आयकर अपीलीय अधिकरण,सुरत न्यायपीठ, सुरत

IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT

श्री सी.एम.गर्ग, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्य के समक्ष

BEFORE SHRI C.M.GARG, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER

S. No	आ.अ.सं./I. T.A No.	निर्धारण वर्ष/AY:	अपीलार्थी Appellant	V.	प्रत्यर्थी/Respondent
1	700/Ahd/2016/SRT	2007-08	Rajeev Kumar Tulsiyan, Prop. of Nidhi Textile, R-206, Rohit A/c Market, Ring Road, Surat-395002. **PAN: ABXPK 3288J**	**V.**	The Income Tax Officer, Ward-5(4), Surat.
2 & 3	3093/Ahd/2014/SRT & 3094/Ahd/2014/SRT	2008-09 & 2009-10	Rajeev Kumar Hariprasad Tulsiyan, Shop No.1012, Rohit A.C. Market, Ring Road, Surat - 395 001. **PAN: ABXPK 3288J**	**V.**	The Income Tax Officer, Ward-5(4), Surat.

निर्धारिती की ओर से **/Assessee by**	Shri P.M.Jagasheth, CA
राजस्व की ओर से **/Revenue by**	Shri Srinivas T. Bidari, CIT-DR

सुनवाई की तारीख**/ Date of hearing:**	30.05.2018
उद्घोषणा की तारीख**/Pronouncement on**	05.06.2018

आदेश /O R D E R

PER O. P. MEENA, ACCOUTANT MEMBER:

1. These three appeals filed by Assessee are directed against the order of the Ld.Commissioner of Income Tax(Appeals)-1, [CIT(A)], Surat dated 26.02.2016 for the assessment year 2007-08 and two orders

common date 02.09.2014 for the assessment years 2008-09 and 2009-10 which in turn has arisen from the order passed by the Income Tax Officer, Ward-5(4), Surat (in short "the AO") u/s.143(3) r.w.s. 147 dated 28.03.2014 for the assessment year 2007-08, and under section 144 read with section 147 dated 22.03.2013 for the assessment year 2008-09, and A.Y. 2009-10 of the Income Tax Act, 1961 (in short 'the Act').

ITA No.700/Ahd/2010, A.Y. 2007-08 is being dealt with as under:

2. During the course of appeal proceedings before the Tribunal, the assessee has taken additional ground which reads as under :

> "*1. The learned Commissioner of the Income Tax (Appeals) has erred in law and on the facts and in not granting sufficient opportunity and in rejecting the additional evidence filed before Hon'ble CIT(A)."*

3. The ld.Counsel for the assessee submitted that the additional ground of appeal could not be raised at the time of filing of appeal before the Tribunal. Since, during the period of hearing of appeals Shri Hari Prasad Agarwal, father of the assessee was suffering from chronic liver paveuse ajmal disease (copy of USG report filed) and ultimately, he passed away. Therefore, the assessee could not attend the hearing before CIT(A). The CIT(A) has dismissed the appeal ex-party for non-prosecution by the assessee by applying the ratio of the decision in the case of CIT vs. B.N.Bhattachargee & Ors. 118 ITR 461 and Estate of late Tukojirao Holkar vs. CWT 223 ITR 480 (MP) and CIT vs. Multiplan India

(P) Ltd. 38 ITD 320 (Del). Therefore, the assessee could not submit additional evidence before the CIT(A), as no opportunity of being heard was allowed to the assessee. It is also a fact that assessment was made u/s.144 of the Act as the assessee could not submit the relevant evidences during the course of assessment proceedings. Therefore, citing the decision of Hon'ble Supreme Court in the case of Jute Corporation of India vs. CIT (1991) 187 ITR 688 it was urged before us that the additional ground and additional evidences be admitted in the interest of justice. However, such additional evidences were submitted under Rule 46A before the CIT(A) for the assessment year 2008-09 and 2009-10. But same were also not admitted, therefore, it was requested that additional evidences under Rule 29 Tribunal Rules 1963 may please be admitted. As the assessee could not furnish these documents during the course of assessment proceedings as the books of accounts were seized by DRI (PB-47-51) as well as during the course of appellate proceedings. Further, Shri Hari Prasad Agarwal, father of the assessee was under treatment and therefore, the assessee was prevented from sufficient cause for non-producing evidences and non-appearing In appellant proceedings for A.Y. 2007-08 and non-appearing in assessment proceedings for A.Y. 2008-09 and 2009-10.

4. On the other hand, the ld.Senior Departmental Representative (Sr.DR) opposed to the admission of the additional ground as well as additional evidences, however, did not raise serious objection to it.

