IN THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai

Before Shri Jason P. Boaz, Accountant Member
and Shri Ram Lal Negi , Judicial Member

ITA No. 7322/Mum/2014
(Assessment Year: 2011-12)

A C I T – 10(3)(1) Room No. 218, 2nd Floor Aayakar Bhavan, M.K. Road Mumbai 400020	Vs.	M/s. Ojas Mall Management P. Ltd. Knowledge House, Off Jogeshwari Vikroli Link Road, Shaym Nagar Jogeshwari (E), Mumbai 400060

PAN – AAACO8406H

Appellant **Respondent**

Appellant by: Shri Abhishek Sharma
Respondent by: Shri Vipul Joshi

Date of Hearing: 25.01.2017
Date of Pronouncement: 31.01.2017

O R D E R

Per Jason P. Boaz, A.M.

This appeal by Revenue is directed against the order of the CIT(A)-17, Mumbai dated 18.09.2014 for A.Y. 2011-12.

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

2.1 The assessee company, stated to be in the business of renting of property, filed its return of income for A.Y. 2011-12 declaring loss of ₹6,75,90,696/-. 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. The assessment was completed under section 143(3) of the Act vide order dated 31.12.2013, wherein the assessee's income was determined at ₹86,16,260/-. In doing so, the Assessing Officer (AO); (i) treated the assessee's returned business 'income from letting out of property' as 'income from house property' and accordingly recomputed the same at ₹5,55,39,292/-, and (ii) in this regard also disallowed the assessee's claim for interest paid on borrowed capital to the extent of

₹4,98,87,988/- to the extent of interest free loans advanced to sister concerns.

2.2 Aggrieved by the order of assessment dated 31.12.2013 for A.Y. 2011-12, the assessee preferred an appeal before the CIT(A)-17, Mumbai. The learned CIT(A) disposed off the appeal vide impugned order dated 18.09.2014, allowing the assessee partial relief, i.e. by (i) upholding the AO's action in holding that the assessee's income from renting out of property was to be taxed under the head 'income from house property' and not as 'business income' as claimed by the assessee and (ii) in partly allowing the assessee's claim for allowance of proportionate interest on interest free advances; not for the entire year but only for actual number of days (i.e. 13 days).

3.1 Aggrieved by the order of the CIT(A)-17, Mumbai dated 18.09.2014 for A.Y. 2011-12, Revenue has preferred this appeal raising the following grounds"-

> *"1. On the facts and circumstances of the case and in law, the CIT(A) has erred in allowing relief on the amount of disallowance of interest on the basis of the bank statement furnished by the assessee during appellate proceedings without giving an opportunity to the Assessing Officer to verify the same thereby violating Rule 46A of the I.T. Rules.*
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> *2. The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the AO be restored.*
>
> *3. The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."*

3.2 The learned D.R. was heard in support of the ground raised. It is the contention of the learned D.R. that the learned CIT(A) erred in allowing relief to the assessee on the amount of disallowance on the basis of a bank statement (i.e. additional evidence) furnished by the assessee during appellate proceedings, without giving an opportunity to the Assessing Officer (AO), before whom the same was not filed, in order to examine, verify and rebut the same; which is in violation of Rule 46A of the I.T. Rules, 1962. In support of this contention, the attention of the Bench was drawn to para 2.3.1 of the impugned order wherein the learned CIT(A) has

recorded and acknowledged that the assessee has placed on record the Bank statement to prove that the loan was sanctioned on 18.03.2011. It is submitted that it is also apparent that no report on this was called by the CIT(A) from the AO. The learned D.R. further submitted that perusal of paras 6 to 6.2 of the order of amount for A.Y. 2011-12 clearly establish that this bank statement on the basis of which assessee was given relief was never furnished before the AO in assessment proceedings. The learned D.R. submits that the above averments clearly establish that in the impugned order the learned CIT(A) has allowed the assessee relief on this issue, solely based on additional evidence placed before him in appellate proceedings, without affording the assessee adequate opportunity as required under Rule 46A of the I.T. Rules, 1962. It is prayed that in these circumstances, the order of the learned CIT(A) giving relief to the assessee be set aside, for de novo consideration and fresh adjudication after affording the AO adequate opportunity under Rule 46A of the I.T. Rules.

3.3 The learned A.R. of the assessee was not able to contravene the learned D.R.'s arguments/grounds raised that the learned CIT(A) had given the assessee relief based on additional evidence admittedly filed in appellate proceedings. The learned A.R. of the assessee, however, opposed the prayer of Revenue that the decision of the learned CIT(A) on this issue be set aside for fresh consideration and adjudication. It was argued that, even then, the powers of the learned CIT(A) being co-terminus with that of the AO, the CIT(A) can direct the assessee or AO to produce any documents, etc. so as to dispose off the appeal under Rule 46A or to cause any enquiry to be made under section 250(4) of the Act which has been done. In support of this arguments, the learned A.R. placed reliance on the following judicial pronouncements: -

(i) Smt. Prabhavati S. Shah vs. CIT (1998) 231 ITR 1 (Bom)
(ii) B.L. Choudhary vs. CIT (1976) 105 ITR 371 (Orissa)
(iii) CIT vs. Poddar Swadesh Udyog P. Ltd. (2007) 295 ITR 252 (Gauhati)

3.4 In rejoinder, the learned D.R. submitted that the arguments put forth by the learned A.R. in support of the action of the learned CIT(A) in the

impugned order are factually erroneous and untenable in law. It is further submitted that the judicial pronouncements cited by the learned A.R. (supra) do not in any way support or come to the rescue of the assessee in the case on hand since it is clear from the impugned order that neither has the learned CIT(A) directed the assessee to file the said additional evidence under Rule 46A(4) of the I.T. Rules nor was any remand order passed under section 250(4) of the Act directing any inquiry in the matter be carried out.

3.5.1 We have heard the rival contentions and perused and carefully considered the material on record, including the judicial pronouncements referred to. The facts on record, in our considered view, clearly establish that admittedly, the learned CIT(A) as per his own recordings at para 2.3.1 of the impugned order has recorded that the assessee has placed on record the Bank of Allahabad's statement to prove that the loan was sanctioned and accordingly allowed the assessee part relief on the disallowance of interest made by the AO without affording the assessee adequate opportunity of being heard in the matter as required under Rule 46A of the I.T. Rules. As admitted by the counsels for both sides, this piece of additional evidence was never furnished before the AO in assessment proceedings. In our view, Rule 46A of the I.T. Rules, 1962 has a direct bearing on the controversy before us and therefore it would be in the fitness of things to extract the same. Rule 46A reads: -

> ***46A.*** *(1) The appellant shall not be entitled to produce before the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)], any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the [Assessing Officer], except in the following circumstances, namely :—*
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> *(a) where the [Assessing Officer] has refused to admit evidence which ought to have been admitted ; or*
>
> *(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.]"

3.5.2 On a perusal of Rule 46A (supra), it appears that sub-rule (1) places an embargo upon the assessee for producing additional evidence; either oral or documentary. Such evidence can only be permitted to be produced, if the conditions enumerated in such clauses (a) to (d) thereof are fulfilled. Sub-rule (3) contemplates that if additional evidence is taken on record, then it cannot be considered on merits, unless opportunity is afforded to the AO to examine, comment and if required rebut the evidence or documents or to cross examine the witness produced by the assessee. Apart from this, the AO should be given opportunity to produce any evidence or documents in rebuttal of the additional evidence produced by the assessee. In the factual matrix of the case on hand, we find that the learned CIT(A) failed to afford the AO opportunity of being heard in the matter and therefore the requirements/conditions laid down in sub-rule (3) of Rule 46A of the Rules remain uncomplied with by the learned CIT(A). Sub-rule (4) is an exception to the other sub-rules and authorizes the

CIT(A) to direct any party for production of documents or examination of witness to enable him to dispose off the appeal or for arriving at a just conclusion. We, however, find from a perusal of the impugned order, that the learned CIT(A) has not issued any directions under Rule 46A(4) to the assessee to file the said additional evidence.

3.5.3 In this factual and legal matrix of the case, as discussed above, we find, as contended by Revenue in the grounds raised, that the learned CIT(A) allowed the assessee relief on the interest disallowed by the AO on the basis of additional evidence/documents filed for the first time before him in appellate proceedings, which was never placed before the AO, and without giving the AO adequate opportunity of being heard in the matter as required for the purposes laid in Rule 46A(3) of the Rules. This has led to a gross violation of the principles of natural justice. In this view of the matter, we set aside the order of the learned CIT(A) on the issue of interest disallowance raised by Revenue (supra) and restore the matter to the file of the learned CIT(A) for de novo consideration and adjudication, after affording the AO adequate opportunities of being heard in terms of Rule 46A(3) of the Rules for examination, verification and rebuttal of the said additional evidence put forth by the assessee. We hold and direct accordingly. Consequently grounds raised by Revenue are treated as allowed for statistical purposes.

4. Before parting, we refer to the judicial pronouncements cited by the learned AR (supra). We have carefully perused the same and with all humility find that they do not in any way support the arguments put forth by the learned A.R. of the assessee that the learned CIT(A) can accord the assessee relief by taking additional evidence on record without; (i) affording the AO an opportunity of being heard in the matter or without directing the assessee to file additional evidence under Rule 46A of the Rules or would otherwise come to the rescue of the assessee. The case of B.L. Choudhary the Hon'ble Orissa High Court (supra) is not applicable to the case on hand because it refers to an discusses the provisions and powers of the CIT(A) under section 250(4) of the Act; which power the learned CIT(A) has not

exercised in the case on hand. The cited case of Poddar Swadesh Udyog P. Ltd. of the Hon'ble Gauhati High Court (supra) is also not applicable to the case on hand as it refers to sub-rule (4) of Rule 46A. In this regard we find that the learned CIT(A) has not suo moto directed the assessee in the case on hand to file any documents as per provisions of Rule 46A(4) of the Rules. Similarly, the case of Prabhavati S. Shah (supra) also does not further the assessee's case; for while discussing the powers of the CIT(A) under section 250(4) of the Act and under Rule 46A, the Hon'ble Court also holds that Rule 46A is intended to put fetters on the right of the appellant to produce any additional evidence, except in the circumstances as laid out therein. The violation of provisions of Rule 46A of the Rules is precisely an error the learned CIT(A) has committed suo moto, to give relief by acting on additional evidence furnished by the assessee before him without affording the AO due opportunity as required under Rule 46A(3) of the Rules.

5. In the result, Revenue's appeal for A.Y. 2011-12 is treated as allowed for statistical purposes.

Order pronounced in the open court on 31st January, 2017.

Sd/-	Sd/-
(Ram Lal Negi)	**(Jason P. Boaz)**
Judicial Member	**Accountant Member**

Mumbai, Dated: 31st January, 2017

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -17, Mumbai*
4. *The CIT - 8, Mumbai*
5. *The DR, "C" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.