1998] 233 ITR 485 (KER.) the High Court of Kerala observed that there was no evidence that any attempt was made by assessee to produce additional before Assessing Officer or appellate authority.*

*Even order of first appellate authority was wholly silent in regard thereto. Further, contention raised before Tribunal showed no regard to follow requirements of rule 46A. In the abovementioned circumstances, Tribunal was right in holding that appellate authority was justified in not considering additional evidence.*

*7.3 In the case of Commissioner of Income-tax v. Ranjit Kumar Choudhury [2007] 162 TAXMAN 257 (GAU.) the High Court of Gauhati held that the appellant is not entitled to produce oral or documentary evidence afresh before appellate authority, as a matter of right. As per sub-rules (1), (2) and (3) of rule 46A, 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 assessing authority-to refute and reject such production and that Rule 46A(4) does not permit to do away with procedural law prescribed under sub-rules (1), (2) and (3) of rule 46A, once additional evidence is produced .*

*8. 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. Reference to the contents of the rule 46A show that production of additional evidence is conditioned by certain situations. The assessee has to show that the Assessing Officer has refused to admit the evidence. The assessee also has to show alternatively that he was prevented by sufficient cause from producing the evidence before the Assessing Officer. Alternatively further the assessee also has to show its relevance to the grounds of appeal sought to be urged. Lastly, the assessee also has -to establish that the Assessing Officer did not afford him sufficient opportunity in regard thereto.*

*The material on record is abundantly clear that no attempt was made by the assessee to produce the evidence before the Assessing Officer. As no reasons have been provided by the appellant for not producing the evidence before the lower authorities, the application for admission of additional evidence deserves to be rejected. If admitted, the provisions of Rule 46A have to be followed. As noted above, the facts of this case fail to fulfill the requirements of Rule 46A.*

*In light of the objections raised and observations made in and case laws cited above, you are requested to reject the application of the assessee for production of any additional evidence.”*

12. On perusal of the above, it is clear that the ld. AO has not been allowed reasonable opportunity to examine the documents submitted by the assessee. The case laws relied upon by the ld. AR are not relevant in facts of the assessee, whereas the in the facts of the instant case the judgement of jurisdictional High Court in the case of CIT Vs. Manish Builwell Pvt. Ltd. 245 CTR 397 (Del) is squarely applicable , where in it is held as under:-

*“24. In the present case, the CIT (A) has observed that the additional evidence should be admitted because the assessee was prevented by adducing them before the assessing officer. This observation takes care of clause (c) of sub-rule (1) of Rule 46A. The observation of the CIT (A) also takes care of sub-rule (2) under which he is required to record his reasons for admitting the additional evidence. Thus, the requirement of sub-rules (1) and (2) of Rule 46A have been complied with. However, sub-rule (3) which interdicts the CIT (A) from taking into account any evidence produced for the first time before him unless the Assessing Officer has had a reasonable opportunity of examining the evidence and rebut the same, has not been complied with. There is nothing in the order of the CIT (A) to show that the Assessing Officer was confronted with the confirmation letters received by the assessee from the customers who paid the amounts by cheques and asked for comments. Thus, the end result has been that additional evidence was admitted and accepted as genuine without the Assessing Officer furnishing his comments and without verification. Since this is an indispensable requirement, we are of the view that the Tribunal ought to have restored the matter to the CIT (A) with the direction to him to comply with sub-rule (3) of Rule 46A. In our opinion and with respect, the error committed by the Tribunal is that it proceeded to mix up the powers of the CIT (A) under sub-section (4) of Section 250 with the powers vested in him under Rule 46A. The Tribunal seems to have overlooked sub-rule*

*(4) of Rule 46A which itself takes note of the distinction between the powers conferred by the CIT (A) under the statute while disposing of the assessee's appeal and the powers conferred upon him under Rule 46A. The Tribunal erred in its interpretation of the provisions of Rule 46A vis-A-vis Section 250(4). Its view that since in any case the CIT (A), by virtue of his conterminous powers over the assessment order, was empowered to call for any document or make any further enquiry as he thinks fit, there was no violation of Rule 46A is erroneous. The Tribunal appears to have not appreciated the distinction between the two provisions. If the view of the Tribunal is accepted, it would make Rule 46A otiose and it would open up the possibility of the assessee's contending that any additional evidence sought to be introduced by them before the CIT (A) cannot be subjected to the conditions prescribed in Rule 46A because in any case the CIT (A) is vested with conterminous powers over the assessment orders or powers of independent enquiry under sub-section (4) of Section 250. That is a consequence which cannot at all be countenanced."*

13. Further, the Hon'ble Delhi High Court in the case of Director of Income Tax Vs. Modern Charitable Foundation (2011) 335 ITR 105 has held that where Id CIT(A) asked for remand report on additional evidence furnished before him by the assessee, but the AO objected to remand report and did not verify the documents and the Id CIT(A) admitted such evidences without verifying it, in order to compliance equities, the assessee was to be permitted to rely upon additional evidence and the AO should also be given opportunity to verify those documents.

14. In view of the above judgements of the jurisdictional High Court in the case of Manish Buildwell (supra) and Modern Charitable foundation (supra), we are of the opinion that the AO should be given opportunity to verify the additional evidence furnished by the assessee before the Id CIT(A).

Accordingly, we direct the Id CIT(A) to forward all the additional evidence to the Id. AO. Since the issue of professional fees of Rs.1,96,85,000/- agitated in ground No.3 is related to and dependent on ground No.2, therefore we remit the issue involved in ground No.3 back to the file of the AO and direct him to decide the issue afresh in view of additional evidences. Thus, ground Nos.2 and 3 of the Revenue stand allowed for statistical purposes.

15. In the result the appeal of the Revenue is allowed for statistical purposes.

**Order Pronounced in the Court on 14/10/2015.**

-Sd/-

**(Diva Singh)**  
**JUDICIAL MEMBER**

**Dated:14/10/2015**

\*Ajay\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

-Sd/-

**(O.P.Kant)**  
**ACCOUNTANT MEMBER**

**ASSISTANT REGISTRAR**  
**Delhi Benches, New Delhi**