IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'SMC' NEW DELHI

BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER

ITA No.-5624/Del/2017
(Assessment Year: 2009-10)

Zia Ur Rehman C/o Sh.Vinod Kumar Goel 282, Boundary Road, Civil Lines, Meerut **AOXPR8059P**	vs	ITO Ward 2(4) Meerut

Assessee by	**None**
Revenue by	**Ms. Ashima Neb, Sr. DR**

Date of Hearing	**23.04.2018**
Date of Pronouncement	**26.06.2018**

ORDER

The present appeal has been filed by the assessee assailing the correctness of the order dt. 28.7.2017 of CIT(A) Meerut pertaining to 2009-10 AY on the following grounds:

> *1. "That the AO is in error that Rs. 11,02,500/- investment in property represent unexplained investment, the AO ignored that the property was purchased by the assessee and his other co-owner and taken bank loan of Rs. 25,00,000/- and balance was paid by his brother and CIT(A) has not justified the confirming the same.*
> *2. That Ld. CIT(A) is in error that bank certificate of loan was a new evidence. In the sale deed mode of payment was clearly mentioned that the source of the payment was made through the bank cheque.*
> *3. That the assessee has right to add, modify or delete any ground during the appeal proceeding."*

2. At the time of hearing, an adjournment application was moved on behalf of the assessee. No one was present the same was passed over. Even thereafter when the appeal was called out again the assessee remained unrepresented. It was noticed that the appeal could be decided on the basis of material available on record, in the circumstances it was deemed appropriate to reject the application moved and proceed with the present appeal ex-parte qua the assessee appellant on merits after hearing the Ld. Sr. DR.

3. The relevant facts of the case are that the AO was in receipt of information that a specific property H.No. 5354, Bahu No. 518, Hall No. 178, South Patel Nagar Meerut measuring 193.90 sq. mt. had been sold. Accordingly he required the assessee to explain the 1/4th share out of receipt of total consideration of Rs. 44,10,000/- (which included stamp duty and other expenses of Rs. 3,55,000/-) Since despite opportunity the assessee

failed to explain the availability of the receipt Rs. 11,02,500/- his share of the addition of the said amount was made in the hands of the assessee.

4. The assessee carried the issue in appeal before the CIT(A). The record shows that the following submissions are found to have been advanced on behalf of the assessee:

> *"The AO has made addition of 1/4th share +Stamp Value and concluded that the assessee has not given source of deposit. In this regard, it is submitted that the source in purchase of property was* ***out of loan from Nainital Bank Ltd., therefore, the same cannot be said unexplained, a copy of certificate is being enclosed herewith.***
> *As the source of the investment is very well explained, therefore, there is occasion to make addition."*
>
> *(emphasis supplied)*

5. The submission is found to have been dismissed by the CIT(A) holding that number of opportunities were given by the AO and since the evidence was not before him, the fresh evidence in the form of term loan certificate from Nainital Bank sought to be filed could not be admitted. The CIT(A) further went on to hold that though term loan of Rs. 25 lakh had been taken by the assessee and three others it could also not be accepted as it was not supported by any application under Rule 46A. Thus, it was held that it could not be admitted. It is seen that having so observed, the CIT(A) further goes on to note that even if it is admitted the evidence could not corroborate the facts from the customer ID and account ID details etc. as how the funds were used. Thus, it was concluded that the closure certificate filed from the Bank did not highlight the purpose of the loan and its actual use. Thus, even on merits holding that it was the basic duty and function of the AR to explain it was held that the evidence was not relevant as it proved nothing. The addition consequently was confirmed.

6. The Ld. Sr. DR relies upon the order.

7. I have heard the submissions and perused the material available on record. I find on going through the material available on record, and on a consideration of the peculiar facts and circumstances of the case that the ld. CIT(A) being aware of the procedures should have provided the assessee a specific opportunity to place its evidences by way of a proper application under Rule 46A. Opportunity to do so in all fairness should have been provided. The CIT(A) in the discharge of his responsibilities is not visualized to function in a mechanical manner. The Income Tax Act has ensured that in order to achieve an active justice delivery system the Ld. CIT(A) is more than adequately armed to ensure that only just and due tax are collected. Sub section (4) and (5) of Section 250 of the Act when read alongwith Rule 46A of the Income Tax Rule

1962 which govern the production of additional evidences before the CIT(A) not only lays down the procedure to be adhered to by the tax payers and the tax authority but also in Sub Rule 4 of Rule 46A, The legislative intent is more than amply declared which ensure that no constraints on the power of the Commissioner appeals are visualized in order to fulfill the ends of justice. The CIT(A) has been empower more than adequately to direct the production of any document, examination of any witness etc. *"to enable him to dispose of the appeal, or for any other special cause"*. Accordingly in the facts of the present case I do not find why appropriate directions were not given by the Ld. CIT(A). Merely because the assessee's counsel apparently ignorant about the procedure relies upon evidences without following the due procedure does not entitle the First Appellate Authority to function mechanically. The Ld. CIT(A) is expected to act fairly and responsibly utilizing the powers with which he is endowed with the single minded aim that justice is done and not to frustrate a valid claim of the assessee on a hyper technical ground. The Appellate Forum provided under law must perform by ensuring that only just and due taxes for the state are only collected. The orders passed should not rely on the ignorances of the tax payers. The claims of the assessee must succeed or fail on merits, facts and evidences and not on account of the ignorance of the assessee or his counsel.

7.1 In the facts of the present case I am of the view that the evidence sought to be relied upon cannot be discarded out rightly as irrelevant. The fact that such evidence may not be sufficient or complete by itself may be true and that is another story which can only be decided after consideration. I find that the evidence admittedly is relevant and crucial and consequently is directed to be admitted. At the cost of reiteration, it is again emphasized that in the eventuality the Ld. CIT(A) finds that the evidence filed is not sufficient or complete, it is expected that he shall communicate this fact to the assessee and provide the assessee to file further supporting evidence, if any either by way of an affidavit and/or relevant document to explain the purpose of the loan taken and the usage thereof. No doubt it is the duty of the assessee to justify its claims. However, admittedly where the assesse's Counsel himself is ignorant about the procedures, the occasion to castigate the assessee for not being conversant with the legal requirements is, in the least, unfortunate. It is further seen that qua the specific property there were three other co-owners. The loan as per the claim put forth was from Nainital Bank as per the finding in the impugned order which also has been taken by these persons apart from

the assessee. The purpose of referring to the co-sharers is relevant as exercise of administrative and quasai judicial orders passed by the authorities is legitimatized only if it is seen to be fair, equal and impartial. If identically situated persons are differently taxed, such orders of Quasi Judicial Authority strike at the very root of the principles of legitimate expectation of the tax payers and thus is open to the challenge of being whimsical, arbitrary and perverse. Such an approach cannot be given legal sanction.

8. Accordingly, in the interest of substantial justice, the impugned order is set aside and remanded back to the file of the CIT(A) with a direction to admit the fresh evidences in accordance with the procedure prescribed by law and further provide the assessee to file supporting evidences which go to the root of the matter in case the evidence filed is found to be insufficient or incomplete and thereafter the CIT(A) shall pass a speaking order in accordance with law after giving the assessee a reasonable opportunity of being heard. Said order was pronounced in the open court at the time of hearing itself.

9. In the result, the appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 26/06/2018

Sd/-
(DIVA SINGH)
JUDICIAL MEMBER

Dated: 26/06/2018
*Kavita Arora/Poonam(CHD)/AG(CHD)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

TRUE COPY

ASSISTANT REGISTRAR
ITAT NEW DELHI