

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'B' , NEW DELHI**

**BEFORE SH. O.P. KANT, ACCOUNTANT MEMBER  
AND  
SH. K.N. CHARY, JUDICIAL MEMBER**

ITA No.3193/Del/2015  
Assessment Year: 2010-11

Sh. Nafe Singh Gahlawat, H. No. 1032, Sector-14, Faridabad	<b>Vs.</b>	Income Tax Officer, Ward-II(3), Faridabad
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant by	Sh. Gurjeet Singh, CA
Respondent by	Ms. Ashima Neb, Sr.DR

Date of hearing	19.11.2018
Date of pronouncement	07.12.2018

**ORDER**

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

This appeal by the assessee is directed against order dated 16/03/2015 passed by the Ld. Commissioner of Income-tax (Appeals), Faridabad [in short 'the Ld. CIT(A)'] for assessment year 2010-11, raising following grounds:

1. (a) *Because the action is under challenge on facts & law, for not admitting the additional evidence u/r 46A of the Income Tax Rules 1962, for the reason that the evidence was available at initial stage & had not been produced before AO.*  
(b) *Because the action is under challenge on facts & law, for not admitting the additional evidence u/r 46A of the*

*Income Tax Rules 1962 after calling for the remand report from the Assessing Officer.*

2. *(a) Because the action is under challenge on facts & law, for an addition of Rs. 42,76,362/- on account of Sundry Creditors whereas the said is an allowable liability having examined & appreciated the 'commercial expediency & business exigencies' thus the action is unwarranted & unsustainable in law.  
(b) Even alternatively the quantum of addition is disputed.*
3. *Because the action is under challenge on facts & law, for an addition of Rs. 16,300/- on account of advertisement expenses being expenses debited as per statement of BPTP.*

**2.** Briefly stated facts as culled out from the records are that the assessee, individual has shown source of income from dealing in real estate, pension, house property, interest from bank etc. For the year under consideration the assessee filed return of income on 30/07/2010 declaring income of Rs.10,22,210 and agriculture income of Rs.45,000/-. The case of the assessee was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short 'the Act') was issued and in response authorised representative of the assessee attended and filed part of the replies, **however, books of accounts were not produced before the Assessing Officer.** The Assessing Officer noted that during the year under consideration the assessee shown commission of Rs.12,35,491/- (inclusive service tax) from a real estate company namely BPTP for property/flats etc sold through him. From the details filed, the Assessing Officer observed creditors for expenses amounting to Rs.42,72,362/-. It was claimed by the assessee that said amount was payable since 01/04/2007. The assessee also filed a copy of ledger account for sundry creditors from 01/04/2007 to 31/3/10 and monthly

summary for the same period. The Assessing Officer noted inconsistency in the closing balance of sundry creditors in ledger account and monthly summary. According to the Assessing Officer in the ledger account of sundry creditor, the closing balance as on 31/03/2010 was Rs.51,79,269/- whereas the closing balance in the monthly summary as on 31/03/2010 was Rs.42,76,362/-. The Assessing Officer noted that no details whatsoever of those creditors and no evidence of existence of those creditors outstanding as on 31/03/2010 was filed before him. The Assessing Officer further noted that the assessee credited capital account by amount of Rs.16,77,034.85 on account of writing back of sundry creditor for expenses and this amount was rooted directly to the capital account instead of rooting through the profit and loss account. In the circumstances, the Assessing Officer called upon to explain the chargeability of the said sum of Rs.42,76,362/- under the provisions of section 41(1) of the Act. The assessee contested that there cannot be any unilateral cessation of the liability and the provision of section 41(1) of the Act cannot be attracted in the case of the assessee. The submission of the assessee was rejected and addition was made by the Ld. AO observing as under:

*“The assessee has thoroughly and completely failed to prove that his case does not fall within mischief of the section 41(1). His claim is that no benefit is obtained by him by way of remission or cessation. However, the fact is that the Limitation has struck in favour of the assessee and he had obtained benefit by transferring part liability to capital account. Even otherwise, he has failed to prove even the existence of the creditors in current year or even their names, conceding thereby that the creditors no more exist in his eyes.*

*The claim of the assessee regarding set off cannot be accepted since no bad debts has been written off in P & L A/c or claimed. Even proof of satisfaction of conditions under section 36(2) has not been submitted. No confirmation or reconciliation of BPTP is submitted.*

*Thus, the assessee cannot claim benefit of his own badly shaped accounts by passing book entries into un-reconciled accounts without furnishing any detail or evidence. In view of the above discussion and for the reasons the creditors to the extent of Rs. 42,76,362/- cannot be accepted as existing or genuine and are added to the income of the assessee. In this way net addition on this comes to Rs. 42,76,362/-. I am satisfied that the assessee has concealed his income by furnishing of inaccurate particulars of his income on this account and therefore penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961 are hereby initiated.*

*(Addition Rs. 42,76,362/-)”*

**2.1** The Assessing Officer also made disallowance of advertisement expenses of Rs. 16,300 and other disallowances. The assessment was completed on 26/03/2013 assessing the total income at Rs.62,78, 110/-.

**2.2** Aggrieved, the assessee filed appeal before the Ld. CIT(A), who partly allowed the appeal of the assessee. Aggrieved, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

**3.** In ground Nos. 1 and 2 of the appeal, the assessee has challenged the action of the Ld. CIT(A) in not admitting the additional evidences under rule 46A of the Income Tax Rules and sustaining the addition of Rs.42,76,362/- on merit. The assessee has also disputed the quantum of the addition.

**3.1** The facts qua the issue in dispute are that the sundry creditors amounting to Rs.42,76,362/- were observed by the Assessing Officer since 01/04/2007. According to the Assessing Officer part of the said liability (Rs.16.77 lakhs) was credited to his capital account and thus acknowledged that the assessee was no more required to pay those creditors. The Assessing Officer also noted that no details to establish the existence of the creditors in current year or even their names, conceding thereby

that creditors no more existed. The Assessing Officer held the cessation of the sundry creditors amounting to Rs.42,76,362/- and the benefit accrued as deemed profit and gain of the business under section 41(1) of the Act. During appellate proceedings, the assessee filed additional evidences under rule 46A of Income Tax Rules, 1962 to substantiate its claim that trading liability exist. The Ld. CIT(A) forwarded the additional evidences to the Assessing Officer for his comments. The Assessing Officer objected to the admissibility of the additional evidences on the ground that the assessee was provided several opportunity of being heard and produce necessary documentary evidence to support his contention, and there was no denial of opportunity on the part of the Assessing Officer to file those documents. The Ld. CIT(A) observed that the assessee in the submission has nowhere mentioned as what prevented him from furnishing those evidences during the course of assessment proceeding. The Ld. CIT(A) after taking into account the provisions of the Rule 46A and various judicial pronouncement on the issue of admissibility of additional evidences concluded that assessee did not satisfy the conditions laid down under Rule 46A for admissibility of the additional evidence due to following reasons:

*10. Coming to the facts of the instant case it is observed that none of the listed (four) conditions envisaged under rule 46 have been satisfied by the appellant, because of the following reasons.*

*a) As evident from the assessment order it's clear that several opportunities have been given to the appellant.*

*b) The appellant has not been able to establish any sufficient cause that prevented him from furnishing this evidence earlier.*

*c) Perusal of assessment order reveals that the AO has been constantly calling information from the appellant and the*

*appellant has been constantly denying the information to the AO till the fag end of financial year.*

