

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA-PATNA 'e-COURT', KOLKATA
[Virtual Court Hearing]**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Rajesh Kumar, Accountant Member**

**I.T.A. No. 72/PAT/2020
Assessment Year: 2017-2018**

***Assistant Commissioner of Income Tax,.... Appellant
Central Circle-2, Patna,
C.R. (Annexe) Building, 6th Floor,
Bir Chand Patel Marg, Patna-800001, Bihar***

-Vs.-

***M/s. Contessa Commercial Co. Pvt.
Limited,.....Respondent
12, Syed Salley Lane, Bura Bazar,
Kolkata-700073
[PAN:AABCC3858Q]***

Appearances by:

*Shri Rupesh Agrawal, Addl. CIT, Sr. D.R., appeared on
behalf of the Revenue*

*Shri A.K. Rastogi, Sr. Advocate, appeared on behalf of the
assessee*

Date of concluding the hearing : August 22, 2023

Date of pronouncing the order : October 18, 2023

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The Revenue is in appeal before the Tribunal against the order of Id. Commissioner of Income Tax (Appeals)-3, Patna dated 22.06.2020 passed for A.Y. 2017-18.

2. The Revenue has taken four grounds of appeal. In brief, its grievance is that ld. CIT(Appeals) has erred in deleting the addition of Rs.2,19,20,000/- by entertaining additional evidence in violation to Rule 46A of the Income Tax Act. The addition was made by the ld. Assessing Officer with the aid of section 68 on account of unexplained credit.

3. Brief facts of the case are that the assessee has filed its return of income on 04.11.2017 declaring total income 'NIL' and current year loss of Rs.60,00,834/-. The case of the assessee was selected for scrutiny assessment and a notice under section 143(2) was issued on 14.08.2018 fixing the case for hearing on 28.08.2018. The ld. Assessing Officer thereafter issued a questionnaire under section 142(1) on 29.01.2019 and fixed the case for hearing on 11.02.2019. According to the ld. Assessing Officer in response to the notice under section 143(2) of the Income Tax Act, the assessee has submitted that the reasons assigned for selection of the case for scrutiny assessment are being available in audited balance-sheet. The assessee further prayed that kindly issue questionnaire to submit any other information, if required by the ld. Assessing Officer. According to the ld. Assessing Officer, he has issued notice but those were not replied by the assessee. He

found cash credits amounting to Rs.2,19,20,000/- available against the name of five lenders. According to the ld. Assessing Officer, these amounts were taken by the assessee as a loan during the year and they were paid back. Hence the accounts of these concerns have been squared up. Somehow in an *ex-parte* assessment order, the ld. Assessing Officer treated these credits as unexplained one and made an addition of Rs.2,19,20,000/-.

4. On appeal, assessee filed submissions along with certain details and ld. CIT(Appeals) has deleted the addition.

5. The assessee has filed a paper book running into 229 pages under the certificate that these papers were filed before the ld. CIT(Appeals).

6. On the other hand, ld. Sr. D.R. has filed a paper book containing written submission, order-sheets before the ld. CIT(Appeals) etc. While impugning the order of ld. CIT(Appeals), ld. Sr. D.R. contented that the assessee did not participate in the proceedings before the ld. Assessing Officer. The ld. Assessing Officer has passed an *ex-parte* assessment. Thus it will demonstrate that no documents were submitted by the assessee. The assessee in the garb of written submission filed a paper book

along with evidences, which has been entertained by the ld. CIT(Appeals) without following true procedure contemplated in Rule 46A of the Income Tax Act. The ld. Sr. D.R. thereafter appraised us the true meaning and scope of Rule 46A. For the facility of reference, we take note of the written submission filed by the ld. D.R. as well as copy of Annexure 1 & 2 placed on record by the ld. D.R. It is pertinent to note that ld. D.R. has further placed on record copy of the written submission filed by the assessee before the ld. CIT(Appeals). The ld. Sr. D.R. has also placed on record copy of the judgments relied by him in his written submission. The written submission along with Annexure 1 & 2 read as under:-

