

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'C', NEW DELHI  
(Through Video Conferencing)**

**BEFORE,  
SHRI G.S. PANNU, VICE PRESIDENT  
AND  
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.5165/Del/2016  
(ASSESSMENT YEAR-2004-05)**

Global One India Private Limited DSO 601-603, 607-608, 6 <sup>th</sup> Floor, DLF South Court, Saket, New Delhi-110017 PAN:AABCG 2558B	Vs.	DCIT, Circle-12(1), New Delhi
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant By	<b>S/Sh. Kanchua Kaushal &amp; Rishabh Malhotra, ARs</b>
Respondent by	<b>Sh. Saras Kumar, Sr.DR</b>
Date of Hearing	<b>07.07.2020</b>
Date of Pronouncement	<b>30.09.2020</b>

**ORDER**

**PER SUDHANSHU SRIVASTAVA, JM:**

This appeal has been preferred by the assessee against order dated 27.07.2016 passed by the Learned Commissioner of Income Tax (Appeals)-15, New Delhi {CIT(A)} for Assessment Year 2004-05.

2.0 The brief facts of the case are that Global One India Private Limited is a company incorporated on November 15, 1999 under the laws of India and engaged in the business of providing internet and network services to its group's customers in India. It is a wholly owned subsidiary of EGN BV, Netherlands ('EGN BV'). The business operations of the Assessee have been closed down with effect from March 31, 2009.

2.1 For the Assesment Year (AY) 2004-05, the return of income was filed declaring a loss of Rs. 1,04,14,970/- on the basis of unaudited accounts. The assessee's case was taken up for scrutiny assessment and during the course of assessment proceedings, the Assessing Officer (AO) asked the Company to provide audited accounts and details of expenses incurred by the Company during the year. However, due to lack of available data, the Company was unable to provide the said details. The Assessing Officer, vide order dated October 20, 2006, assessed the income at an *ad-hoc* 12% mark-up on total cost of providing services by the Company to its parent company. Accordingly, the taxable income was computed at Rs. 58,66,890/- .

2.2 The audit of the financial statements could be completed only by January 10, 2008 i.e. by the time assessment proceedings were already concluded. Further, the Assessee also filed an application with the Company Law Board on March 15, 2011 requesting compounding of offences under Companies Act, 1956 for not filing the audited annual account wherein it was submitted that the reasons for the delay were beyond the control of the company as there was change in management structure from time to time and there was an absence of persons responsible for compliances. The Company Law Board vide order dated September 07, 2011 compounded the offences.

2.3 Aggrieved by the impugned assessment order, the Assessee filed an appeal before the Ld. Commissioner of Income-Tax (Appeals) [CIT (A)] who decided the appeal *ex-parte* vide order dated September 12, 2008 by upholding the additions made by the AO and noted that the Assessee did not appear for the hearings despite being notices issued.

2.4 Aggrieved, the Assessee preferred an appeal before the Tribunal. The Tribunal took note of the fact that notices for hearing

were issued by the Ld. CIT (A) at a wrong address and, thus, the notices were not received by the Assessee. In view of the same, the matter was remanded back to the file of Ld. CIT (A) vide order dated February 10, 2010 with a direction to send the notices at the correct address and decide the issue on merits.

2.5 Thereafter, in the second round of appellate proceedings before the Ld. CIT (A), the Assessee filed an application under Rule 46A of the Income Tax Rules, 1962 dated February 24, 2015 for furnishing additional evidences i.e. audited financial statements, tax audit report, Form 3CEB, transfer pricing documentation, computation of income basis audited financial statements. The Ld. CIT (A), on receipt of application for admission of additional evidence, requisitioned a remand report from the Assessing Officer. The Assessing Officer objected to admission of the additional evidence. Subsequently, the Assessee Company filed another request letter dated March 24, 2015 for admission of additional evidences. Thereafter, the Ld. CIT(A) vide letter dated June 03, 2015 directed the Assessing Officer to refer the matter to the Transfer Pricing Officer (TPO) for the reason that the Assessee was

following Profit Split Method and, accordingly, the Assessing Officer should have referred the matter to the TPO. Thereafter, the Ld. CIT (A) was transferred and his successor took over the case who passed the impugned appellate order dated July 20,2016 and dismissed the appeal holding as under:

*“On 14.07.2016 the appeal was heard and it was communicated to the appellant that the audited financials under company law, the tax audit report u/s 44AB and the transfer pricing audit report u/s 92E were obtained much after the passing of assessment order and therefore it is an evidence created after the completion of assessment proceedings. Under rule 46A the appellant can furnish additional evidence which he could not furnish during assessment proceedings, if its case falls under one or more of the four conditions mentioned in rule 46A. The additional evidence does not mean the new evidence created after the conclusion of assessment proceedings. In view of the same and the objections raised by the assessing officer vide*

*remand report dated 10.03.2015, the three audit reports (supra) are not admitted as additional evidence.”*

*.....In my view this case does not require a reference to T.O.O as it was a no accounts case. Therefore this order is being passed without such report as the undersigned does not agree with the directions given by the predecessor.”*

2.6 Now, the assessee is before the Tribunal challenging the order of the Ld. CIT (A) wherein he has refused to admit additional evidence. The grounds raised by the assessee are as under:

*“1. On the facts in the circumstances of the case and in law, the Ld. CIT(A) erred in not admitting additional evidence i.e., audited accounts, tax audit report, accountant’s certificate in Form 3CEB, transfer pricing documentation and computation of income:*

*1.1 without appreciating that the same constitutes material evidence necessary to examine the claim of the assessee and adjudicate the same on merit;*

*1.2 without appreciating that in terms of Rule 46A of the Income Tax Rules, 1962 (‘Rules’), the appellant was prevented by sufficient cause from producing the evidence to the Assessing Officer;*

1.3 without appreciating that the additional evidence should be considered in the interest of justice;

1.4 by observing that “additional evidence does not mean the new evidence created after the conclusion of assessment proceedings”;

1.5 without appreciating that action by his predecessor of seeking of the remand report from the Ld. AO results in admission of the evidence.

2. Without prejudice to the above grounds, the Ld. CIT(A) has on the facts in the circumstances of the case and in law, erred in not allowing the depreciation claim of INR 3,70,41,482 as per tax audit report

2.1 by observing that revised claim of depreciation is not permissible without filing a revised return of income;

2.2 by ignoring the provisions of the Income Tax Act, 1961 (‘Act’) that claim of depreciation has to be mandatorily allowed whether or not claimed by the assessee.

3. Without prejudice to the above grounds, the Ld. CIT (A) has on the facts in the circumstances of the case and in law, erred in not allowing the depreciation claim of INR 2,54,10,470 as claimed in the original Return of Income.

4. Without prejudice to the above grounds, the Ld. CIT (A) erred in confirming the addition of INR 58,66,890 made by the Assessing Officer by holding that its international

*transactions pertaining to provision of internet connectivity and related services do not satisfy the arm's length principle envisaged under the Act and in doing so, the Ld. CIT(A) has grossly erred in agreeing with and upholding Ld. AO's action of*

*4.1 applying the mark-up of 12% without bringing on record the basis thereof which is highly excessive;*

*4.2 disregarding the arm's length price ('ALP') as determined by the appellant in the transfer pricing ('TP') documentation maintained by it in terms of section 92D of the Act read with Rule 10 D of the Rules;*

*4.3 not giving the basis for applying the particular method as prescribed under section 92 C(i) of the Act;*

*4.4 not appreciating that none of the conditions set out in section 920(3) of the Act are satisfied in the present case.*

*5. Without prejudice to the above grounds and without accepting the additions, the Ld. CIT(A) has erred in not allowing deduction under section 80-LA(2A) of the Act from the Gross Total Income (as assessed).*

*6. On the facts in the circumstances of the case and in law, the Ld. AO erred in charging interest under section 234B of the Act.*

*7. On the facts in the circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under section 27I(1)(c) of the Act.*

*That the above grounds of appeal are without prejudice to each other.*

*That the appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal.”*

3.0 The Ld. Authorized Representative (AR) submitted that additional evidence should be admitted as it is imperative to arrive at correct income of the assessee. It was submitted that during the second round of proceedings before the Ld. CIT (A), the assessee had sought to file additional evidences vide communication dated 24.02.2015 explaining why the accounts of the assessee could not be submitted earlier. It was submitted that vide this letter dated the assessee had sought to furnish additional evidences viz. audited financial statements, tax audit report, Form 3CEB, Transfer Pricing Documentation, computation of income based on the financial statements etc. It was further submitted that the Ld. CIT (A), on receipt of such application for filing of additional evidence, had called for a remand report from the Assessing Officer. The Ld. Authorized Representative also submitted that the remand report was submitted by the Assessing Officer. It was submitted that, thereafter, the Ld. CIT (A) directed the Assessing Officer to make a reference to the Transfer Pricing Officer (TPO).

However, there was a change in the incumbent to the office of the Ld. CIT (A) who refused to accept his predecessor's directions of making a reference to the TPO and, thus, the additional evidences filed by the assessee were refused to be admitted by observing that since the new evidences were created after the conclusion of the assessment proceedings and since it was a no accounts case, a reference to the TPO also was not required. The Ld. Authorized Representative submitted that the assessee had a sufficient cause in not filing these documents earlier. He submitted that the assessee had also filed an application with the Company Law Board on 15<sup>th</sup> March, 2011 requesting compounding of offences under the Companies Act, 1956 for not filing the audited annual accounts wherein it had been submitted that the reason for the delay were beyond the control of the company as there was a change in the management structure of the company from time to time and there was no person to take charge of the legal compliances before the various authorities. The Ld. Authorized Representative submitted that even the Company Law Board vide order dated 07.09.2011 had accepted the assessee's contention and

had compounded the offences. The Ld. Authorized Representative submitted that assessee had sufficient cause in terms of clauses (b) and (c) of Rule-46A of the Income Tax Rules, 1962 and, therefore, the assessee should be allowed to furnish additional evidences and the matter may be sent back to the Assessing Officer for fresh consideration to arrive at the correct income of the assessee based on the audited financial statements, tax audit report, Form 3CEB etc. filed by the assessee.

4.0 In response, the Ld. Sr. Departmental Representative (DR) opposed the assessee's prayer for admitting additional evidence and submitted that sufficient time had earlier been given by the Assessing Officer to the assessee for furnishing of the documents as was evident from Para-11 of the assessment order as well as Para-6 of the order of the Ld. CIT (A). It was submitted that the audit report was finalized after the completion of assessment proceedings and, thus, it was an evidence created after the conclusion of the assessment proceedings and, therefore, the Ld. CIT (A) was correct in refusing to admit such additional evidences.

5.0 We have heard the rival submissions and have also perused the material on record. It is undisputed that the assessee did not file audited financial statements along with audit report either at the time of filing of return or during the course of assessment proceedings. In this regard, it is the assessee's contention that the same could not be done because of the some changes in the management. The *bona fide* of the assessee is lent credence by the fact that the assessee had also moved an application before the Company Law Board for compounding of offences requesting compounding for not filing the audited annual accounts. It is also of fact on record that the Company Law Board, vide order dated 07.09.2011, compounded the said offence. Also, it is trite that an assessee would not stand to gain by delaying the finalization of financial statements. On the factual matrix, it can be safely inferred that the failure to submit audited accounts and the audit report during the course of assessment proceedings was entirely out of control of the assessee company. We also note that the correct income of the assessee can be determined only on the basis of the audited financial results and, therefore, it would be

incorrect to shut out an assessee in the process of administration of justice from leading evidence to prove its case. The earlier inability to lead evidence should not be held against the assessee unless it is known to be incorrect or suggested to be incorrect or there was evidence to suspect that the evidence was fabricated. In the present case no such adverse inference has been drawn by the Ld. CIT (A). We also note that the CBDT Instruction No.14 (XL-35) dated 11<sup>th</sup> April, 1955 has directed that one of the duties of the Officers of the Department is to assist the tax payers in a reasonable way, particularly in the matter of claiming and securing reliefs. We also note that there is no prohibition for admitting the additional evidence at the appellate stage, though, the same may pertain to a period after completion of the assessment proceedings and the only condition is that the Revenue should not be prejudiced and that the Assessing Officer should be given a reasonable opportunity to rebut the additional evidence. For this, we place reliance on the judgment of Hon'ble Madhya Pradesh High Court in the case of *CIT vs. Gani Bhai Wahab Bhai reported in [1998] 232 ITR 900 (MP)*. Thus, it is our considered opinion that

since the audited financial statements and audited report could not be filed during the course of assessment proceedings due to factors entirely beyond the control of the assessee, in the interest of substantial justice, the Assessing Officer should *de-novo* make the assessment after duly considering the audited financial statements and the audit report of the assessee and after giving proper opportunity to the assessee to present its case. It is directed accordingly.

6.0 In the final result, the appeal of the assessee stands allowed for statistical purposes.

Order pronounced on 30/09/2020.

Sd/-

**(G.S.PANNU)**  
**VICE PRESIDENT**

Dated: 30/09/2020

PK/Ps

Copy forwarded to:

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

Sd/-

**(SUDHANSHU SRIVASTAVA)**  
**JUDICIAL MEMBER**

ASSISTANT REGISTRAR  
ITAT NEW DELHI