5. We have considered the rival submissions of both the parties, looking to the facts and circumstances of the case and law and in the interest of justice we are inclined to admit that the additional ground of appeal in the light of decision of Hon'ble Supreme Court in the case of National Thermal Company Ltd. vs. CIT (1998) 229 ITR 383 (SC) wherein it was held that additional ground of appeal can be admitted where the issue involved is pure question of law not involving any investigation of facts and also the decision of Hon'ble Madras High Court in the case of CIT vs. Indian Express (Madhurai) Pvt. Ltd. (1983) 140 ITR 705 (Mad) wherein it was held as under :

> *"It is well-settled now that while exercising its appellate jurisdiction, the Tribunal need not confine itself to the grounds which are set forth in the appeal memorandum or taken by leave of the Tribunal. Indeed, in the case of CIT v. Mahalakshmi Textile Mills Ltd. [1967] 66 ITR 710, the Supreme Court described the Tribunal's appellate jurisdiction in the widest terms possible saying that all questions, whether of law or of fact, which relate to the assessment of the assessee may be raised before the Tribunal and there is nothing in the Act which restricts the Tribunal to the determination of the questions raised before the departmental authorities. On the basis of these principles laid down by the Supreme Court, it must be held in this case that the assessee was not precluded from raising the new contention and the Tribunal was not precluded from examining and determining that contention, merely on the score that it had not been put forward at the earlier stages of the proceedings in assessment and in the first appeal.*
> *The statutory provisions in section 254, which confers appellate jurisdiction on the Tribunal, clearly lays down that the Tribunal, in disposing of an appeal, may pass such orders thereon as it thinks fit. The expression 'subject-matter' has not been employed in this provision. Indeed in Mahalakshmi Textile Mills' case (supra), even the Supreme Court has understood the Tribunal's appellate jurisdiction as a jurisdiction to pass such orders on the appeal as it thinks fit without adding any gloss of their own to the expression. Therefore, both on principle and on precedent, there is no reason why the Tribunal must be precluded from handling a*

point which appertains to the assessee's assessment merely because nobody else had handled it before or because it had not occurred either to the assessee or to the department to raise and urge that point at earlier stages of the proceedings. Consequently, in the instant case, the Tribunal was justified in entertaining the additional ground raised by the assessee relating to a claim which was not raised either before the ITO or before the AAC."

6. In the light of ratio laid down in above decision and looking to the facts and circumstances of the case and law, we are of the view that these additional evidences are necessary for proper appreciation of the issue under appeal and would cause of substantial justice. Such evidence may ultimately turn out to the benefit of either taxpayer or the Revenue. Reliance is placed in the case of CIT v. Text Hundred India (P)Ltd.[2011] 351 ITR 57 (Del): 197 Taxman 128(Del) : 51 DTR 241 (Del) wherein it was observed as follows: *"**13**. The aforesaid case law clearly lays down a neat principle of law that discretion lies with the Tribunal to admit additional evidence in the interest of justice once the Tribunal affirms the opinion that doing so would be necessary for proper adjudication of the matter. This can be done even when application is filed by one of the parties to the appeal and it need not to be a suo motu action of the Tribunal. The aforesaid rule is made enabling the Tribunal to admit the additional evidence in its discretion if the Tribunal holds the view that such additional evidence would be necessary to do substantial justice in the matter. It is well-settled that the procedure is handmade of justice and justice should not be allowed to be choked only because of some inadvertent error*

or omission on the part of one of the parties to lead evidence at the appropriate stage. Once it is found that the party intending to lead evidence before the Tribunal for the first time was prevented by sufficient cause to lead such an evidence and that this evidence would have material bearing on the issue which needs to be decided by the Tribunal and ends of justice demand admission of such an evidence, the Tribunal can pass an order to that effect."

7. In the light of above facts and circumstances and relying on aforesaid decision, we admit the additional ground of appeal and additional evidence filed by the assessee and restored issue back to the file of AO to decide afresh. The AO, is therefore, directed to decide the issue after examining additional evidence and any other evidence as may be filed by the assessee before him in support of his claim. The AO may decide the issue after making such enquiries as necessary as deem fit and required further evidence as required in the interest of justice. Accordingly, entire assessment is set-aside to the file of the AO for denovo consideration after affording proper opportunity of being heard. Nevertheless to say that the assessee will cooperate in the enquiry and assessment proceedings and furnish necessary evidences as required by the AO.

8. In the result, the appeal of the assessee for A.Y. 2007-08 in ITA No.700/Ahd/2016 is allowed for statistical purposes.