<p>496 (Allahabad) [2005] 199 CTR 170 (Allahabad)[20-01-2005] Haji Lal Mohd. Biri Works vs. Commissioner of Income-tax</p> <p>b. [2013] 35 taxmann.com 272 (Calcutta HC) [2013] 357 ITR 657 (Calcutta) [2014] 265 CTR 593 (Calcutta)[25-03-2013] Commissioner of Income-tax, Kolkata - III vs. Mitra Logistics (P.) Ltd.</p> <p>c. [2014] 45 taxmann.com 145 (Calcutta HC) [2014] 224 Taxman 324 (Calcutta) [2015] 370 ITR 373 (Calcutta) [2015] 274 CTR 156 (Calcutta)[24-03- 2014] Commissioner of Income- tax, Kolkata-III vs. Trimline Vyapaar (P.) Ltd.</p> <p>d. [2016] 65 taxmann.com 180 (Andhra Pradesh HC) [2016] 237 Taxman 151 (Andhra Pradesh)[14-12-2015] Commissioner of Income-tax-IV vs. NE Technologies India (P.) Ltd.</p> <p>e. [2018] 99 taxmann.com 370 (Mumbai Tribunal) [2017] 59 ITR(T) 261 (Mumbai)[01-09-2017] Assistant Commissioner of</p>		
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	<p>Income-tax vs. Ciron Drugs & Pharmaceuticals (P.) Ltd.</p> <p>f. [2014] 52 taxmann.com 27 (Delhi - Trib.) [2014] 36 ITR(T) 277 (Delhi - Trib.) [2014] 151 ITD 597 (Delhi - Trib.) [08-09-2014] Income-tax Officer, Ward-4 (4), New Delhi vs. Life Line Biotech Ltd.</p> <p>g. [2016] 73 taxmann.com 392 (Delhi - Trib.) [19-08-2016] Income-tax Officer, Ward-36 (3), New Delhi vs. Pardeepa Rani</p>		
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2. The facts of the present case are that assessee filed return of income for the year under consideration showing loss of Rs. 60,00,834/-. During the course of assessment proceedings, the AO provided various opportunities to the assessee company vide notices issued u/s 143(2) and 142(1) dated 14.08.2018, 29.01.2019, 12.10.2019, 04.11.2019, 15.11.2019. However, the assessee company did not make any compliance whatsoever to the statutory notices and therefore, the AO completed assessment u/s 144 of the Act making addition u/s 68 of the Act as the assessee company could not establish the identity, genuineness or creditworthiness of the loan creditors for total amount of Rs. 2,19,20,000/- accepted by it as loan during the year under consideration.

4. In appeal before CIT (A), the Id. CIT (A) allowed the appeal of the assessee and deleted addition made by the AO on the basis of additional evidence filed before CIT(A) by the assessee company, without following the due procedure laid down in Rule 46A(1) to 46A(3) of the Income Tax Rules, 1962.

The Id. CIT(A) held in Para 4.3.2 of order that he has perused the submission filed by the assessee and is satisfied that the appellant has discharged its onus placed on it in terms of section 68 of the Act and deleted the entire addition of Rs. 2,19,20,000 made by the AO.

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5. The department has preferred present appeal against the order of Id. CIT(A) before the Hon'ble ITAT. During the course of last hearing held in this case on 21.12.2022, it was argued by the Sr. DR. on behalf of the department that CIT(A) did not follow the mandated procedure laid down in Rule 46A (1) to 46A (3) which deals with the production and admission of additional evidence before the CIT(A).

5.1 Before proceeding further, it is important to discuss the provision of Rule 46A of the Income Tax Rules, 1962, reproduced as under for reference: -

⁶[Production of additional evidence before the ⁸[Deputy Commissioner (Appeals)] ⁹[and Commissioner (Appeals)].

