

**IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member
and Shri Sandeep Gosain, Judicial Member**

ITA No. 251/Mum/2015
(Assessment Year:2010-11)

A C I T - 7(3)		M/s. Vasant Construction
Room No. 137, 1 st Floor		Company (I)
Aayakar Bhavan, M.K. Road	Vs.	33/37, 1 st Floor
Mumbai 400020		Chandra Bhuvan Building
		Mumbai 400003
		PAN - AAAFV0909M

Appellant

Respondent

Appellant by: Shri Rajneesh K. Arvind
Respondent by: Shri Ajay R. Singh

Date of Hearing: 21.09.2016
Date of Pronouncement: 28.09.2016

ORDER

Per Jason P. Boaz, A.M.

This appeal by Revenue is directed against the order of the CIT(A)-26, Mumbai dated 27.10.2014 for A.Y. 2010-11.

2. The facts of the case, briefly, are as under: -

2.1 The assessee, a firm engaged in business as government civil contractor, filed its return of income for A.Y. 2010-11 on 28.09...2010 declaring income of ₹58,43,650/-. The return was processed under section 143(1) of the Income Tax Act, 1961 (in short 'the Act') and the case was subsequently taken up for scrutiny. In the course of assessment proceedings, the Assessing Officer (AO) on the basis of a list of 2000 dealers brought out by the Sales Tax Department of the Government of Maharashtra, who had filed affidavits admitting that they were engaged in providing bogus bills, in which the three parties from whom the assessee had purchased goods figured therein, issued notice under section 133(6) of

the Act and then required the assessee to establish the genuineness of these purchases. The details thereof are as under: -

S.No.	Name of the party	Amount involved (In ₹)	Remarks
1	M/s. Shyam Corporation	17,83,589/-	Unclaimed
2	M/s. Shree Yamuna Impex	28,49,990/-	Declared that his firm is closed and he didn't do any transaction
3	M/s. Darshan Sales Corporation	17,37,105/-	No reply
	Total	63,70,684/-	

2.2 In response there to the assessee filed copies of purchase bills, copies of ledger accounts, payment details for these purchases, copies of bank account evidencing payments by cheque and submitted that the said purchases (supra) were made through brokers and that brokerage and transportation charges are paid by the suppliers of goods. The assessee's above explanations and evidences furnished did not find favour with the AO, who was of the view that since the assessee was unable to produce the parties for verification and relying on the enquiries conducted by the Sales Tax authorities, held that these purchases were bogus and the assessee had failed to establish the genuineness of these purchases amounting to ₹63,70,684/- and disallowed the same. The assessment was concluded by an order under section 143(3) of the Act vide order dated 21.03.2013; wherein the income of the assessee was determined at ₹1,22,14,330/- as against returned income of ₹58,43,646/- in view of the disallowance of purchases amounting to ₹63,70,684/- being treated as bogus.

3. Aggrieved by the order of assessment dated 21.03.2013 for A.Y. 2010-11, the assessee preferred an appeal before the CIT(A)-26, Mumbai challenging the aforesaid disallowance of purchases amounting to ₹63,70,684/- held to be bogus by the AO. The learned CIT(A) disposed the appeal vide order dated 27.10.2014 allowing the assessee partial relief; by directing the AO to assess the additional income estimated from these purchases of ₹63,70,684/- from bogus parties @25% thereof.

4.1 Revenue, being aggrieved by the order of the CIT(A)-26, Mumbai dated 27.10.2014 for A.Y. 2010-11, has preferred this appeal raising the following grounds: -

- “1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding purchases from parties M/s. Shyam Corporation, M/s. Shree Yamuna Impex, M/s. Darshan Sales Corporation as genuine ignoring the fact that quantitative details were not produced by the assessee during the course of assessment proceedings.*
- 2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in considering the purchases to be genuine when the vendor parties have been considered bogus.*
- 3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in admitting additional evidences in violation of rule 46A without giving opportunity to the A.O. to verify the same.*
- 4. The appellant prays that the order of the CIT(A) on the above ground(s) be set aside and that of the Assessing Officer be restored.*
- 6. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.”*

4.2.1 The learned D.R. for Revenue was heard in support of the grounds raised. He placed strong reliance on the findings of the AO that the total purchases of ₹63,70,684/- from M/s. Shyam Corporation, M/s. Shree Yamuna Impex and Ms. Darshan Sales Corporation were bogus and contended that the learned CIT(A) had erroneously held the said purchases to be genuine and in restricting the addition to 25% thereof; being the profits/benefit that the assessee would have earned from out of the transaction with the aforesaid three parties.

Ground No. 3:

4.2.2 At the outset, the learned D.R. was heard in respect of ground No. 3 (supra) in which it was contended that the learned CIT(A) had erred in admitting additional evidences in violation of Rule 46A of the I.T. Rules, 1962 without affording the AO any opportunity to verify and rebut the same before adjudicating the matter of bogus purchases and therefore the impugned order of the learned CIT(A) is not sustainable. According to the

learned D.R., even though the learned CIT(A) had not specifically mentioned admission of any additional evidence, it is clear from the impugned order that the assessee had infact adduced additional evidences in the form of filing various documents, inter alia, in respect of the purchases from these three parties that resulted in the learned CIT(A) deciding the appeal partly in favour of the assessee. The learned D.R. drew the attention of the Bench to the paper book-I filed by the assessee vide letter dated 12.08.2016 containing items at Sr. No. 1 to 11 consisting of pages 1 to 346; wherein the assessee has certified that only items at Sr. No. 1 to 3 (pages 1 to 80) have been filed before the AO and that items at Sr. No. 4 to 11 (pages 8 to 346) been filed before the learned CIT(A) only. It is argued that though the learned CIT(A) had not passed any order admitting additional evidences, the certificate/admission of the assessee in the paper book-I filed by it and the reference to these documents having also been only filed before the learned CIT(A), as acknowledged by him by various mentions in his order at paras 3.3.1 to 3.5.4 thereof, wherein he has recorded the assessee's submissions and details filed by it before him, clearly indicate that the learned CIT(A) had admitted and acted favourably upon additional evidence placed before him by the assessee without affording to AO opportunity to rebut the same, as is required by the provisions of Rule 46A. It is pleaded by the learned D.R. that on this short point alone, as raised in ground No. 2 of this appeal (supra), the order of the learned CIT(A) is not sustainable and ought to be set aside.

4.3 Per contra, the learned A.R. for the assessee supported the impugned order of the learned CIT(A) as being in order in all respects.

4.4.1 We have heard the rival contentions of both the parties in respect of the ground at Sr. No. 3 raised in this appeal and perused and carefully considered the material on record. On an appreciation of the averments of the learned D.R. and the material on record, we are of the considered view that Rule 46A of the Income Tax Rules, 1962 (in short 'the Rules') has a direct bearing on the controversy. Therefore it would only be in the fitness of things for us to take note of the Rule. Rule 46A 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 :—*

- (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 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.]”*

4.4.2 A perusal of this Rule would suggest that sub-Rule-1 puts an embargo upon the assessee to seek permission for producing additional evidence either oral or documentary. Such evidence can only be permitted to be produced, if conditions enumerated in sub-clauses (a) to (d) are available. The learned Commissioner has to record in writing as to why he had admitted the additional evidence. Sub-Rule-3 contemplates that if

additional evidence is taken on record, then it cannot be considered on merit, unless an opportunity to the Assessing Officer is being given to comment the evidence or documents or to cross examine the witness produced by the assessee. Apart from that the learned Assessing Officer would be given an opportunity to produce any evidence or documents or any evidence in rebuttal of the additional evidence produced by the assessee. Sub Rule-4 is an exception to all other sub-rules. This rule authorizes the CIT(A) to direct any party for production of any documents or examination of any witness to enable him to dispose of the appeal or for arriving at a just conclusion.

4.4.3 In the case on hand, as contended by the learned D.R., we find that the learned CIT(A) has infact admitted additional evidence put forth by the assessee as admitted by the assessee in certifying its paper book-I (page 1 to 346) that only details at Sr. No. 1 to 3 (pages 1 to 80) were filed before the AO and that the details/documents at Sr. HO. 4 to 11 (pages 86 to 346) were filed only before the learned CIT(A). The fact that the learned CIT(A) acted on this additional evidence favourably is, in our view, evident from the mention of the same having also been filed before him in appellate proceedings at paras 3.3.1 to 3.5.4 of the impugned order while recording the assessee's arguments, submissions and details and evidences filed. In the light of the factual matrix above, we find that the learned CIT(A) has failed to afford the AO an opportunity of being heard in the matter and to verify and rebut the same and therefore in our view, the conditions mentioned in sub-Rule-3 of Rule 46A of the Rules remain uncomplied. We therefore set aside the finding of the learned CIT(A) in the impugned order in respect of the issue of purchases from the three parties, viz., M/s. Shyam Corporation, M/s. Shree Yamuna Impex and M/s. Darshan Sales Corporation amounting to ₹63,70,684/- and restore the matter to his file for fresh consideration and adjudication thereon after affording the AO due opportunity under Rule 46A(3) of the Rules. We hold and direct accordingly. Ground No. 3 of Revenue's appeal is accordingly disposed off.

5. In view of our findings in respect of ground No. 3 supra, there is no requirement for us to adjudicate the grounds raised by Revenue at Sr. No. 1, 2, 4 & 5.

6. In the result, Revenue's appeal is allowed for statistical purposes.

Order pronounced in the open court on 28th September, 2016.

Sd/-
(Sandeep Gosain)
Judicial Member

Sd/-
(Jason P. Boaz)
Accountant Member

Mumbai, Dated: 28th September, 2016

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -26, Mumbai*
4. *The CIT - 15, Mumbai*
5. *The DR, "F" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.