IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'A' BENCH, NEW DELHI

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

ITA No.1308/DEL/2024[A.Y 2014-15]

The Dy. C.I.T. Circle – 1(1) New Delhi	Vs.	Acore Consulting Pvt Ltd S -1, 2nd Floor, B-15, DDA Local Shopping Centre, Mayur Vihar - II Delhi PAN – AAFCA 5754 M
(Applicant)		(Respondent)

Assessee By : Shri C.S. Anand, Adv
Shri Sarthak Upadhyay

Department By : Shri Kanv Bali, Sr. DR

Date of Hearing : 07.08.2024
Date of Pronouncement : 13.08.2024

ORDER

PER NAVEEN CHANDRA, ACCOUNTANT MEMBER:-

With this appeal by the Revenue has challenged the correctness of the order of the ld. NFAC – 6, Delhi dated 23.01.2024 pertaining to A.Y 2014-15.

2. The Revenue has raised the following grounds of appeal:

"1.On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 2,45,99,739/- made on account of professional fee paid to M/ Johnson Controls India Pvt Ltd treating as bogus expenditure in the books of account by allowing the additional evidence in disregard to the Rule 46A of the I. T. Rules, 1962 as the case of the assessee company is not covered under any of the circumstances as enumerated in Rule 46A of the I. T. Rules, 1962.

2. On the facts and in the circumstances of the case. the Ld. CIT(A) has erred in deleting the addition of Rs. 3,59,45,109/- made on account of professional fee paid to M/s Paramount Associated Real-Estate Company Pvt Ltd(PARC) treating as bogus expenditure in the books of account by allowing the additional evidence in disregard to the Rule 46A of the I. T. Rules, 1962 as the case of the assessee company is not covered under any of the circumstances as enumerated in Rule 46A of the I. T. Rules, 1962.

3. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 25,00,000/- made on account of professional lee paid to R. R. Vani treating as bogus expenditure in the books of account by allowing the additional evidence in disregard to the Rule 46A of the I. T. Rules, 1962 as the case of the assessee company is not covered under any of the circumstances as enumerated in Rule 46A of the I. T. Rules, 1962.

4. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 1,96,87,463/- made on account of professional fee paid to M/s Srikara Associates treating as bogus expenditure in the books of account by allowing the additional evidence in disregard to the Rule 46A of the I. T. Rules, 1962 as the case of the assessee company is not covered under any of the circumstances as enumerated in Rule 46A of the I. T. Rules, 1962.

5. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in accepting the additional evidences under Rule 46A of the I. T. Rule, 1962, as the decision of Ld. CIT(A) is not based on facts. The Ld. CIT(A) in its order at para 6.3 stated that "No adverse report has been filed by AO" and that "remand proceedings were initiated and Assessing Officer issued fresh notices" etc., are not verifiable from assessment record. What confirmation were filed by the assessee are also not verifiable from AO's file.

6. The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal."

3. It is clear from the above grounds of appeal that the Revenue is aggrieved by the deletion of additions by the ld. CIT(A) who admitted additional evidence in disregard to the Rule 46A of the I.T. Rules, 1962

as the case of the assessee company is not covered under any circumstances as enumerated in Rule 46A of the Rules. Therefore, we decided to take up the all the grounds together.

4. Briefly stated, the facts of the case are that the assessee company is engaged in the business of real estate agent/brokerage services. The assessee e-filed its return of income on 29.11.2014 declaring loss of Rs. 1,55,75,720/-. Return was selected for scrutiny assessment through CASS and accordingly, statutory notices were issued and served upon the assessee.

5. During the course of scrutiny assessment proceedings, the assessee was asked to furnish details of expenses. The Assessing Officer investigated the expense towards Royalty of Rs 16,68,952/- and Professional Fees amounting to Rs. 17,22,90,644/-. The Assessing Officer finally observed that the assessee failed to provide the confirmations relating to professional fees from four out of six parties and accordingly made an addition of Rs. 8,27,32,311/- on account of professional fees and Rs 16,68,952/- on account of Royalty.

6. When the assessee went in appeal, the ld. CIT(A) deleted the addition on account of professional fees made by the Assessing Officer.