46A. (1) The appellant shall not be entitled to produce before the ⁸[Deputy Commissioner (Appeals)] ⁹[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 ¹⁰[Assessing Officer], except in the following circumstances, namely:—

(a)	where the ¹⁰ [Assessing Officer] has refused to admit evidence which ought to have been admitted; or
(b)	where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the ¹⁰ [Assessing Officer]; or
(c)	where the appellant was prevented by sufficient cause from producing before the ¹⁰ [Assessing Officer] any evidence which is relevant to any ground of appeal; or
(d)	where the ¹⁰ [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 ¹¹[Deputy Commissioner (Appeals)] ¹²[or, as the case may be, the Commissioner (Appeals)] records in writing the reasons for its admission.

¹³(3) The ¹⁴[Deputy Commissioner (Appeals)] ¹⁵[or, as the case may be, the Commissioner (Appeals)] shall not take into account any evidence produced under sub-rule (1) unless the ¹⁶[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 ¹⁷[Deputy Commissioner (Appeals)] ¹⁸[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 ¹⁹[Assessing Officer]) under clause (a) of sub-section (1) of section 251 or the imposition of penalty under section 271.]”



5.2 A bare perusal of Rule 46A(1) shows that it states categorically that the appellant shall not be entitled to produce before CIT (A) any evidence, whether oral or documentary, other than evidence produced by him during the course of proceedings before the AO except in circumstances as mentioned in (a) to (d) of Rule 46A (1) which prescribes specific circumstances to be established and explained by the appellant even before producing such additional evidence. The perusal of the written submission and additional evidence filed by the appellant before the CIT(A) and the appellate records as obtained from the office of CIT(A) shows very clearly that the appellant has not provided any explanation of the applicable circumstances as per clause (a) to (d) of Rule 46A(1) before producing additional evidence before the Id. CIT(A). Further, there is no prayer also to the CIT(A) to admit the additional evidence produced by the assessee before CIT(A) in any of the submission.

5.3 As per Rule 46A(2) it is stated that **no evidence shall be admitted by the CIT(A)** under Sub-rule (1) unless the CIT(A) records its reasons in writing for its admission. Sub-Rule (3) of Rule 46A further states that CIT(A) **shall not take into account any evidence produced under Sub-Rule (1) unless the AO has been allowed reasonable opportunity to: -**

- a. Examine the evidence or document or to cross-examine the witness produced by the appellant
- b. To produce any evidence or document or any witness in **rebuttal of the additional evidence produced by the appellant**

5.4 Joint reading of the Sub-Rule (1), (2) and (3) of Rule 46A of the Income Tax Rules 1962, makes it very clear that the principle of establishing of reasonable cause by the appellant for failure to produce additional evidence before AO, its appreciation and admission by CIT(A) after recording reasons in writing and after giving reasonable opportunity to AO wrt such additional evidence is clearly laid down in this Rule. Any violation of such rule would make the appellate order passed by the **CIT(A) as bad in law and void as such additional evidence itself would be inadmissible.**

5.5 This has been upheld in number of judicial pronouncements in favour of revenue by the different High Courts and Tribunals across India. Some of the notable judgments relied

upon by the department in this regard as under for reference (**Copies placed as annexure 5 at page nos. 11 to 58 of the paper book**): -

- h. [2005] 145 Taxman 578 (Allahabad HC)_[2005] 275 ITR 496 (Allahabad)_[2005] 199 CTR 170 (Allahabad)[20-01-2005] Haji Lal Mohd. Biri Works vs. Commissioner of Income-tax
- i. [2013] 35 taxmann.com 272 (Calcutta HC)_[2013] 357 ITR 657 (Calcutta)_[2014] 265 CTR 593 (Calcutta)[25-03-2013] Commissioner of Income-tax, Kolkata - III vs. Mitra Logistics (P.) Ltd.
- j. [2014] 45 taxmann.com 145 (Calcutta HC)_[2014] 224 Taxman 324 (Calcutta)_[2015] 370 ITR 373 (Calcutta)_[2015] 274 CTR 156 (Calcutta)[24-03-2014] Commissioner of Income-tax, Kolkata-III vs. Trimline Vyapaar (P.) Ltd.
- k. [2016] 65 taxmann.com 180 (Andhra Pradesh HC)_[2016] 237 Taxman 151 (Andhra Pradesh)[14-12-2015] Commissioner of Income-tax-IV vs. NE Technologies India (P.) Ltd.
- l. [2018] 99 taxmann.com 370 (Mumbai Tribunal)_[2017] 59 ITR(T) 261 (Mumbai)[01-09-2017] Assistant Commissioner of Income-tax vs. Ciron Drugs & Pharmaceuticals (P.) Ltd.
- m. [2014] 52 taxmann.com 27 (Delhi - Trib.)_[2014] 36 ITR(T) 277 (Delhi - Trib.)_[2014] 151 ITD 597 (Delhi - Trib.)[08-09-2014] Income-tax Officer, Ward-4 (4), New Delhi vs. Life Line Biotech Ltd.
- n. [2016] 73 taxmann.com 392 (Delhi - Trib.)[19-08-2016] Income-tax Officer, Ward- 36 (3), New Delhi vs. Pardeepa Rani

6. In response to the arguments of the Sr. DR during the course of hearing on 21.12.2022, it was contended by the AR of the assessee that Rule 46A (1) to (3) would not apply in this case and Rule 46A (4) would apply. It was further argued that as per sub-Rule 4 of the Rule 46A, nothing contained in Rule 46A(1) to (3) would apply in this case the evidence placed by the assessee first time before the CIT(A) were **upon direction of the CIT(A) for production of such document to enable him to dispose off the appeal.**

6.1 The above contentions of the AR of the assessee were vehemently disputed during the course of the hearing by the SR. DR as not being true and not evident from the available

records. Further, the Hon'ble [redacted] kindly acceded to the request of the Sr. DR to call for the appellate records of the CIT(A) as to **verify and submit before the Hon'ble bench as to whether there was any such direction by the CIT(A) to the assessee for production of any document.**

6.2 The appellate records of the CIT(A) were called for from the CIT(A) and the same have been verified. The Appellate records as per the forwarding letter of the Id. CIT(A) placed **at page 10 of the paper book as annexure 4** dated 18.01.2023 contain **one page order sheet, appellate documents page 1 to 48 (i.e. copies of the appellate order passed) and written submission page 1 to 215.**

6.3 The copy of the order sheet of the appellate proceedings is placed as **annexure - 1 at page no. 1 of the paper book.** The perusal of the order sheet shows that statutory notice u/s 250 of the Income Tax Act, 1961 was first issued on 15.06.2020 and date of hearing was fixed on 18.06.2020. It is further noted in the order sheet that in response to the statutory notice issued by the CIT(A), Shri S.K. Singhania, FCA attended and filed written submission and the case is discussed. The next noting dated 22.06.2020 notes that order u/s 250(6) is passed.

6.4 The copy of the statutory notice issued u/s 250 of the Act by the CIT(A) dated 15.06.2020 is annexed as **annexure -2 at page 2 of the paper book.** The copy of the written submission filed by the assessee before the CIT(A) is annexed as **annexure -3 and placed at page numbers 3 to 9 of the paper book.**

6.5 A bare perusal of the order sheet, statutory notice u/s 250 issued by the CIT(A) for fixing hearing in the matter, written submission of the assessee before CIT(A) and the CIT(A) order all show that **there is no direction by the CIT(A) to produce any document,** as has been incorrectly contended by the assessee before the Hon'ble ITAT during the course of hearing on 21.12.2022 and claims made before the Hon'ble ITAT are baseless and merely self-serving presumably made to bypass the mandatory procedure prescribed in the Rule 46A wrt production and admission of additional evidence by the CIT(A). Hence, the claims

of the assessee before the Hon'ble CIT with regard to the applicability of Sub-Rule (4) of the Rule 46A have no basis and are not proper.

