

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH 'D' NEW DELHI**

**BEFORE : SHRI C.M. GARG, JUDICIAL MEMBER &
 SHRI L.P. SAHU, ACCOUNTANT MEMBER**

**ITA No. 1071/Del./2011
Asstt. Year : 2007-08**

Income-tax Officer,
Ward 5(1), New Delhi.

(Appellant)

vs. Kalatmak Construction Pvt. Ltd.,
 105, Victoria Plaza, Saraswati Marg,
 Karol Bagh, New Delhi.
 [PAN:AACCK8793M]
 (Respondent)

Appellant by : Ms. Ritu Sharma, Sr. DR
Respondent by : Sh. Suresh Gupta, C.A.

Date of hearing : 23.03.2016
Date of pronouncement : 31.03.2016

ORDER

Per L.P. Sahu, Accountant Member:

This appeal by the Revenue arises out of the order dated 28.12.2010 of Id. CIT(A)-VIII, New Delhi for the assessment year 2007-08, challenging the deletion of addition of Rs.37,00,000/- made by the AO u/s. 68 of the IT Act being unexplained cash credits, ignoring the findings recorded by the AO that the assessee failed to discharge the onus of satisfying the conditions laid down in section 68 of the Act.

2. The brief facts of the case are that during course of assessment proceedings for the year under appeal, the Assessing Officer noticed that the assessee had received a sum of Rs. 37,00,000/- from the following persons :

S. No.	Name	Address	Amount
01.	Manju Mittal	1795, U/E, Jind.	45,000/-
02.	G. K. Aggarwal	D-12/5, Rohtak Road, Jind	2,25,000/-
03.	Bhupander Aggarwal	18/7, Rohtak Road, Jind	1,25,000/-
04.	Virender Kumar Satra	14/9, Rohtak Road, Jind	2,75,000/-
05.	Hari Om Shanti CGHS Ltd.	B-312, Netaji Subhash Place, Delhi.	4,00,000/-
I 06.	Rajesh Mittal	1795 U/E, Jind	2,00,000/-
07.	Samata	B-4768, Sector-11, Rohini, Delhi.	1,00,000/-
07.	Ram Kishan	A-57, Village Sahapur, Jind	4,80,000/-
08.	Manish	14/8, Mundka, Delhi	1,00,000/-
09,	Jai Bhagwan	Jagnti Apartment, Pitampura, Delhi.	7,50,000/-
10.	Ajit Singh	E-68, Prashant Vihar, Delhi.	10,00,000/-

3. The assessee was asked to explain the nature and source of above deposits. The ld. AR of the assessee submitted a list of share holders stating that the above amounts were received by assessee as share application money. The AO then required the assessee to file confirmations of the share holders, copies of IT returns, Bank statements and identity proof of the share

subscribers in order to discharge the onus that lay on the assessee u/s. 68 of the Act. Plenty of opportunities were extended by AO, but the assessee could not furnish requisite confirmations, bank statements, IT returns, PANs etc. of all the share applicants. During the course of assessment proceedings, the assessee filed only the list of share applicant containing names and addresses and Forms No. 2 filed with ROC. The AO also tried to search the PANs of the subscribers, and noticed that PANs of three subscribers, noted at last page of assessment order, were found allotted on 18.12.2009, i.e., after the assessee was asked to file copies of ITRs of the share applicants and the search for PANs of other persons did not yield any results. In view of these facts, the AO observed that the assessee has utterly failed to satisfactorily explain the cash credits totalling to Rs.37,00,000/- received by it during the year and the onus cast upon the assessee u/s. 68, having not been discharged, addition of this amount was made to the total income of the assessee.