*d) And most importantly coming to the specifics of the additional evidence furnished by the appellant it needs to be appreciated that the appellant has not furnished before the AO even the most basic information which would have been readily available with him i.e. the complete list of the creditors along with their addresses. I can understand if the appellant was unable to furnish the confirmed copies of account of the creditors as this information was dependent upon a third party i.e. the creditors.-However the names of the creditors and their addresses are the basic information which would have been available with the appellant under any circumstances. The appellant has been unable to give any justification for what prevented him from furnishing the names and addresses of the creditors as appearing in his books of account. This fact is evident from the appellant's rejoinder reproduced in Para 5 of the present order."*

**3.2** After rejecting the additional evidences, Ld. CIT(A) decided the issue in dispute on merit observing as under:

*"14. After perusing the order of the AO and the submission of the appellant, my observation is as below:*

*a) The initial onus to authenticate the claims of the expenses is of the assessee and once that is done then the onus is on the Assessing Officer to prove why the credit balances arising out the same transactions cannot be accepted as correct. In this case the appellant has failed to even provide the names of the creditors. In such a situation it is evident that the appellant has failed to discharge his onus, when the burden of proof squarely jay on his shoulders.*

*b) It is not the case that the appellant had provided the names and addresses of the creditors and the AO failed to verify the same by issuing summons u/s 131. In this case no such occasion arose and in the absence of even the names of the creditors the AO has rightly held that all the creditors are nonexistent and thus there is no liability towards them as the appellant does not even know the names of the creditors.*

*c) The. appellant is a property broker and is not engaged in the business of manufacturing any goods wherein it can be held that the creditors were on account of purchase of raw materials and if the ^creditor are found to be non existing the purchases made from them would be on account of bogus purchases and*

would thus disturb the GP of the appellant and would make an unrealistic GP.

d) The assessee himself 'has credited 16.77 lacs to his capital account out of creditors, thus, acknowledging that he is no more required to pay them."

15. Before concluding it's pertinent to once again recap that the onus lay on the appellant to provide the names and address of the creditors, which the appellant failed to provide on both counts i.e. no names were provided thus there is no question of furnishing their addresses.

16. The terms burden of proof or onus probandi connotes the obligation to prove a fact or facts, by adducing the necessary evidence. The rule relating to burden of proof, as laid down in S-101 of the Evidence Act, is as follows: "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that these facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person." The rule that the burden of proof lies on the person who asserts a fact in the affirmative is derived from the ancient maxim of Roman Law, *ei qui affirmat, non ei qui negat, incumbit probatio*, and has been adopted on two considerations: (i) In the nature of things a negative is more difficult to establish than the affirmative; and (ii) where a person has invoked the process of law to establish a case which is based on the facts asserted by him, it is but reasonable that the obligation to prove such facts should rest on him. And as has been observed, the appellant totally failed to discharge his burden of proof.

17. Thus after examining the assessment order and in light of my observations above I see no reasons to interfere with the finding of the AO. Thus Ground No. 1 of the appellant is dismissed."

**3.3** Before us, the Ld. counsel of the assessee submitted that the Ld. CIT(A) was not justified in rejecting the additional evidences and deciding the issue without taking into consideration those additional evidences. According to him, the information in respect of the said creditors were called for in the month of February/March, 2013 and authorised representative of

the assessee had submitted the relevant details. The Ld. counsel submitted that if certain details were not filed by the authorised representative of the assessee before the Assessing Officer, the assessee cannot be penalized by way of rejecting the additional evidences produced before the Ld. CIT(A) in the appellate proceedings. He requested that, in the interest of Justice, the additional evidences might be admitted and the matter might be restored to the file of the either Ld. CIT(A) or to the Assessing Officer for deciding the matter afresh in the light of additional evidences.

**3.4** The Ld. DR, on the other hand, objected to the request of the Ld. counsel on the ground that the assessee did not fulfil the conditions of Rule 46A of the Income Tax Rules for admissibility of the additional evidences. The Ld. DR submitted that in view of the various decision cited by the Ld. CIT(A), the decision of rejecting additional evidences is justified.