7. In view of above, submissions and case laws relied upon in its support, it is most humbly submitted that the CIT(A) has clearly erred in passing the appellate order by relying upon additional evidence produced by the assessee before it and without following the due process laid down in Rule 46A(1) to (3) in this regard. This has clearly made the appellate order passed by the CIT(A) as being bad in law and void as the additional evidence produced by the assessee before the CIT(A) is inadmissible without following the due process as laid out in the Income Tax Rules under Rule 46A.

8. It is, therefore, submitted in view of the above submission and judicial pronouncements that erroneous order of Id. CIT(A) be set-aside and order of AO be restored.

Submitted for kind consideration.

Dated: 20.01.2023

Rupesh Agrawal
20.01.2023

(Rupesh Agrawal)

(Addl. CIT (ITAT), Patna)

Sr. Departmental Representative

ITAT, Patna Bench

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ANNEXURE -

आयकर आयुक्त (अपील) - 3 पटना

Appeal No. 300/A-3/Pat/2019-20

A.Y. 2017-18

PAN: AABCC3858Q

Contessa Commercial Complex Pvt. Ltd.
12, Syed Salley Lane Burabazar
Kolkata, West Bengal

15.06.2020

The notice u/s 250 of the I.T. Act has been issued on 15.06.2020. In the case of Contessa Commercial complex Pvt. Ltd. . The date for hearing is fixed on 18.06.2020.

19/6/2020 Sri. S.K. Singhania FCA
attended and filed written
submissions. The case is discussed

[Signature]


19/6/20

22/6/2020 order u/s 250 by passed.

[Signature]

ANNEXURE - 1
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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE COMMISSIONER OF INCOME TAX, APPEAL
CIT (A), Patna- 3

To, CONTESSA COMMERCIALCOMPANY PRIVATE LIMITED 12, SYED SALLEY LANE BURABAZAR KOLKATA 700073 ,West Bengal India			
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PAN: AABCC3858Q	AY: 2017-18	Dated: 15/06/2020	DIN & Notice No : ITBA/APL/S/APL_1/2020- 21/1027296530(1)
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Sub.: Appeal No. - CIT (A), Patna- 3/10120/2019-20 for the Assessment Year 2017-18 regarding.

The above noted appeal against the order u/s 144 of Income Tax Act preferred by you has been fixed for hearing on 18/06/2020 at 11:00 AM in my office.

You are requested to attend in person or through a representative. Your counsel should bring the power of attorney while attending the appellate proceedings, if not filed so far. Attendance is not necessary if you wish that the appeal may be decided on the basis of your written submissions which may be furnished on or before the said date.

Please also send your written submissions, if any, through e-mail at PATNA.CIT.APL3@INCOMETAX.GOV.IN

RAJARAM BODA
CIT (A), Patna- 3

Copy to:
DCIT/ACIT CEN CIR2,PAT

RAJARAM BODA
CIT (A), Patna- 3

Note: If digitally signed, the date of digital signature may be taken as date of document.
CENTRAL REVENUE BUILDING, BIRCHAND PATEL MARG, PATNA, Bihar, 800001
Email: PATNA.CIT.APL3@INCOMETAX.GOV.IN,

* DIN- Document identification No.

7. On the strength of the submissions, ld. Sr. D.R. further contended that ld. CIT(Appeals) did not follow the mandatory procedure contemplated in sub-Rule 1, 2 & 3

of Rule 46A and, therefore, he should have not deleted the addition by entertaining the additional evidence.