4. The assessee challenged the assessment order in appeal before the Id. CIT(A) and vide letter dated 15,07,2010 made a request for admission of additional evidences u/r. 46A of the IT Rules 1962, submitted in the form of confirmations, copies of IT returns, copies of PAN Cards and the bank statements etc. of the share applicants. It was submitted that the time allowed by the AO to the assessee company for submitting the requisite

evidence was insufficient. It was also submitted that most of the share applicants were settled outside Delhi and these documents were not within the control of assessee-company. The assessee, therefore, requested to admit the additional evidence on record. The Id. CIT(A) forwarded the application of assessee along with additional evidences, to the AO for furnishing the remand report. In response, the AO vide his letter dated 30.09.2010, submitted his remand report on each point of assessee's application and objected to the admissibility of additional evidences submitted before the Id. CIT(A). In the remand report the AO has tried to rebut the contention of the assessee that the time allowed by AO for furnishing these documents in the assessment proceedings was insufficient by placing the chronology events of the proceedings which is summarized as under :

Date	Action by AO	Action by assessee
24.09.2008	Initial notice u/s. 143(2) was issued fixing the date of hearing on 30.09.2008	None appeared on fixed date 30.09.2009 on behalf of the assessee
19.01.2009	Notice u/s. 142(1) along with questionnaire asking for furnishing the details/evidence for share application money, was issued fixing the case for 05.02.2009. This notice was served personally which contains the signature of the recipient with telephone number of Sh. T.R. Mittal, Director of the company.	None appeared on the fixed date 05.02.2009 nor was there any response on behalf of the assessee.
14.07.2009	Another notice along with copy of the same questionnaire was issued asking for the same details to discharge the onus u/s. 68	
24.07.2009	Case was adjourned to 04.08.2009 on the request of assessee's AR	AR of assessee appeared and requested for adjournment.

04.08.2009		None appeared on behalf of the assessee
11.08.2009		The AR of assessee appeared and submitted ITR and balance sheet only.
13.10.2009	AO once again required to furnish confirmations of increase in share capital along with copies of bank extracts, ITRs and identity proofs etc.	AR of assessee appeared and only list of share holders was submitted
13.10.2009	Case was adjourned to 05.011.2009 as the AR requested for a long adjournment stating that share applicants are mostly outstation parties.	
05.11.2009		None appeared on behalf of the assessee
06.11.2009	A letter was issued to the assessee requiring the assessee to file the requisite details/evidences otherwise the case would be decided exparte.	
10.11.2009	In order sheet noting dated 10.11.2009, the AR was made to note that confirmations were called for on 11.08.2009 and three months time has elapsed since then. Case was adjourned to 16.11.2009.	AR of the assessee appeared on 10.11.2009 but confirmations were not filed.
16.11.2009		None appeared on the date fixed
17.11.2009	The case was finally adjourned to 22.12.2009 with direction to furnish complete evidences, failing which the assessment shall be made exparte	AR of assessee appeared on 17.11.2009 and filed some confirmations, which were not found mentioning the PAN of subscribers. No other evidence required filed.
22.12.2009		None appeared on the fixed date
24.12.2009	Assessment was completed adding the sum of Rs.37 lacs u/s. 68.	

It was submitted that assessee was given more than sufficient time right from 19.01.2009 to 22.12.2009 for file the requisite evidences, but he failed

to do so, hence, the plea of assessee for insufficient time is not tenable at all and the additional evidences have been objected for admission.

5. The ld. CIT(A) provided the copy of remand report to the assessee for comments, on which the ld. counsel for the assessee submitted that the questionnaire dated 19.01.2009 according to which the date was fixed for hearing on 05.02.2009 was never received by the assessee. It was submitted that the first questionnaire dated 14.07.2009 only was received by the assessee. In this respect order sheet entries were filed before the CIT(A) where no proceedings regarding issuance of questionnaire dated 19.01.2009 were recorded. Considering the rejoinder of the assessee, the ld. CIT(A) admitted the additional evidences on record u/r 46A for consideration and after considering the same deleted the addition vide impugned order. It is this order, which has been assailed by the Revenue by way of this appeal before the Tribunal.