7. Now the aggrieved Revenue is in appeal before us.

8. Before us, the ld. DR vehemently stated that the ld. CIT(A) has admitted the additional evidences without following Rule 46A of the Income tax Rules 1962, and therefore, the order of the CIT(A) deserves to be quashed, since it is in violation of principles of natural justice.

9. On the other hand, the ld. counsel for the assessee stated that the assessee was prevented by sufficient cause from producing the complete evidence which was called upon to produce by the Assessing Officer. It is the say of the ld. counsel for the assessee that the documents furnished before the ld. CIT(A) u/r 46A were more or less clarificatory evidences which were placed to make the effect of evidences more explicit. It was further submitted by the AR that the CIT(A) forwarded the documents furnished before him to the AO and called for a remand report from the AO. The AO, in the course of remand proceedings examined the various issues that required verification by issuing show cause and furnished a report to the CIT(A).

10. The ld. counsel for the assessee relied upon the decision of the ITAT, Mumbai Bench in the case of Industrial Roadways 112 ITD 293.

11. We have given thoughtful consideration to the rival submissions. On the issue of the scope of powers of CIT(A) u/s 250 of the IT Act and Rule 46A of the IT Rules, the decision of the ITAT Mumbai Tribunal in the case of Industrial Roadways (supra), relied upon by the assessee, is very illuminating. It was held as under:

> "4. We have carefully considered the rival submissions. In our opinion, having regard to the provisions of Part A of Chapter XX relating to the appeals before the first appellate authority, a distinction has to be made between the evidence and material voluntarily furnished by an assessee in support of his appeal and the evidence / material requisitioned from an assessee by the first appellate authority with a view to proper disposal of proceedings before him. In our opinion while the provisions of rule 46A apply to the former, the same have no application to the latter.
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> 5. Rule 46A of I.T. Rules has been inserted by the Income-tax (Second Amendment) Rules, 1973 with effect from 01-04-1973. This rule provides that an assessee shall not be entitled to produce before the first appellate authority evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the assessing officer. Rule however enumerate certain exceptional circumstances such as where the assessing

officer has refused to admit evidence which ought to have been admitted or where the assessee was prevented by sufficient cause from producing the evidence he was called upon to produce by the assessing officer or which is otherwise relevant to any ground of appeal taken by the assessee or where the assessment order itself is made without giving sufficient opportunity to the assessee to adduce evidence relevant to any ground of appeal. Provision of rule 46A enjoins upon the first appellate authority not to admit any fresh evidence unless he records in writing his reasons for its admission. Further rule 46A enjoins upon him to provide the assessing officer a reasonable opportunity to examine the fresh evidence or to cross examine the witness produced by the assessee or to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the assessee.

6. The provisions of Section 250(4), on the other hand, empower the first appellate authority to make such further enquiry as he thinks fit or to direct the assessing officer to make further enquiry and report the result of the same. The provisions of Section 250(4) are the provisions of long standing that existed under 1922 Act also in Section 31 of that Act. In the case of CIT v. Kanpur Coal Syndicate 53 ITR 225 (SC) the Hon'ble Supreme Court have held that the first appellate authority can do what the assessing officer could do and can also direct the latter to do what the latter has failed to do. In the case of Jute Corporation of India Ltd v. CIT 187 ITR 688 (SC) and in the case of CIT v. Nirbheram Daluram 224 ITR 610 (SC) the Hon'ble Supreme Court have held that the powers of the first appellate authority over an assessment are all pervasive and they

are not confined to the matters considered by the assessing officer. There are many judgments to the effect that in view of the provisions of Section 250(4) the first appellate authority is duty bound to make an enquiry even if such enquiry was not made by the assessing officer if the facts and circumstances of the case warrant such an enquiry to be made. Reference in this regard may be made to the judgments reported in 107 ITR 808 (Ker); 204 ITR 580 (Cal); 231 ITR 1 (Bom) and 36 Taxman 353 (Del). It therefore follows that the matters to be considered by the first appellate authority need not be confined to what was considered by the assessing officer while making the order appealed against…..

9. There are of course several judgments where it has clearly been laid down that the assessee on his own cannot produce any additional evidence not furnished before the assessing officer without meeting the various conditions provided under rule 46A for which satisfaction is to be recorded by the appellate authority in writing and with which the appellate authority is further required to confront the assessing officer and allow him reasonable opportunity to have his say in the matter. In the case of Rajkumar Srimal v. CIT 102 ITR 525 (Cal) the Hon'ble Calcutta High Court have clearly held that where the CIT is not acting suo motu in admitting additional evidence, there must be some ground for admitting new evidence. The Hon'ble Calcutta High Court have further observed that in such a case the Tribunal can interfere with the discretion exercised by the first appellate authority in admitting the additional evidence. In the words of Hon'ble High Court "It is true, as was contended by counsel for the assessee, that the Appellate Assistant Commissioner has very wide

powers and in the interests of justice he can make further enquiry and he can admit new ground of appeal. He can also give deductions not claimed by the assessee, as was held by this Court in the case of Union Coal Co. Ltd. v. Commissioner of Income tax. In this case counsel for the revenue also did not dispute that in certain circumstances the Appellate Assistant Commissioner had jurisdiction to admit new grounds if it was necessary to admit new evidence. The point in this case is not whether the Appellate Assistant Commissioner is entitled to admit new ground or evidence either suo motu or at the invitation of the parties. In this case it is apparent that the Appellate Assistant Commissioner was not acting suo moto in admitting additional evidence. If the Appellate Assistant Commissioner was acting on being invited by the assessee, then there must be some ground for admitting new evidence in the sense that there must be some explanation to show that the failure to adduce evidence earlier sought to be adduced before the Appellate Assistant Commissioner was not willful and not unreasonable. We find from the record that no such explanation was ever offered or referred to. If without any explanation at all the Appellate Assistant Commissioner admits evidence at the invitation of the parties, he would be exercising, in our opinion, discretion not properly. He has undoubtedly a discretion vested in him to admit additional evidence in appropriate cases but admission of evidence at the instance of an appellant without any ground or explanation would not be exercising discretion properly and in such a case the appellate authority is competent, in our opinion, to interfere with the discretion exercised by the Appellate Assistant Commissioner. Reliance in this connection may be placed on the observations in the case of Ramgopal Ganpatrai Sons

Ltd. v. Commissioner of Excess Profits Tax, in the case of Byramji Co. v. Commissioner of Income tax and in the case of Karamchand v. Commissioner of Income tax."

10. In the case of CIT v. Vali Mohamed Ahmedbhai 134 ITR 214 (Guj) Hon'ble Gujarat High Court have held that if any additional evidence submitted by an assessee is accepted behind the back of the assessing officer and the assessing officer is not given proper opportunity to rebut the same, it would amount to the violation of the principles of natural justice……

11. The proposition that the first appellate authority can admit additional evidence sought to be filed by an assessee only for good reasons and after allowing the assessing officer reasonable opportunity to have his say in the matter is supported by some more judgments such as CIT v. Babulal Jain 176 ITR 411 (MP); C. Unnikrishnan v. CIT 233 ITR 485 (Ker); and Ramprasad Sharma v. CIT 119 ITR 867 (All).

12. In the case of Smt. Prabhavati Shah v. CIT 231 ITR 1 (Bom) Hon'ble jurisdictional High Court dealt with a case where the assessee sought to produce fresh evidence before the first appellate authority for no good reasons for not having produced the same before the assessing officer. Referring to the provisions of rule 46A the Hon'ble Bombay High Court held that the first appellate authority was justified in not taking on record the fresh evidence sought to be produced before him by the assessee. In the course of the judgment Hon'ble High Court closely examined the provisions

of Section 250(4) of the Act and the provisions of rule 46A and observed as under:

On a plain reading of rule 46A, it is clear that this rule is intended to put fetters on the right of the appellant to produce before the Appellate Assistant Commissioner any evidence, whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the Income-tax Officer, except in the circumstances set out therein. It does not deal with the powers of the Appellate Assistant Commissioner to make further enquiry or to direct the Income-tax Officer to make further enquiry and to report the result of the same to him. This position has been made clear by Sub-rule (4) which specifically provides that the restrictions placed on the production of additional evidence by the appellant would not affect the powers of the Appellate Assistant Commissioner to call for the production of any document or the examination of any witness to enable him to dispose of the appeal. Under Sub-section (4) of Section 250 of the Act, the Appellate Assistant Commissioner is empowered to make such further inquiry as he things fit or to direct the Income-tax Officer to make further inquiry and to report the result of the same to him. Sub-section (5) of Section 250 of the Act empowers the Appellate Assistant Commissioner to allow the appellant, at the hearing of the appeal, to go into any ground of appeal not specified in the grounds of appeal, on his being satisfied that the omission of he ground from the form of appeal was not wilful. It is clear from the above provisions that the powers of the Appellate Assistant Commissioner are much wider than the powers of an ordinary court of appeal. The scope of his powers is coterminus with