8. The ld. Counsel for the assessee, on the other hand, drew our attention towards Annexure 2 filed by the ld. D.R. and submitted that it is a copy of the notice issued by the ld. CIT(Appeals) and in this notice, ld. CIT(Appeals) invited the written submission from the assessee and provided a e-mail on which such submission could be filed. In response to this notice, the assessee has filed the submissions. The ld. CIT(Appeals) thereafter decided the appeal of the assessee. Therefore, the assessee has not applied for permission to lead for the evidence under Rule 46A. It is the ld. CIT(Appeals) who has provided an opportunity to the assessee for filing written submission. The ld. CIT(Appals) must have exercised his powers under sub-Rule 4 of Rule 46A and duly deleted the additions. He relied upon the order of the ld. CIT(Appeals).

9. We have duly considered the rival contentions and gone through the record carefully. Rule 46A, Section 250(1) and Section 261 have direct bearing on the controversy, therefore, we deem it appropriate to take note of all these provisions, which read as under:-

“Procedure in appeal:-

250.: *The Commissioner (Appeals) shall fix a day and place for the hearing of the appeal*

and shall give notice of the same to the appellant and to the Assessing Officer against whose order the appeal is preferred.

x x x x x x x x x x x x x x x x

***Powers of the Commissioner (Appeals);
251.:***

(1) In disposing off an appeal, the Commissioner (Appeals), shall have the following powers:

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment; or

(aa) in an appeal against the order of assessment in respect of which the proceeding before the Settlement Commission abates under section 245HA, he may, after taking into consideration all the material and other information produced by the assessee before, or the results of the inquiry held or evidence recorded by, the Settlement Commission, in the course of the proceeding before it and such other material as may be brought on his record, confirm, reduce, enhance or annul the assessment; or

(b) in an appeal against an order imposing a penalty — he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;

(c) in any other case — he may pass such orders in the appeal as he thinks fit.

(2) The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.

Explanation:-In disposing of an appeal, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the appellant.

Rule - 46A:- Production of additional evidence before the Deputy Commissioner (Appeals) and Commissioner (Appeals)

(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 :—

- (a) where the Assessing Officer has refused to admit evidence which ought to have been admitted ; or*
 - (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 ⁹⁷[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.*

10. Before, to construe the meaning of Rule 46A, it is pertinent to note that against an assessment order, the appeal only is available to the assessee and not to the revenue. A bare perusal of Rule 46A would indicate that it prohibits the appellant to produce any evidence before the Appellate Authority either oral or documentary other than the evidence, which were produced by the assessee during the assessment proceeding. However, under sub-Rule 4, certain exceptions have been carried out when the appellant would be entitled to lead evidence. This exception provides namely-

Sub-Rule (1)

- (a) Where ld. Assessing Officer has refused to admit evidence which ought to have been admitted. In other words, an assessee produced some evidence, which was to be taken on record but ld. Assessing Officer refused to take it.

- (b) Under sub-clause (b), where assessee prevented by sufficient cause for producing the evidence, which he was called upon to produce. For example, certain documents were not possessed by the assessee. It might have been seized by the authorities i.e. State Government or Central Government, therefore, the

assessee could not produce that document and after the assessment order if he is able to lay his hand on the documents, then, on fulfilment of the condition of this clause, he will be allowed to produce that document.

- (c) Where the appellant was prevented by sufficient cause from producing before the ld. Assessing Officer any evidence, which is relevant to any grounds of appeal. This clause would provide certain types of evidence, which is relevant due to some reason could not be produced before the ld. Assessing Officer. Sometime a situation would come that after the addition, it is felt by an assessee that had that particular evidence was produced, then, this addition would not be there.

The last condition is where ld. Assessing Officer has not given proper opportunity to lead evidence.

11. Sub-Rule (2) of Rule 46 further contemplates that whenever any evidence is being entertained, then the ld.

1st Appellate Authority would record reasons for permitting to adduce the additional evidence.

12. Sub-Rule (3) would further put a condition upon Id. CIT(Appeals) that such evidence will not be used unless an opportunity is being granted to the assessee.

13. Sub-Rule (4) is an exception to Rule 1, 2 & 3. This starts with a non-obstante clause, which provides that nothing contained in Rule 46A to effect the power the Id. 1st Appellate Authority to direct the production of any document or examination of any evidence etc. In other words, when Id. Commissioner felt that certain material is required for just decision of the appeal, then he can exercise the powers under sub-Rule (4) and take on record any material, which is relevant for adjudication of the appeal in right perspective.

14. Adverting to Section 250, sub-Section (1), this clause provides that Id. 1st Appellate Authority would fix a date and place for hearing the appeal and shall give notice of the same to the appellant as well as to the Id. Assessing Officer. At this stage, we would like to draw our attention towards Annexure 2 placed on record by the Id. Sr. D.R., which is extracted by us. A perusal of the Annexure would indicate that Id. 1st Appellate Authority has not only given notice of hearing of the

appeal to the assessee alone, rather this notice was given to the ld. Assessing Officer also. A copy of the notice was supplied to ld. Assessing Officer. He could join the appellate proceedings.

15. Section 251 provides the powers with the ld. 1st Appellate Authority while deciding the appeal. By exercising the powers under this section, ld. 1st Appellate Authority may confirm, reduce, enhance or annul the assessment. Explanation appended to this section would further contemplate that any issue if arose before the ld. 1st Appellate Authority from the assessment proceedings, then he may entertain that issue and decide even if no discussion is available in the assessment order on that topic. In other words, any item which was the subject matter of the proceeding in which order against appeal was passed, then all ancillary issue on that subject matter could be entertained by the ld. 1st Appellate Authority. A bare perusal of the scheme of section 251 would indicate that under this section, ld. 1st Appellate Authority not only exercised the powers of 1st Appellate Authority but co-terminus powers of the ld. Assessing Officer.

16. In the light of above, let us consider the facts of the present case. There is no doubt that assessment order was passed as an *ex-parte* order. However, a perusal of

the assessment order would indicate that in response to the notice under section 143(2), assessee has submitted that the questions narrated in the reasons for issuance of this notice are answered by the assessee in the audited financial statement. But if any other queries required, then a show-cause notice be issued to the assessee. According to the ld. Assessing Officer, he has issued a show-cause notice on 29.01.2019, which was to be replied by 11.02.2019. A perusal of the assessment order would suggest that after February, 2019, the proceedings before the ld. Assessing Officer remained dormant and all of a sudden, they were taken up on 12.10.2019 whereby hearing was fixed for 18.10.2019. The ld. Assessing Officer has passed the assessment order on 27.11.2019. For the sake of giving opportunity of hearing, he has given 2, 3 notices whereby only four days, six days time was given. The ld. Assessing Officer has not ensured whether service of these notices was being affected upon the assessee or not. He issued notice under section 143(2) on August 18, but did not keep the proceeding live for almost 8-10 months and then all of a sudden concluded the proceeding within one month *ex-parte*. Against this assessment, when assessee carried the matter in appeal, ld. 1st Appellate Authority has given a notice fixing the date of hearing as well as place of hearing. This notice was given not only to the assessee but to the ld. Assessing Officer also, but again ld.

Assessing Officer did not join the proceedings before the ld. Commissioner. Since it was an *ex-parte* assessment order and on perusal of that, ld. 1st Appellate Authority would have thought fit for permitting the assessee to file written submission. The assessee has filed the written submission and ld. CIT(Appeals) perused them and decided the issue. If we take the aspect theoretically, then to some extent, stand of the ld. Sr. D.R. is justified, namely demonstrative application of mind at the end of the ld. 1st Appellate Authority for entertaining the written submission including supporting evidence is not discernable on the record, but simultaneously it is to be appreciated that notice was given to the ld. Assessing Officer. He himself not joined the proceeding. Apart from that, ld. Sr. D.R. was unable to make submission on the quality of evidence placed before the ld. CIT(Appeals), which was considered by the ld. 1st Appellate Authority. It is true that it is not discernable as to how ld. 1st Appellate Authority has applied his mind for providing the opportunity of hearing along with entertainment of supporting material, but under clause (4) of Rule 46A, ld. 1st Appellate Authority would himself gone into all these materials and it appears 1st Appellate Authority has gone through those materials.

17. The paper book filed before the ld. CIT(Appeals) has been filed before us also, though, we were not taken

through this evidence on merit during the course of hearing, but we ourselves have perused them. The reason for not referring these papers was the emphasis of the Revenue that these are not part of the record and these are not to be considered.

18. It is pertinent to observe that ld. 1st Appellate Authority has given liberty to the assessee to file written submission in the show-cause notice (extracted supra). Impliedly it would suggest that the assessee could file any supporting material in support of its submission. This opportunity to file written submission contained in the notice for hearing issued by the ld. CIT(Appeals) would suggest that this notice has taken care of all procedural mechanism, which has been alleged to have been violated by the ld. Sr. D.R. The assessee itself has not filed any application for additional evidence under Rule 46A where reasons were required to be recorded. It is the opinion of the ld. CIT(Appeals), which might have been formed on the basis of perusal of the assessment order. Therefore, to this extent, we do not find any merit in Ground No. 2 of the Revenue, where it has been pleaded that ld. CIT(Appeals) has erred in entertaining submissions along with fresh material for deleting the addition. The ld. Sr. D.R. has relied upon a large number of decisions. We do not have any dispute with regard to the proposition propounded therein rather we have

adopted that very line of reasoning. There are factual deviations. The assessee has submitted the written submission on the basis of opportunity given by the ld. 1st Appellate Authority. In the written submission, it has filed supporting evidence, which is to be construed, as gone through by the ld. CIT(Appeals) while exercising the co-terminus power of the ld. Assessing Officer. Sub-Rule 4 of Rule 46A provides so. A perusal of the paper book would indicate that all the creditors were income-tax assessee. For example, Jiwansagar Times Pvt. Limited, the assessee has taken a loan of Rs.1.62 crores from this concern. The assessee has repaid this loan during this period and squared up this amount. Copy of the return of this creditor is available on page 31 of the paper book, wherein it has disclosed gross income of Rs.20,27,185/-. It has claimed refund of Rs.7,31,100/-. On page 73, the copy of the return of KSL Resources Pvt. Limited is available. The assessee has taken a loan of Rs.2,00,000/-. This concern has shown gross income of Rs.19,89,514/- and claimed refund of Rs.58,980/-. Similar, is the position with regard to other creditors. The ld. CIT(Appeals) has observed that he has gone through the documentary evidence in the shape of income-tax return, balance-sheets, bank statements and thereafter deleted it. Once the ld. 1st Appellate Authority has co-terminus power of the ld. Assessing Officer and if ld. 1st Appellate Authority itself gone into all these

materials, otherwise, which would have been gone by the ld. Assessing Officer had an opportunity to the assessee was granted properly. Therefore, we do not find any miscarriage of justice in the approach of the ld. CIT(Appeals), which deserves one more round of litigation at the level of ld. Assessing Officer.

19. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 18.10.2023.

Sd/- (Rajesh Kumar) Accountant Member Kolkata, the 18th day of October, 2023	Sd/- (Rajpal Yadav) Vice-President Kolkata, the 18th day of October, 2023
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- Copies to :* (1) Assistant Commissioner of Income Tax,
Central Circle-2, Patna,
C.R. (Annexe) Building, 6th Floor,
Bir Chand Patel Marg, Patna-800001, Bihar
- (2) M/s. Contessa Commercial Co. Pvt. Limited,
12, Syed Salley Lane, Bura Bazar,
Kolkata-700073
- (3) Commissioner of Income Tax (Appeals)-3,
Patna
- (4) Commissioner of Income Tax- ,
- (5) The Departmental Representative
- (6) Guard File
- TRUE COPY

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.