6. The ld. DR relying upon the order of the Assessing Officer, submitted that in view of the remand report furnished by the AO giving chronological events of assessment proceedings, the ld. CIT(A) was not justified in admitting the additional evidences on record and to consider the same for holding that the assessee has discharged the onus that lay upon him u/s. 68 of the Act. It was submitted that more than sufficient opportunities were

extended to the assessee by the AO and the assessee was required to furnish the evidences time and again, but he failed to furnish the same before the AO to discharge the onus u/s. 68. Therefore, the conditions given in Rule 46A stands not satisfied for admission of additional evidence. The AR of the assessee, on the other hand, relied upon the first appellate order and a decision of Hon'ble Delhi High Court in the case of Vrindavan Farms (P) Ltd. in ITA Nos. 71, 72 & 84/2015 dated 12.08.2015.

7. Having considered the rival submissions in the light of factual matrix of the case, we find that the primary question which requires adjudication in the present appeal is whether the first appellate authority was justified in admitting the additional evidence u/r. 46A or not and if the answer to this question comes in affirmative, whether the Id. CIT(A) was justified to delete the addition holding that the onus u/s. 68 stood discharged on the part of the assessee or not.

8. Before dealing with the primary question, we feel it appropriate to reproduce the provisions of Rule 46A of the IT Rules, 1962 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 :ô

- (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 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 opportunityô

- (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.

9. A bare reading of the above provisions shows that the assessee will not entitled to produce any additional evidence before the CIT(A), which were not

produced before the Assessing Officer except in the following circumstances specified in Rule 46A :

- (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 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.

Admittedly, the first exceptional clause regarding refusal of AO to admit any evidence, does not exist in the present case. Rather the AO has impressed upon the assessee time and again to file the same evidences, which have been filed by him before the Id. CIT(A) as additional evidence. Regarding the second and third exceptional clause, we do not find any such plausible explanation of the assessee which prevented him to file the evidences before the AO. As far as the last exceptional clause is concerned, we find that this condition also does not stand satisfied in the instant case. From the chronological events given by the AO in the remand report, as summarized above in this order, we find that the assessee has been afforded enough opportunities to furnish the evidences on various dates, but he failed to do so without assigning any cogent reasons. The assessment proceedings commenced from January, 2009 and were

concluded in the end of December, 2009. During this period of about one year, the assessee has been specifically required time and again to furnish the evidences in the form of confirmations of the share holders, copies of IT returns, Bank statements and identity proof of the share subscribers in order to discharge the onus that lay on the assessee u/s. 68 of the Act, but all in vain. The events of assessment proceedings noted above clearly show the lackadaisical attitude of the assessee, which the ld. CIT(A) has failed to consider. In the similar circumstances, Hon'ble ITAT "B" Bench, New Delhi in the case of DCIT vs. M/s. E-4 Entertainment Pvt. Ltd. vide order dated 11.05.2012 has observed as under :

"6. We have heard rival contentions and gone through the relevant material available on record.

6.1. Coming to the additional evidence, we have perused form no. 35 i.e. memo of appeal filed by the assessee before ld. CIT(Appeals). In the grounds raised, there is neither any ground nor whisper about not providing sufficient opportunity by AO while framing the assessment. It is further evidenced from the fact that the assessment proceedings commenced on 26-9-2008 and assessment order has been passed on 10-11-2009 indicating that sufficient time was given to assessee for compliance. Therefore, there is no justification in the averment of assessee before ld. CIT(Appeals) that sufficient opportunity was not given by AO, therefore additional evidence should be admitted. We are constrained to observe that ld. CIT(Appeals) has admitted the additional evidence in a perfunctory manner without appreciating the role of rule 46A and its requirements and verifying assessee's averments.

6.2. Ld. CIT(Appeals) has failed to give any satisfactory reasons for exercising his powers u/s 46A. Hon'ble Delhi High Court in the case of Manish Build Well Pvt. Ltd. (supra) has emphasized the mandatory characteristics of this rule and the scruples to be applied while entertaining such additional evidence. We may further add that the documents admitted by ld. CIT(Appeals) are foreign documents and are not verified properly. Besides, the AO's objection about charging huge premium remains unanswered. In our view, ld. CIT(Appeals) ought not have admitted this additional evidence inasmuch as there was no ground raised by the assessee about extension of time or opportunity."