9. 3093 & 3094/Ahd/2014/SRT for A.Y. 2008-09 & 2009-10 :

Ground No.1 for assessment year 2008-09 and 2009-10 reads as under :

> *"1. The Ld. CIT(A) has erred in law and on the facts and in not granting sufficient opportunity and in rejecting the addition evidence filed before CIT (A)."*

10. At the outset, the learned counsel appearing for the assessee submitted that assessment order for the assessment year under consideration has been framed u/s. 144 of the Act ex-parte without affording sufficient time and opportunities by the AO. The ld. CIT (A) has adjudicated complicated issues on the basis of statement of facts without allowing rebuttal of the findings of the AO. The CIT(A) has failed to admit additional evidences filed under Rule 46A of I.T.Rules. During the period the father of the assessee was critically ill and was under treatment and ultimately died. Further, the books of accounts were seized by DRI, hence, these could not be produced. The Revenue Authorities ought to have appreciated that there was medical emergency in the family, which prevented the assessee from complying with notices and resultant attendance of hearing. Therefore, the learned counsel for the assessee urged before us that one more opportunity of

being heard might be granted to the assessee to make good his submissions with relevant evidence to the satisfaction of Revenue Authorities by setting aside the appeal to the file of the AO. Hence, in all fairness, the learned counsel for the assessee does not have any objection to the issue if it is restored to the file of the Assessing Officer for a de-novo consideration.

11. The learned D.R. has relied on the order of Revenue Authorities.

12. We have heard the rival contentions of both the parties. We find that the assessment in both the years have been passed ex-parte under section 144 read with section 147 of the Act by the AO. The AO though afforded number of opportunities but the assessee has failed to respond the same. Therefore, we find that books of accounts were seized by DRI and Shri Hari Prasad Agarwal was under treatment for chronic liver paveuse ajmal diseases (Evidence filed PB 55 to 59) and has ultimately passed away. Therefore, there was medical emergency in the family, due to which, the assessee could not appear before the Assessing Officer for A.Y. 2007-08 and nor makes compliance on appeal. The ld.CIT (A) has also decided these appeals without admitting additional evidences and proper compliance and without allowing proper opportunity of being heard. The principle of *audi alteram partem* is the

basic concept of natural justice. The expression "*audi alteram partem*" implies that a person must be given an opportunity to defend himself. This principle is *sine qua non* of every civilized society. The right to notice, right to present case and evidence, right to rebut adverse evidence, right to cross examination, right to legal representation, disclosure of evidence to party, report of enquiry to be shown to the other party and reasoned decisions or speaking orders are must. We find the guidance for right of hearing, as is laid down by the Hon'ble Supreme Court in the case of Maneka Gandhi v. Union of India, wherein Hon'ble Supreme Court has held that rule of fair hearing is necessary before passing any order. We find that it is pre-decision hearing standard of norm of rule of *audi alteram partem.* We find that in this instant case, the assessee was not given proper hearing. We also observe that the CIT(A) has not admitted additional evidences filed under Rule 46A of I.T.Rules for the assessment year 2008-09 and 2009-10. Therefore, on the basis of finding as given by … in appeal for assessment year 2007-08 in ITA no.700/Ahd/2016, the additional evidences and directed to be admitted under Rule 29 of ITAT Rules. The AO is directed to consider same in fresh assessment proceedings and allow evidences to be adduced by the assessee as may be needed. Therefore, we are of the view that the assessee must be given one

more opportunity of hearing and to represent his case. Therefore, in exercise of power conferred under Rule 28 of Tribunal Rules, we restore this appeal / these appeals for the assessment years 2008-09 and 2009-10 to the file of the ld. Assessing Officer for allowing proper opportunity of being heard in accordance with law. Nevertheless, to mention that the assessee will cooperate in the appeal proceedings and file necessary evidences on which he wants to rely upon.

13. In the result, the appeal of the assessee for the assessment year under consideration / assessment years 2008-09 and 2009-10, in I.T.A. No's. 3093 & 3094/Ahd/2014/SRT are allowed for statistical purposes.

14. To sum up, in the result, three appeal of the assessee are allowed for statistical purposes.

15. The order pronounced in the open court on 05-06-2018.

Sd/- **Sd/-**

(सी.एम.गर्ग) **/(C.M. GARG)** (ओ.पी.मीना) **/(O.P.MEENA)**

न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य/ ACCOUNTANT MEMBER

सुरत/ Surat: दिनांक /Dated : 5th Jun,2018 / SGR

Copy sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

/ / TRUE COPY / /

Assistant Registrar, Surat