that of the Income-tax Officer. He can do what the Income-tax Officer can do. He can also direct the Income-tax Officer to do what he failed to do. The power conferred on the Appellate Assistant Commissioner under Sub-section (4) of Section 250 being a quasi-judicial power, it is incumbent on him to exercise the same if the facts and circumstances justify. If the Appellate Assistant Commissioner fails to exercise his discretion judicially, and arbitrarily refuses to make enquiry in a case where the facts and circumstances so demand, his action would be open for correction by a higher authority.

Thereafter the Hon'ble High Court again observed at page 8 in the following words:

On a conjoint reading of Section 250 of the Act and rule 46A of the rules, it is clear that the restrictions placed on the appellant to produce evidence do not affect the powers of the Appellate Assistant Commissioner under Sub-section (4) of Section 250 of the Act. The purpose of rule 46A appears to be to ensure that evidence is primarily led before the Income-tax Officer.

13. From the various authorities cited by us (supra) in this order we find that the legal position is that the first appellate authority has wide powers over the order of assessment appealed against before him. In the course of exercise of such power the first appellate authority can direct the assessee to produce any evidence, information or material that was not produced before or considered by the assessing officer. The purpose of rule 46A is to place fetters on the rights of an appellant to produce additional evidence before

the first appellate authority and not the rights of the first appellate authority to call for production of any fresh evidence or information. This aspect of the provisions of rule 46A is clear from the provisions of Sub-rule (4) of rule 46A itself that nothing contained in rule 46A shall affect the power of first appellate authority to direct the production of any document or 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). As against the judicial pronouncements supra we see no assistance to the case of revenue from the judgment of hon'ble Bombay High Court in the case of Gammon India Ltd. 214 ITR 50 (Bom) relied upon by learned DR. That is a case related to the proceedings under Section 154 and therefore it was held that the Appellate Assistant Commissioner had no powers to consider what was not on record.

12. Adverting to the facts of the instant case, we find that in the case of Industrial Roadways (supra), the CIT(A) himself examined the evidences and concluded in favour of the assessee without forwarding the evidence/materials to the AO. In the instant case, the CIT(A) has duly complied with Rule 46(3) and forwarded the evidences/materials placed before him to the assessing officer for his verification/examination. We also note that the additions regarding professional expenses paid to four parties were made not on account

of allegation of excessive payment but for non-furnishing of the confirmation by the counter parties. On the request of the assessee, the CIT(A) initiated the remand proceedings and the Assessing Officer issued fresh notices to parties who filed their confirmations along with their bank statement, Ledger account and Invoice. On finding that the confirmations and requisite supporting documents were filed and examined by the AO, who had no adverse comments to make in the remand report, the ld. CIT(A) deleted the addition.

13. In the facts and circumstances of the case, we are, therefore, of the considered opinion that the CIT(A) was within the powers as enshrined in section 250(4) of the IT Act and has duly with complied Rule 46A. The CIT(A) has adhered to the principles of natural justice and gave the Assessing Officer sufficient opportunity to consider the additional evidences/documents. We find that the Assessing Officer has examined the additional evidences/documents submitted before him and found nothing adverse against the assessee's claim of the said expense. The CIT(A) accepted the remand report findings and deleted the addition on account of professional fees. Therefore, we do not find any reason to interfere with the findings of the first appellate authority. Consequently, we do not find any merit in the grievance

raised by the revenue in its appeal. Accordingly Ground Nos. 1 to 5 of the revenue are dismissed.

14. In the result, the appeal of the Revenue in ITA No. 1308/DEL/2024 is dismissed.

The order is pronounced in the open court on 13 .08.2024.

[VIKAS AWASTHY**]** **[NAVEEN CHANDRA]**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Dated: 13th August, 2024.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
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Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
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