**3.5** We have heard the rival submissions and perused the relevant material on record. We find that the Assessing Officer made the addition of observing that no detail in respect of the sundry creditors and their existence was filed before him. The Ld. CIT(A) also upheld the finding of the Ld. Assessing Officer observing that the burden of proof was on the assessee to produce necessary evidences and in view of the failure on the part of the assessee, the action of the Ld. Assessing Officer were justified.

**3.6** We note that for invoking provisions of section 41(1) of the Act, and holding the amount obtained by a person or the value of the benefit accrued to him as deemed to be the profit or gains of the assessee, following conditions are required to be fulfilled:

1. The assessee must have claimed an allowance or deduction in respect of the loss, expenditure for trading liability in earlier years.
2. During the year under consideration the assessee must have obtained whether in cash or in any other manner, any amount in respect of such loss expenditure or some benefit in respect of such trading liability by way of remission of cessation thereof.

**3.6** We find that in absence of evidences filed by the assessee; both the authorities have not examined the issue of applicability of provisions of section 41(1) of the Act in the case of the assessee. In our opinion, in order to decide the issue in question, it is important to admit the additional **evidences** filed by the assessee. The Ld. counsel has submitted before us that those evidences have not been filed due to ignorance on the part of the authorised representative appearing before the Assessing Officer and for which the assessee cannot be penalized. In view of the submission of the Ld. Counsel, and in the interest of Justice, we feel it appropriate to admit the additional evidences and restore the matter in dispute to the Ld. CIT(A) for deciding a fresh after analyzing the documents or the evidences, which the assessee may file before him. The Ld. CIT(A) may call for remand report from the Assessing Officer. We note that no books of accounts were produced during the assessment proceeding, therefore we direct the assessee to produce all the books of accounts along with vouchers for the year under consideration before the authorities. We also direct the assessee to produce confirmation of the creditors along with their copy of ledger accounts, complete

narration of the transaction alongwith documentary evidences, and also produce those sundry creditors before the authorities for verification of the their existence and transactions of the assessee with them. To verify and ascertain facts in respect of the issue in dispute, if the authorities feel it necessary, they may carry out enquiries from the real estate companies, from whom the assessee received commission and also from the customers to whom the commission has been passed over. It is needless to mention that the assessee shall be afforded sufficient opportunity of being heard. In the result, issue in dispute is allowed for statistical purposes.

**4.** In ground No. 3, the assessee has challenged disallowance of Rs.16,300/- on advertisement. The Assessing Officer made disallowance in view of the failure of the assessee to produce bills of those expenses. The Ld. CIT(A) in his finding has recorded that the authorised representative the assessee argued that those bills were not essential for the allowability of the expenses and accordingly confirmed that this disallowance.

**5.** We have heard arguments of the parties on the issue in dispute. We find that issue in dispute related to sundry creditors has already been restored to the file of the Ld. CIT(A). This disallowance has been confirmed on the ground that no bills or other documents in support of the expenditure have been produced before the authorities. In the interest of substantial Justice, we feel it appropriate to give one more opportunity to the assessee to produce the bills of documents in support thereof, accordingly, we restore this issue to the file of the Ld. CIT(A) for deciding afresh, with the direction to the assessee to produce all the bills and documentary evidence in support of the expenditure

incurred wholly and exclusively for the purpose of the business. The Assessing Officer as well the assessee shall be afforded adequate opportunity of being heard on the issue in dispute. This ground of the appeal is also accordingly allowed for statistical purposes.

**6.** In the result, the appeal of the assessee is allowed for statistical purposes.

**Order is pronounced in the open court on 7<sup>th</sup> December, 2018.**

**Sd/-  
K.N. CHARY  
JUDICIAL MEMBER**

**Sd/-  
O.P. KANT  
ACCOUNTANT MEMBER**

Dated: 7<sup>th</sup> December, 2018.

RK/-(D.T.D.)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi