

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C" New Delhi**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

आ.अ.सं./I.T.A No.5139/Del/2015
निर्धारणवर्ष/Assessment Year:2011-12

Mohd. Gulzar T-444, Gali Pahar Wali, Ahata Kidara, Sadar Bazar, Delhi.	बनाम Vs.	ITO Ward 63(3) New Delhi.
अपीलार्थी Appellant		प्रत्यर्थी/Respondent
PAN No. AGUPG8688A		

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आ.अ.सं./I.T.A No.5001/Del/2015
निर्धारणवर्ष/Assessment Year:2011-12

ITO Ward 63(3) New Delhi.	बनाम Vs.	Mohd. Gulzar T-444, Gali Pahar Wali, Ahata Kidara, Sadar Bazar, Delhi.
अपीलार्थी Appellant		प्रत्यर्थी/Respondent
PAN No. AGUPG8688A		

राजस्वकीओरसे /Revenue by	Shri S.N. Meena, Sr. DR
निर्धारितीकीओरसे /Assessee by	Sh. Salil Kapoor, Advocate Sh. Sumit Lalchandani, Adv. Ms. Sona Advocate

सुनवाईकीतारीख/ Date of hearing:	27.11.2019
उद्घोषणाकीतारीख/Pronouncement on	28.11.2019

आदेश / O R D E R

PER N.K. BILLAIYA, A.M.

1. These are cross appeals by the Revenue and the Assessee preferred against the very same order of the Ld. CIT (Appeals)-20, New Delhi dated 25.05.2015 pertaining to AY 2011-12. Both these appeals were heard together and are disposed of by this common order for the sake of convenience.

2. We will first take up the Revenue's appeal in ITA No. 5001/Del/2015 on the following grounds:

1. *"The Ld. CIT(A) has erred in reducing the gross profit rate from 2% to 1.5%.*
2. *The Ld. CIT(A) has erred in reducing the disallowance of expenses from 20% to 10%.*
3. *The Ld. CIT(A) has erred in reducing the addition on account of unloading charges to 50% of total claim i.e. (50% of Rs. 11,02,626/-).*
4. *The Ld. CIT(A) has erred in reducing addition on account of salary expenses from 50% to 25% of total claim.*
That the Appellant craves leave to add, amend or modify the ground(s) of appeal at any time."

3. We have heard the learned CIT (D.R.), who has pointed out the tax effect involved in this appeal, is below monetary limit prescribed by the CBDT. We find that the CBDT vide Circular No.17/2019 dated 8th August 2019 [F.No.279/ Misc.142/ 2007-ITJ (Pt)] by amending para 3 of CBDT

Circular No.3/2018 dated 11.07.2018 has enhanced the monetary limit for filing of appeal before Tribunal to Rs.50 lakhs and has also removed the anomaly in para 5 of said Circular No. 3/2018. We find that the present case does not fall within the exceptions clause 10 of said CBDT Circular No. 3/2018. Therefore, the present appeal is not maintainable as per above Circular No. 17/2019, hence dismissed. This Circular is applicable to all pending appeals as clarified by CBDT letter dated 20.08.2019 [F. No. 279/Misc./M-93/2018-ITJ] and in the light of judgment of Hon`ble Supreme Court in the case of Pr. CIT, Jaipur v. Meenakshi Modi SLP (Civil) Diary No. 25076 of 2019-dated 16.08.2019 wherein the Hon`ble Supreme Court has dismissed the appeal of Revenue, as tax involved was less than Rs. 2 Crores. However, the Revenue is at liberty to approach to this Tribunal for recalling this order, if it comes to the notice of the AO that the tax effect is more than the monetary limit provided under above Circular or the appeals is fall within ambit of the exceptions provided under the said Circular.

4. In the result, appeal of the Revenue stands dismissed.

5. Now we will take up assessee's appeal in ITA No. 5139/Del/2015. Though the assessee has raised 12 substantive grounds of appeal the sum and substance of the grievance of the assessee is that due to reasons beyond the control the assessee could not furnish the necessary

documentary evidences before the AO and the AO framed the assessment *ex parte* u/s 144 of the Act.

6. Before us, the application under Rule 29 of the ITAT Rules for admission of additional evidence has been filed by which the assessee explained that before the assessment proceedings could start the Counsel Shri Subhash Gupta, Advocate died. Subsequent to the death of Shri Subhash Gupta his son Chartered Accountant Sh. Sitish Gupta took over the charge but could not attend the assessment proceedings due to lack of concentration on account of his father's death.

7. The assessee strongly contends that the additional evidences now furnished are necessary for proper appreciation of the issue under appeal and for substantial justice.

8. The DR strongly opposed to the admission of the additional evidences. It is the say of the DR that sufficient opportunities were given by the AO and the CIT(A) but the assessee did not avail those opportunities and now filing fresh evidences which should not be accepted.

9. We have given a thoughtful consideration to the rival contentions and have carefully perused the application made under Rule 29 of the ITAT Rules. The undisputed fact is that the discretion lies with the Tribunal to admit additional evidence in the interest of justice. It is also

not in dispute that Rule 29 of the ITAT Rules is *akin* to order 41 Rule 27(1) of the CPC. Our view is fortified by the decision of the Hon'ble High Court of Delhi in the case of CIT vs. Text Hundred India Pvt. Limited 351 ITR 57 the relevant observations of the Hon'ble Delhi High Court read as under:

“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 moto 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.

14. *The next question which arises for consideration is as to whether the exercise of discretion in the instant case permitting the additional evidence by the Tribunal, is apposite? It is undisputed that Rule 29 of the Rules is akin to Order 41 Rule 27(1) of the Code of Civil Procedure. The true test in this behalf, as laid down by the Courts, is whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. The legitimate occasion, therefore, for exercise of discretion under this rule is not before the Appellate Court hears and examines the case before it, but arises when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent to the Appellate Court coming in its way to pronounce judgment, the expression 'to enable it to pronounce judgment' can be invoked. Reference is not to pronounce any judgment or judgment in a particular way, but is to pronounce its judgment satisfactory to the mind of Court delivering it. The provision does not apply where with existing evidence on record the Appellate Court can pronounce a satisfactory judgment. It is also apparent that the requirement of the Court to enable it to pronounce judgment cannot refer to pronouncement of judgment in one way or the other but is only to the extent whether satisfactory pronouncement of judgment on the basis of material on record is possible. In Arjan Singh vs. Kartar Singh AIR 1951 SC 193, while interpreting the provisions of Order 41 Rule 27, the court remarked as follows: -*

"The legitimate occasion for the application of Order 41, rule 27 is when on examining the evidence as it stands, some inherent lacuna or defect becomes

apparent, not where a discovery is made, outside the court of fresh evidence and the application is made to impart it. The true test, therefore, is whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced.”

[Emphasis supplied]

[See also Netha Singh v. Financial Commissioner AIR 1976 SC 1053]

15. *In the present case the reason which was given by the assessee in support of its plea for admission of additional evidence was that the assessee could not produce these records before the lower authorities due to non-retrievability of e-mail on the date because of technological difficulties. This reason was specifically mentioned in the application filed. No reply to this application was filed refuting this averment, though the departmental representative had opposed the admission of the additional evidence. The ground pleaded by the assessee was not confronted. In this backdrop, the Tribunal looked into the entire matter and arrived at a conclusion that the additional evidence was necessary for deciding the issue at hand. It is, thus, clear that the Tribunal found the requirement of the said evidence for proper adjudication of the matter and in the interest of substantial cause. Rule 29 of the Income-tax (Appellate Tribunal) Rules categorically permits the Tribunal to allow such documents to be produced for any substantial cause. Once the Tribunal has predicated its decision on that basis, we do not find any reason to interfere with the same. As a result, the questions*

of law are answered in favour of the assessee and against the Revenue resulting into dismissal of these appeals. No costs.”

10. As mentioned elsewhere with the demise of the Counsel of the assessee the assessee could not be represented properly either before the Assessing Officer or before the CIT(A). In the interest of justice, the additional evidences are admitted.

11. The additional evidences contained documents establishing that the appellant is only an agent of Allana Group. In our considered opinion, these documents need thorough investigation/verification at the assessment stage. We, accordingly, restore the entire issues to the files of the AO. The assessee directed to furnish all these evidences before the AO and the AO is directed to examine the same and decide the issues afresh, after affording reasonable and fair opportunity of being heard to the assessee.

12. In the result, the appeal filed by the assessee is treated to be allowed for statistical purposes.

The order pronounced in the open court on 28.11.2019

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 28th November, 2019

*Kavita Arora, Sr. PS

Sd/-
(N.K. BILLAIYA)
ACCOUNTANT MEMBER

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

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi