IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K, JUDICIAL MEMBER AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.2/Bang/2021
Assessment year : 2010-11

The Dy. Commissioner of Income-tax, Central Circle-1(2), Bengaluru.	Vs.	M/s Bharath Infra Exports & Imports Ltd., No.48, Landmark Hosur Road, Huskur Gate, Electronic City, Bengaluru-560 027. PAN – AADCB 1793 P
APPELLANT		RESPONDENT

Assessee by	:	Shri Narendra Sharma, Advocate
Revenue by	:	Shri Narayana K.R, Addl.DIT (DR)

Date of hearing	:	11.07.2022
Date of Pronouncement	:	.08.2022

O R D E R

Per Laxmi Prasad Sahu, Accountant Member

This appeal by the Revenue is directed against the order of the Commissioner of Income-tax (Appeals) – 11, Bengaluru dated 15.10.2019 for the asst. year 2010-11 with the following revised grounds of appeal:-

"1. Whether on facts and in circumstances of the case, the Ld.CIT(A) is justified in law in not considering the Board's circular No.5/2014 dated 11.02.2014 which has made it clear that the disallowance u/s14A read with Rule 8D has to be made even when the tax payer in a particular year has not earned any exempted income.
2. Whether on facts and in circumstances of the case, the Ld.CIT(A) has erred by deleting the addition made u/s 69 of Rs. 1,50,00,000/-.
3. The Ld.CIT(A) has erred by holding that the MOU was not signed by the assessee and has not acted upon, when the M/s Manar Developers has duly accepted the receipt of the sum of Rs. 1,50,00,000/-.
4. The Ld.CIT(A) has erred by not considering the fact that the MOU has been finalised with meeting of mind between these parties i.e., assessee and developer which is a binding contract.
5. The Ld.CIT(A) has erred by not considering the fact that the Developer has duly accepted the cash of Rs. 1.50 Crores and acknowledged by signing the MOU.
6. Whether CIT(A) has erred in allowing the additional evidence without sending it to the AO for verification as mandated under Rule 46A Sub rule 3 of the Income Tax Rules, 1962."

2. The brief facts of the case are that the assessee company is engaged in import and export of all kinds of construction materials. It filed return of income for the assessment year 2010-11 on 15.9.2010 declaring a total income of Rs.1,89,48,380/-. The case was selected for scrutiny and statutory notices were issued to the assessee. The case was selected for scrutiny and statutory notices were issued to the assessee. A survey u/s 133A was conducted on 18/1/2013 and during the course of survey proceedings certain documents were impounded for verification as the assessment for

the assessment year 2010-11 was pending. On going through the impounded material, it was observed that assessee company had entered into two MOU with M/s Manar Development Pvt. Ltd., vide MOU dated 13/10/2009 for purchase of nine flats total measuring 11,711 sq.ft. of super built up area on the converted land bearing survey No.37/7 of Haralukunte Village, Beagur Hobli. For the sake of convenience, we are reproducing the relevant part of the assessment order here under;-

"1. The assessee company (second party) would supply the building construction material to M/s Manar Developers Pvt Ltd (first party)
2. The first party shall here afterwards pay the bills of the second party for having supplied the materials for its projects time to time within 80 days without making any further delay.
3. The first and second party herein have mutually agreed to open an escrow account in their joint names in any of the nationalized banks and any payment received by the first party shall be debited to the said account and first party has to clear the bills of the second party by giving first preference.
4. If the first party fails to clear the bills of the second party for supplying the building materials, the second party shall be at liberty to adjust the bill amount to be paid by the first party towards the further sale consideration amount towards the purchase of the flats mentioned in the sale agreement dated 13.10.2009.
5. The second party after adjusting the due payable amount to the first party herein shall intimate the same to the first party of such adjustment in writing and the first party has to execute and register the flats by receiving the balance consideration amount if any from the second party without any further delay and in case if the first party fails to execute the sale deeds, the second party is at liberty to deposit the remaining balance of sale consideration amount, if any in the Court and get the sale deeds registered in its name from the court and it has also entitled to sue for damages and loss occurred to it.
Further on going through the other M0U dated 13.10.2009 it is observed:

"Whereas the first party in need of funds for developing the property as aforesaid and the second party being desirous of purchasing 9 Nos. of residential flats / apartment units in the said apartment complex to be constructed over the Schedule A property, namely "MANAR ELEGANCE" have approached the first party and the first party have agreed to build and sell 9 Nos. of residential flats / apartment units to the second party and accordingly this agreement to Build and Sell came to be executed."
The details of the said 9 Nos. of apartment units / Flats agreed to be built and conveyed to the assessee company are as follows:

Sl.No.	Block	Flat No.	Floor	Type No. of Bedroom	Super built up area in sq.ft.	Undivided interest on land in sq.ft.	Car parking covered / open
01	A	206	Second	3BHK	1619	648	Open
02	A	607	Sixth	2BHK	1336	536	Open
03	A	705	Seventh	2BHK	1186	474	Open
04	A	708	Seventh	2BHK	1185	474	Open
05	B	602	Sixth	2BHK	1178	471	Open
06	B	603	Sixth	3BHK	1650	660	Open
07	B	605	Sixth	2BHK	1186	474	Open
08	B	701	Seventh	2BHK	1186	474	Open
09	B	704	Seventh	2BHK	1185	474	Open

The total sale price agreed upon for purchase of 9 flats is mentioned at Rs. 3,01,99,175/- and the said sale consideration are deemed to be apportioned as detailed hereunder:

Block & Flat NO.	No. of bed rooms	SBA SQ.ft.	Rate per sq.ft. Rs.	Car Park Rs.	Deposts E & W Rs.	Amenities Rs.	Total flat cost Rs.
A-206	3BHK	1619	2300	100000	202375	100000	4126075
A&607	2BHK	1336	2300	100000	167000	100000	3439800
A&705	2BHK	1186	2300	100000	148250	100000	3076050
A&708	2BHK	1185	2300	100000	148125	100000	3073625
B&602	2BHK	1178	2300	100000	147250	100000	3056650
B&603	3bhk	1650	2300	100000	206250	100000	4201250
B&605	2bhk	1186	2300	100000	148250	100000	3076050
B&705	2BHK	1186	2300	100000	148250	100000	3076050

As per the said M0U the assessee company has paid a sum of Rs. 1,50,00,000/- by way of cash to M/s Manar Developers Pvt Ltd on 13.10.2009 and the receipts of the same is acknowledged by M/s Manar Developes Pvt Ltd. On a perusal of the financials it is observed that the above transaction is not reflected in assessee's books of account as also the

balance sheet is silent about the advance amount paid to M/s Manar Developes Pvt Ltd towards purchase of flat. During the course of survey proceedings the Managing Director of the company was asked to explain the transaction as under:
13. During the course of survey a sale agreement entered between Bharth Infra Exports & Imports Limited and M/s Manar Developers Pvt Ltd is found towards sale of 9 flats and as per the said sale agreement you have received a cash of Rs. 1.50 crores. Please confirm the transaction?
Ans: M/s Manar Developer has submitted an M0U to Bharath Infra requesting for supply of building materials for their projects and offered around 9 flats in Survey No.3717, Karalukunte Village, Begur Hobli, Bangalore South Ta/uk but the proposal is not accepted by Bharath Infra and Bhart Infra has not signed to this contract. The proposal has been refused by Bharat Infra and we have not purchased directly or indirectly any property out of this. We have not received any money."

Further during the course of assessment proceedings notice u/s 142(1) dt. 28.1.2013 was issued calling for details of above transaction as under:
"You have entered into an agreement to sell during October, 2009 with M/s Manar Developers as per which you have paid an amount of Ps. 1.50 crores in cash. However, it is seen that the said advance of Rs. 1.50 crores is not reflected in the balance sheet filed as on 31.3.2010. You are required to explain why the said amount should not be brought to taxation as addition investment u/s 69 of the Income-tax Act.
In response the assessee company has filed its reply as under:
"We have not signed any contract with M/s Manar Developers, the proposal given by Mannar Developers but the Bharath Infra has not accepted. We have not purchased directly or indirectly any property with Mannar Developers. Hence the secton 69 of the Income-tax Act is not applicable."
*During the course of assessment proceedings the M0U entered was verified in detail and it was found that in the M0U, there is a clear mention that the assessee company has paid a sum of Rs. 1.50 crores and the receipient M/s Manar Developers has also acknowledged the receipt of payment. Further the MoU also makes a mention of the flat No. which are clear pick and choose assorted numbers and not a row. Further there is also mention about the super built up area, rate per sq.ft. agreed upon, deposits towards electricity and water, cost of amenities etc. Even if it is assumed for the sake of argument that this was only a proposal from M/s Manar Developer to the assessee company, then the question arises how the seller could choose the flat Nos, area of flat, super built up area without mutual consent of the purchase i.e the assessee company. As the assessee company has paid the advance money through cash, the *transaction is outside the books of*

account and such the entire sum paid of Rs. 1,50,00,000/- is brought to tax as unexplained investment as per the provisions of Sec. 69 of the Act.

2.1 After analyzing the statements, documents/agreement to build and sell residential flats/apartments found during the course of survey executed on 13.10.2009, explanations and agreement submitted by the assessee it was found that the assessee had paid transaction of Rs.1,50,00,000/- which was not recorded in the books of accounts, accordingly the same was brought to tax as unexplained investment as per the provisions of sec. 69 of the Act. Further, the AO observed that the assessee has investment of Rs.1,49,00,000/- as on 31/3/2009 and Rs.2,03,00,000/- as on 31/3/2010 but no income has been shown by the assessee on such investments and assessee was asked to explain regarding any expenses incurred by the assessee and the assessee submitted that no expenditure has been incurred on such investments. From the submissions made by the assessee, the AO was not satisfied and he applied sec. 14A Rule 8D(iii) and calculated disallowance of 0.5% of the average investments, which comes to Rs.88,000/-.

3. Aggrieved from the above order, the assessee filed appeal before the CIT(A) and the CIT(A) deleted both the issues by observing as under:-

"It is noted that a survey was conducted under section 133 A of the Act on 18/0112013 the business premises of the appellant. During the course of survey, certain documents! books were impounded for verification. An unexecuted Memorandum of Understanding dated 13/10/2009 signed by only M/s Manar Developers (P) Ltd., was found arid impounded during the course of survey operations. The AO held that the appellant had paid a sum of Rs. 15000,000/ to M/s Manar Developers [P] Ltd., as per the Memorandum of Understanding dated 13110/2009 and the above transactions have not been reflected in the books of the appellant. He further held that even assuming for the sake of argument that the said MOU was only a proposal from IN Manar Developers (P) Ltd., then the question arises how the seller

could choose the flat Nos, area of flat, super built up area without mutual consent of the purchaser i.e. appellant and carn' to a conclusion that the appellant had paid the advance money through cash, that the said transaction was outside the books of account and therefore brought the entiFe sum of Rs 1,50,00,000/- to tax as unexplained investment as per the provisions of section 69 of the Act.

8. The appellant had submitted before the AO & during appellate proceeding that the said Memorandum of Understanding dated 13110/2009 which was signed only by M/s Manar Developers (P) Ltd. & not by the appellant is not an executed contract or agreement, it was submitted that the said Memorandum of Understanding, found during survey, was an offer made by M/s Manar Developers (P) Ltd and the same was not accepted by the appellant,

9. It was submitted that there is a clause in the proposed MOU where the appellant company has to supply materials for construction to M/s Manar Developers (P) Ltd for which the appellant was entitled for a price and in the event if M/s Manar Developers (P) Ltd. failed to pay, the appellant company had a right to purchase 9 flats in the property for recovery of dues. The appellant states that this was not acceptable & hence the appellant company did not proceeded further with it. It was submitted that the appellant had not affixed signature to the MOU as the appellant did not agree to the terms proposed by M/s Manar Developers (P) Ltd.

10. In this context, it may be noted that the MOU found during the course of the survey was

unsigned by the appellant. The AO has not found anything to prove that the appellant has acted on the MOU in any manner whatsoever. There is no proof of supply of materials nor is there proof of the appellant having acquired any of the flats mentioned in the MOU. There i's no proof of the appellant having made the payment of Rs.1 5000 000/- either. The MOU for all practical purposes is a document which cannot be relied upon to make an addition to the income of the appellant.

1 1. The appellant has placed reliance on the decision of the Hon'hle Apex Court in the case of Rickmers Verwaltung V/s. Indian oil Corporation [AIR 1999 SC 504] wherein the Hon'ble court held that:-

12. Since it is clear from the facts available on record that the MOU had not been acted upon, one is constrained to sustain addition made thereon. The addition is therefore deleted.

13. Disallowance made under section 14A of the Act of Rs 8800/-:

It is an undisputed fact that the appellant did not earn any income which is exempt from tax, the books of accounts of the appellant clearly establishes that no exempt income was earned by the appellant during the year."

4. Against the order of the CIT(A), the Revenue is in appeal before the Income Tax Appellate Tribunal.

5. The ld. DR relied on the order of the assessing officer, and also filed written synopsis, which is as under:-

"The Respondent company had filed the Return of Income (ROT) for the AY 2010-11 and the same was selected for scrutiny. During the course of scrutiny proceedings a survey u/s 133A was conducted on 18-01-2013. During the course of survey two documents in the form of an MOU and an "Agreement to Build & Sell" dated 13-09-2009 were found and impounded. The AO in the Asst Order observed various clauses of the MOU and the "Agreement to Build & Sell", As per the said agreement, the Respondent had paid Rs 1.5 Crores in cash to M/s Mannar Developers P Ltd and the said company had acknowledged the receipt of said sum. It was mentioned that the said sum was paid towards building and selling 9 flats. The flat wise are also mentioned therein at Page no 5 of the said document. [A copy of the said document is placed at page nos 53-67 of the paper book submitted by the respondent on 22-03-20222]
The AO, after providing opportunities, made an addition of Rs 1.5 Crores, as unexplained investment u/s 69 of the Act. Aggrieved by the addition, the respondent filed an Appeal before Learned CIT(A), who vide order dated 1510-2019 has deleted the addition. The Learned CIT(A) has also deleted another addition of Rs 88,000 made u/s 14A of the Act. Against these deletions, the Revenue has preferred the instant Appeal before this Hon. Tribunal.

Prayer for admission of Additional grounds of appeal:
The Appeal memo in this case was originally filed on 25-02-202 1, along with the Grounds of Appeal. On 23-05-2022, an application for admission of Additional grounds of appeal was submitted. Subsequently, on being pointed out defect in the original Grounds of Appeal, the same was corrected vide letter submitted on 01-06-2022. However, the additional Ground of Appeal was omitted to be included. The same has since been corrected vide letter filed on 05-07-2022. It is prayed for admission of Additional grounds of appeal.
1. SUBMISSIONS ON GROUNDS OF APPEAL NOS 2 TO 5

The Grounds of Appeal from 2-5 relate to erroneous deletion of the addition made u/s 69 of the Act. The order of the Learned CIT (A) is erroneous for the multiple reasons submitted below:

a) On 2-03-2022, the respondent has submitted a Paper Book before this Hon.Tribunal. The written submissions made before the Learned CIT(A) have been produced from Page nos 1-14. As could been seen from Point nos 12, 13 ,14 &15, the respondent had submitted two Affidavits before the Learned CIT(A) under Rule 46A. The Learned CIT(A), without providing opportunity to the AO, as required under Rule 46A, has passed the impugned order. Therefore, it is submitted that the impugned order is bad in law and liable to be set-aside.

b) Reference is invited to the Para no 4 (Page No 6) of the said "Agreement to Build & Sell" which is extracted below:

04. The second party has today paid a sum of Rs 1,50,00,000 (Rupees One Crore fifty lakhs only) today by way of cash to the First party towards advance part sale consideration. The First Part do hereby admit and acknowledge the receipt of the said amount. The balance amount of sale consideration shall be paid by the second party before the registration of the sale deeds conveying the Schedule -B property in the name of the second party"

it is submitted that above is a credible evidence to prove that the respondent has paid above sum. However, the Learned CIT(A) has erred in not considering the above confirmation.

c) The Learned CIT(A) has erred in holding that the said document for all practical purposes is a document which cannot be relied upon. She has failed to appreciate that, if the said document was of no value, there was no reason for the respondent to carefully preserve it for 3 years together.

d) It is submitted that, said document was impounded from the possession of the respondent during survey. Therefore it is admitted position that the respondent was fully aware of the existence and contents of the said "Agreement to Build & Sell". Had the respondent not paid the amount, the respondent would have countered aforesaid payee about the statement of receiving money in cash. The Learned CIT(A) has failed to appreciate this and erroneously relied on a bland denial statement of the respondent, though it is not substantiated by any documentary evidence.

e) It is submitted that the Hon.CIT(A) has erred in not taking cognizance presumption against the respondent in view of Section 292C [as amended by Finance Act 2008 wef 1-06-2002] extracted below:

292C (1) Where any hooks 0/account, other account, money, bullion, jewellery or other r valuable article or thing are or is found in the possession or control of any person in the course a/a search under section 132 or surrey under section 133A, it may, in any proceeding under this Ac!, he presumed-

(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;
(ii) that the contents of such hooks of account and other documents are true, and
(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed or to be in the handwriting of any particular person are in that person's handwriting, and in the case of a document stamped executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or cu/tested.
(2) XXXS
In view of the above presumption, the contents of the "Agreement to Build & Sell" were rightly presumed against the respondent by the AO. However, Learned CIT(A) has erred in deleting the addition, though the respondent had not adduced any irrefutable evidence against aforesaid presumption.

f) It is submitted that the Learned CIT(A) has erred in not appreciating the common practice that the Cash Receipt is signed only by the recipient of the money and not by the payer.
g) It is submitted that the Learned CIT(A) has erred in not appreciating the common practice that the Cash Receipt is preserved by the Payer and accordingly the same was found in possession of the Respondent.
h) It is submitted that the Learned CIT(A) has not appreciated that the Cash transactions can only be proved by Circumstantial evidences not by producing direct evidences. Therefore the Learned CIT(A) has erred in observing that there is no proof of the respondent making payment of Rs 1.5 Crores.
i) It is submitted that the Non.C!T(A) has erroneously placed reliance on the decision of Hon. Apex court in Rickermers Verwaltung v IOC (AIR 1999 SC 504] when the facts were not similar.
in view of above submissions, it is prayed that the Grounds of Appeal in this regard may please be allowed & the order of Learned CIT(A) may be set aside and addition restored.
2, SUBMISSIONS ON GROUNDS OF APPEAL NO 1
The Learned CIT(A) has erroneously deleted the addition mad by the AO invoking the provisions of Section 14A of the Act. The CIT(A) ought have upheld this addition in view of CBDT Circular No 5/2014 dated 11-02-2014."

5.1. In addition to the written synopsis he further submitted that the CIT(A) has wrongly accepted the affidavit of the assessee

without giving opportunity to the AO which is violation of the Rule 46A of the I.T. Rules 1962, he further drew our attention of the written submissions made before the CIT(A) at para No. [xii],[xiii],[xiv] and [xv]. He further referred to the agreements found during the survey, as per the said clause no. 04,05,06,07,08.

4. The Second Party has today paid a sum of Rs.1,50,00,000I- (Rupees One Crore Fifty Lakhs only) by way of cash to the First Party towards advance part sale consideration. The First Party do hereby admit and acknowledge the receipt of the said amount. The balance amount of sale consideration shall be paid by the Second Party before the registration of the Sale Deeds conveying the Schedule-13 Property in the name of the Second Party.

5. Subject to the terms and conditions provided herein and also the other terms and conditions, the Second Party or their successor in interest is bound to comply with whatever conditions, covenants, rights and obligations, stated in Schedule-D, E, F & G appended to this Agreement, which shall also be treated as part and parcel of this Agreement.

6. The Schedule-B Apartments constructed for the SecondParty as per this Agreement as well as the rights and interests of the First Party accrued out of this Agreement could be transferred to any other person only along with his undivided interest in Schedule-A Property, which is the part and parcel of and coextensive with the Schedule-B Flat! Apartment unit agreed to constructed for the Second Party by the First Party.

7. The First Party shall build, construct and convey the apartments as per Schedule-B Property alongwith the corresponding undivided share in the land in Schedule-A Property as described in Schedule B hereunder, to the Second Party by executing a registered sale deed and further handover the vacant possession of the Schedule-13 Apartments to the Second Party within a period of 18 Months from today, i.e., on or before 10-4-2011. The Second Party shall bear the expenses in respect of registration fees, stamp duty and other statutory expenses and deposits if any payable, in actuals.

8. If the First Party fails to perform the aforesaid obligations, they shall refund the Rs.1,50,00,000i- (Rupees One Crore Fifty Lakhs only) received by them as herein above to the Second Party. It is agreed that the Second Party shall not in any way hinder or obstruct the progress of the construction of the apartment Building namely, 'MANAR ELEGANCE "

or any part thereof. for any reasons, in any manner, nor shall be hinder the use of specified car parking area/terrace area if any, allotted to other Purchasers/Co-owners."

5.2 It is clear from the above the assessee has received payments of Rs. 1,50,00,000/- The first party M/s MANAR DEVELOPERS PVT. LTD. has acknowledged payments received. And has signed also , the said agreement was found during the course of survey conducted in the assessee's case. The agreement was made on 13.10.2009 and the survey was conducted on 18.01.2013, why the agreement was lying with the assessee for more than three years if the transaction was not executed. The affidavit filed by the assessee before the CIT (A) is accecptable. .

The ld.DR further submitted that as per para No.04 & 08 of the MOU that the assessee had paid Rs.1,50,00,000/- towards advance for sale consideration and this has been acknowledged but the CIT(A) has not considered has failed to considered the same.

6. On the other hand, the ld.AR relied on the order of the CIT(A) and reiterated the submission made before the CIT (A) and further submitted that MOU executed between the parties has not been signed by both the parties therefore it cannot be considered as valid MOU. It has been signed only by M/s Manar Development Pvt. Ltd., therefore, it has no sanctity in the eyes of law and the transactions has not been materialized. The documents relied by

the ld. AO were never acted upon. He further referred the affidavits filed before the CIT(A) and stated that as per the affidavit both parties have denied for giving payments and receiving any payments . The AR of the assessee has filed two paper books containing page no. 01 to 67 and case law paper book page no. 01 to 62 which are place on record.

7. On the rejoinder the ld.DR submitted that the case law relied by the AR is not applicable because it is distinguishable on facts. The cases referred by the AR in which it has been observed that the documents were not signed by both the parties or not signed by the recipient's of money.

8. After hearing the rival contentions we observe that as per the assessing officer the assessee has paid Rs. 1,50,00,000/- for booking of 09 flats measuring 11,711/- sq.ft. is evident from the agreement (MOU) made between M/s MANAR DEVELOPERS PVT. LTD. (First Party) and M/s BHARAT INFRA EXPORTS AND IMPORTS LTD (second Party) vide agreement dated 13.10.2009 signed by the first party M/s MANAR DEVELOPERS PVT. LTD. and it was not recorded in the books of accounts which was found during the course of survey conducted on 18.01.2013 and it was treated as unexplained investments u/s 69 of the I. T. Act. . During the appellate proceeding the assessee filed two affidavits were filed by both the parties and denying for payments received and

given. The CIT (A) accepted the plea of the assessee without calling the remand report he allowed the appeal of the assessee. We observed from the agreement clause no. 03 to 08 the first party has received cash of Rs. 1,50,00,000/- from the assessee second party. The arguments advanced by the ld. AR is not acceptable that the agreement was a proposal for the purchase of property from the first party to which the assessee had not accepted, therefore, it was not signed which is evident from the affidavits submitted by both the parties and the CIT(A) has accepted the true facts . The CIT(A) has also accepted the additional evidence filed by the assessee without giving the opportunity to the AO as per Rule 46A of the I.T. Rules. We found substance on the submissions of ld. DR. as per the additional ground raised by the Revenue regarding challenge of the violation of Rule 46A of the I.T. Rules. The assessing Officer had given sufficient opportunity to the assessee and facts were in the knowledge of the assessee. The action u/s 133A was conducted on 18.01.2013 and the assessment was completed on 27.03.2013. It has also been observed from the clause no. 04 that the first party has received cash payments of Rs. 1,50,00,000/- from the assessee, it is admitted fact that without receipt of the money the recipient does not sign and the document was found in the possession of the second party to which he had kept for more than three years. We also observe from the agreement signed by the first party he has accepted the amount received and has acknowledged and in the affidavit executed by him on dated

07/02/2018 as per para no. 04 he has completely denied for receiving payments from the second party. We rely on the judgment of Hon'ble Supreme Court of India in the case of **Sumati Dayal *v.*Commissioner of Income-tax [1995] 80 Taxman 89 (SC) SUPREME cOURT OF INDIA.**

8.1 The CIT (A) has accepted the arguments/written submissions of the assessee and he has also accepted the affidavits as additional evidence without giving the opportunity to the AO which is violation of Rule 46A of the I.T. Rules 1962. Our view is supported by the decision of the Hon'ble High Court of Delhi in the case of Siddhart Export vs. Assistant Commissioner of Income Tax [2019] 112 taxmann.com 193 (Delhi) in which it has been held as under:-

14. *Mr. Zoheb Hossain learned senior standing counsel for the Respondent who appeared on advance notice on the date of first listing, had been called upon to take instructions on whether the matter could be remanded back to the Assessing Officer to permit the Appellant to produce the relevant documents to substantiate the claim of unsecured advance. Pursuant thereto, Mr. Hossain submitted that the facts of the case did not warrant a remand, as the Appellant had failed to produce the necessary documents to prove the genuineness of the purported unsecured loans, as also the credit worthiness of the lender Ms. Jasmine Kochhar Kapoor, despite grant of several opportunities, during the assessment and the appellate proceedings. He submitted that multiple opportunities had been given to the Appellant, yet he did not file any proof to demonstrate the genuineness of credits in its account. Even during the appellate proceedings, the assessee was granted sufficient opportunities and he chose not to avail the same and, accordingly, in absence of any such material, the view of the ITAT was correct and did not call for any interference. He further stated that the copy of the sale deed, that was handed over in the Court for the first time to demonstrate that the creditor did have the credit worthiness to advance the loan, cannot be taken into consideration as the Appellant had missed the bus, in as much, as, the said document ought to have been produced before the tax*

authorities at the stage of fact finding. It is impermissible for the Appellant be bring fresh evidence in an appeal under section 260A.

15. *We have given our thoughtful consideration to the rival submissions made by both the counsels. We find merit in the contention of Mr. Zoheb Hossain, learned senior standing counsel for the Respondent that the Appellant's approach has been completely casual and does not call for interference by us, lest we set a bad precedent and open flood gates for others in similar circumstances. Several opportunities were indeed given by the Assessing Officer, as noted in the assessment order dated 30.12.2016 (AY 2014-15), yet Appellant did not furnish the details of the unsecured loan during the hearing. Even before CIT (A), the Appellant was given several opportunities as noted in the order dated 30.01.2017 (AY 2014-15), but the Appellant did not place relevant documents to prove the genuineness of the transactions which are claimed to be unsecured loans. Therefore, at this stage, the sale deed produced by the Appellant for the first time to demonstrate that the creditor had the credit worthiness to advance the loan cannot be taken into consideration. In this regard, it would be relevant to refer to Rule 46A of the Income Tax Rules, 1962 which specifically provides that the Appellant is not entitled to produce before Deputy Commissioner (Appeals) or the Commissioner (Appeals), as the case may be, any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the Assessing Officer, except for the circumstances illustrated in the said provision. The said rule reads as under:*

> *"46A. (1) The appellant shall not be entitled to produce before the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)], any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the [Assessing Officer], except in the following circumstances, namely :—*
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> *(a) where the [Assessing Officer] has refused to admit evidence which ought to have been admitted ; or*
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> *(b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the [Assessing Officer] ; or*
>
> *(c) where the appellant was prevented by sufficient cause from producing before the [Assessing Officer] any evidence which is relevant to any ground of appeal ; or*
>
> *(d) where the [Assessing Officer] has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.*
>
> *(2) No evidence shall be admitted under sub-rule (1) unless the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] records in writing the reasons for its admission.*

(3) The [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] shall not take into account any evidence produced under sub-rule (1) unless the [Assessing Officer] has been allowed a reasonable opportunity—

(a) to examine the evidence or document or to cross-examine the witness produced by the appellant, or

(b) to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant.

(4) Nothing contained in this rule shall affect the power of the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the [Assessing Officer]) under clause (a) of sub-section (1) of section 251 or the imposition of penalty under section 271.]"

16. *The Division Bench of this court in CIT v. Manish Build Well (P.) Ltd. [2011] 184 DLT 611 (Delhi) held as under:*

'...Rule 46A is a provision in the Income Tax Rules, 1962 which is invoked, on the other hand, by the assessee who is in an appeal before the CIT (A). Once the assessee invokes Rule 46A and prays for admission of additional evidence before the CIT (A), then the procedure prescribed in the said rule has to be scrupulously followed. The fact that sub-Section (4) of Section 250 confers powers on the CIT (A) to conduct an enquiry as he thinks fit, while disposing of the appeal, cannot be relied upon to contend that the procedural requirements of Rule 46A need not be complied with. If such a plea of the assessee is accepted, it would reduce Rule 46A to a dead letter because it would then be open to every assessee to furnish additional evidence before the CIT (A) and thereafter contend that the evidence should be accepted and taken on record by the CIT (A) by virtue of his powers of enquiry under sub-Section (4) of Section 250. This would mean in turn that the requirement of recording reasons for admitting the additional evidence, the requirement of examining whether the conditions for admitting the additional evidence are satisfied, the requirement that the assessing officer should be allowed a reasonable opportunity of examining the evidence etc. can be thrown to the winds, a position which is wholly unacceptable and may result in unacceptable and unjust consequences. The fundamental rule which is valid in all branches of law, including Income Tax Law, is that the assessee should adduce the entire evidence in his possession at the earliest point of time. This ensures full, fair and detailed enquiry and verification. A 7-Judge Bench of the Supreme Court in Keshav Mills Co. Ltd. v.

Commissioner of Income-Tax, Bombay North, Ahmedabad (1965) 56 ITR SC 365 had observed as under:—

"Proceedings taken for the recovery of tax under the provisions of the Act are naturally intended to be over without unnecessary delay, and so, it is the duty of the parties, both the department and the assessee, to lead all their evidence at the stage when the matter is in charge of the Income-tax Officer."

23. It is for the aforesaid reason that Rule 46A starts in a negative manner by saying that an appellant before the CIT (A) shall not be entitled to produce before him any evidence, whether oral or documentary, other than the evidence adduced by him before the assessing officer. After making such a general statement, which is in consonance with the principle stated in the above judgment, exceptions have been carved out that in certain circumstances it would be open to the CIT (A) to admit additional evidence. Therefore, additional evidence can be produced at the first appellate stage when conditions stipulate in the Rule 46A are satisfied and a finding is recorded.

*** ** ***

24... In our opinion and with respect, the error committed by the Tribunal is that it proceeded to mix up the powers of the CIT (A) under sub-section (4) of Section 250 with the powers vested in him under Rule 46A. The Tribunal seems to have overlooked sub-rule(4) of Rule 46A which itself takes note of the distinction between the powers conferred by the CIT (A) under the statute while disposing of the assessee's appeal and the powers conferred upon him under Rule 46A. The Tribunal erred in its interpretation of the provisions of Rule 46A vis-à-vis Section 250(4). Its view that since in any case the CIT (A), by virtue of his conterminous powers over the assessment order, was empowered to call for any document or make any further enquiry as he thinks fit, there was no violation of Rule 46A is erroneous. The Tribunal appears to have not appreciated the distinction between the two provisions. If the view of the Tribunal is accepted, it would make Rule 46A otiose and it would open up the possibility of the assessees' contending that any additional evidence sought to be introduced by them before the CIT (A) cannot be subjected to the conditions prescribed in Rule 46A because in any case the CIT (A) is vested with conterminous powers over the assessment orders or powers of independent enquiry under sub-section (4) of Section 250. That is a consequence which cannot at all be countenanced.' [Emphasis Supplied]

17. *It, thus, becomes clear that taking any fresh evidence on record can only be done in certain circumstances at the appropriate stage. The same is an*

exception and not the Rule. The Appellant has not been able to provide any justification for not availing the benefit of any of the aforesaid provisions at the appropriate stage. We have also to be mindful of the fact that the said provision is applicable in respect of first appeals against the assessment order. The present appeal under Section 260A of the Act is against the order passed by the Appellate Tribunal, where a substantial question of law has to be shown to exist. Thus, we cannot permit the Appellant to bring new and additional evidence in the proceedings under Section 260A of the Act, and accordingly, we, disregard the sale deed shown to the Court, relied upon to prove the credit worthiness of Ms. Jasmine Kochhar Kapoor and do not find it to be a case worthy for remand.

Respectfully following the above judgment of Hon'ble Delhi High Court cited supra, the ld.CIT(A) has violated the Rule 46A for not granting opportunity to the AO before accepting the additional evidence has no weaiage. . However, the CIT(A) has not mentioned in his order in regard to the acceptance of the Affidavit but before him the assessee had submitted the Affidavits as per his written submissions at para No. [xii],[xiii],[xiv] and [xv] to which the CIT(A) considered para No.6 while passing his order. Considering the totality of the facts and circumstances of the case the order passed by the CIT(A) is set aside and appeal of the revenue is allowed.

10. In regard to disallowance u/s 14A, the ld.DR relied on the order of the AO and submitted that the amendment made by the Finance Act 2022 is retrospective amendment. Therefore, the AO has rightly calculated disallowance u/s 14A r.w.r 8D.

11. The ld.AR in ground No.1 with regard to sec.14A relied on the order of the CIT(A) and he submitted that no exempt income is

received, hence no disallowance can be made by the revenue authorities as decided by jurisdictional hon'ble High Court.

12. We have heard the rival submissions and carefully considered the same along with the order of the authorities below as well as the documents referred to and relied on before us during the course of the hearing. We observe in respect of disallowance u/s 14A, the AO has disallowed under Rule 8D(iii) of 88,000/- which has been deleted by the CIT(A) by holding that no exempt income has been received, therefore, the addition cannot be made u/s 14A of the Act. The Hon'ble Delhi High Court in recent judgment in the case of M/s Era Infrastructure (India) Ltd. in ITA 204/2022 & CM APPL.31445/2022 dated 20th July, 2022 clarified that the amendment made in section 14A by the Finance Act 2022 is applicable from 01/4/2022 onwards and it does not have retrospective effect. Since this judgment was passed before the date of hearing of the case but sum and substance of this judgment was in regard to the disallowance u/s 14A and applicability of the Finance Act 2022.

13. However, both parties contended regarding the applicability of the amendments made in section 14A by the Finance Act 2022, we observe that the co-ordinate bench of ITAT Gauhati the date of decision is 6th July, 2022, whereas the judgment rendered by the Hon'ble Delhi High Court cited

supra is dated 20th July, 2022, which is later judgment on the same issue. Therefore, we are dismissing the appeal of the revenue on this ground subject to para No.10 of the said judgment of Hon'ble Delhi High Court in the case of M/s Era Infrastructure (India) Ltd. cited supra which reads as under:-

> *"Accordingly, the appeal and application are dismissed. However, it is clarified that the order passed in the present appeal shall abide by the final decision of Supreme Court in the SLP filed in the case of PCIT Vs. IL & FS Energy Development Company Ltd.,"*

14. Respectfully following the above judgment, we dismiss the appeal of the revenue by following the decision of the Hon'ble Delhi High Court Judgment cited supra.

15. In the result, the appeal of revenue is partly allowed

Order pronounced in court on 18th day of August, 2022

Sd/-	Sd/-
(GEORGE GEORGE K)	**(LAXMI PRASAD SAHU)**
Judicial Member	Accountant Member

Bangalore,
Dated, August, 2022
/ vms /

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order
Asst. Registrar, ITAT, Bangalore.

1. Date of Dictation ……

2. Date on which the typed draft is placed before the dictating Member ……..
3. Date on which the approved draft comes to Sr.P.S ……..
4. Date on which the fair order is placed before the dictating Member ……..
5. Date on which the fair order comes back to the Sr. P.S. ……..
6. Date of uploading the order on website……..
7. If not uploaded, furnish the reason for doing so ……..
8. Date on which the file goes to the Bench Clerk ……..
9. Date on which order goes for Xerox & endorsement……
10. Date on which the file goes to the Head Clerk ……..
11. The date on which the file goes to the Assistant Registrar for signature on the order ……..
12. The date on which the file goes to dispatch section for dispatch of the Tribunal Order ……..
13. Date of Despatch of Order. ……..