In the instant case, the ld. First appellate authority has also failed to record any finding as to the efforts having been made by the assessee to furnish the documentary evidence before the AO. Per contra, the chronological events of assessment proceedings noted above do not show any interest of assessee to furnish the documentary evidences required by the AO. The ld. CIT(A) appears to have accepted the contention of the assessee that the notice u/s. 142(1) along with questionnaire dated 19.01.2009 was never received by assessee, for the simple reason that such proceedings were not recorded on the order sheet. However, the ld. CIT(A) has not whispered even a single word on the specific comments of the AO given in the remand report that this notice was personally served upon the assessee, which contains the signatures of the recipient and telephone number of the director. The assessee has also not contended that the signatures of recipient referred to by the AO on the said notice, do not pertain to him. Otherwise also, even if it is taken for granted for arguments' sake, though not proved, that questionnaire dated 19.01.2009 was not served upon the assessee, the fact remains that the said questionnaire was admittedly received with notice dated 14.07.09. The last date of hearing in assessment proceedings was 22.12.2009 and therefore, the period of about five months, i.e., 17.07.2009 to 22.12.2009 also cannot in any way be said to be insufficient time to furnish the requisite evidences. We therefore, find that

none of the circumstances given in Rule 46A, under which the assessee could file the additional evidences before the Id. CIT(A), stood satisfied in the instant case and the Id. CIT(A) was, therefore, not justified in admitting and considering the additional evidences furnished before him by exercising his discretionary powers arbitrarily. The decision of Hon'ble Delhi High Court in the case of Vrindavan Farms (P) Ltd. (supra) relied by the Id. AR, is of no help to the assessee, having been based on different footings. In that decision, complete details including PAN numbers, confirmations, bank statements, balance sheets and profit and loss accounts etc. of the share applicants were available with the AO and the AO failed to conduct inquiry thereon. No such situation arises in the present case. In the instant case, the assessee has failed to furnish any of the above evidences before the AO despite sufficient opportunity having been given, but filed them with CIT(A) as additional evidence u/r. 46A of the IT Rules. In this context, we are fortified by the decision of Hon'ble Allahabad High Court in the case of Ram Prasad Sharma vs. CIT, 119 ITR 867, wherein the Hon'ble Court held as under :

"6. It would be seen that according to this the appellant shall not be entitled to produce before the AAC any evidence, whether oral or documentary, which was not produced in the course of the proceedings before the ITO except in specified circumstances. Thus, the appellant has right to produce additional evidence only in the circumstances specified in the rule and the appellant may be permitted to produce additional evidence in fit case which falls outside the specified circumstances. The present case does not fall within the first category and the appellant has

no right to produce additional evidence before the AAC. He may have been permitted to produce additional evidence but that was matter of discretion with the AAC. In the present case repeated opportunities were given by the ITO to produce evidence to prove the genuineness of the disputed deposits but no evidence whatsoever was given. It cannot be said that in these circumstances the AAC exercised his discretion arbitrarily or capriciously while refusing to admit fresh evidence at the appellate stage.”

In view of this discussion, we conclude that the Id. CIT(A) has wrongly admitted and considered the additional evidences u/r. 46A for holding that initial onus that lay on the assessee u/s. 68 is discharged. The appeal of the assessee is therefore found to have substantial force and deserves to be allowed.

10. In the result, the appeal of the Revenue is allowed.

Order pronounced in the open court on 31.03.2016.

Sd/-
(C.M. GARG)
Judicial Member

Sd/-
(L.P. SAHU)
Accountant Member

Dated : 31.03.2016

*aks/-

Copy of order forwarded to:

(1) The appellant	(2) The respondent
(3) Commissioner	(4) CIT(A)
(5) Departmental Representative	(6) Guard File

By order

Assistant. Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi