

ito Vs. H.A. Containers

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Court : Mumbai

Decided On : Jan-03-2001

Reported in : (2004)87TTJ(Mumbai)729

Appeal No. : ITA No. 1762/Bom/1999 1 March, 2001 A.Y. 1995-96

Appellant : ito

Respondent : H.A. Containers

Judgement :

ORDER

Pradeep Parikh, A.M.

The department is in appeal before us against the order of the learned Commissioner (Appeals) dated 18-1-1999 for assessment year 1995-96. Following grounds have been raised in the appeal :

'1 On the facts and circumstances of the case and in law, the learned Commissioner (Appeals) erred in accepting details produced by the assessee in contravention of rule 46A when it was evident that assessee had not filed any evidence of income/expenditure along with the return or at assessment stage.

2. On the facts and circumstances of the case and in law, the learned Commissioner (Appeals) erred in deleting the addition of 10 per cent of expenses being Rs. 20,940 and addition of Rs. 1,23,892 being 20 per cent of hire charges

treated as income in the absence of evidence regarding expenses claimed.'2. The assessee-firm. is engaged in the business of transport contract rule This is the first return of the assessee and the income declared is Nil. Despite several notices, none appeared for the assessee in the assessment proceedings and enhance, assessment was completed under section 144 of the Income Tax Act, 1961 (the Act) determining the total income at Rs. 60,960. Assessee had declared container hire charges at Rs. 6,19,460 and the P&L; a/c showed total expenses amounting to Rs. 2,09,403. In absence of books of accounts and details of expenses claimed, assessee (sic-assessing officer) disallowed 20 per cent of the expenses and estimated 20 per cent of the hire charges more than what was declared. Thus, the total addition on account of these two items amounted of Rs. 1,65,772.3. Before the Commissioner (Appeals), it was submitted that due to non-receipt of assessing officer's notices, assessee could not produce vouchers, notices and other documentary evidence. The same were furnished for the first time before the Commissioner (Appeals). It was further submitted that even from the P&L; a/c attached with the return of income, it could be patently made out that the expenditure claimed under various heads were ostensibly incidental to the carrying on of the business of transportation. Commissioner (Appeals) observed that assessee's claim did not appear to be inordinate considering the hire charges returned but keeping in view the fact that assessee did not furnish any details, he restricted the disallowance to 10 per cent of the total expenses and deleted the addition of higher hire charges as according to him, there was no basis to estimate the same.4. The learned departmental Representative quoting elaborately from the order of the assessing officer, submitted that several opportunities were given to the assessee but despite that, assessee did not care to make itself available before the assessing officer and hence assessment under section 144 was justified. It was further submitted that the estimation made by the assessing officer was quite fair and reasonable and did not call for any interference by the Commissioner (Appeals). He then referred to the order of the Commissioner (Appeals) wherein the fact of submitting complete details for the first time before him was mentioned. This, it was submitted, was in clear violation of rule 46A and hence if the matter had to go for re-examination by the assessing officer he had no objection for that.5. The contention of the learned counsel was that addresses of

both the partners were on record of the department and hence if at one place, notice could not be served, it should have been served at the other address section. It was further submitted that even in the statement of income submitted along with the return of income new address was filed and hence, assessing officer could have issued the notice at the new address section. Further, even an intimation issued under section 143(1)(a) of the Act was sent to the new address but the notices which were subsequent to this intimation were sent at the old address section. Hence, it could not be said that assessee deliberately did not comply with the notice section. 6. As regards violation of rule 46A, our attention was drawn to sub-rule

(4) of rule 46A. In this connection, it was submitted that Commissioner (Appeals), having powers co-terminus with that of the assessing officer, could direct the production of any evidence for the advancement of any substantial cause. Reliance was placed on the decision of the Bombay High Court in the case of Smt. Prabhavati S. Shah v. CIT : [1998]231ITR1(Bom) .7. On merits, our attention was drawn to the P&L; a/c which was filed along with the return of income. Our attention was invited to certain major expenses like salary to the driver, petrol and diesel charges, interest charges etc. which, it was contended, left very meagre expenses which were debited to the P&L; a/c. In short, it was sought to be emphasised that mere looking at the P&L; a/c should have satisfied the assessing officer that the expenses claimed were legitimate and that there was no basis to enhance the hire charges. 8. We have considered the rival contentions and the material on record. The first issue which calls for our adjudication is whether there is violation of rule 46A or not. On a plain reading of rule 46A, as observed by the Bombay High Court in the case of Smt. Prabhavati S. Shah (supra), it is clear that the rule is intended to put fetters on the right of the assessee to produce before the appellate authority 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 circumstances set out therein. It does not deal with the powers of the Commissioner (Appeals) to make further enquiry or to direct the assessing 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 assessee would not affect the powers of the Commissioner (Appeals) to call for the production of any document or examination of any witness to enable him to dispose of the appeal. It is this provision of the rule which has been relied upon by the learned counsel. In other words, the contention of the learned counsel is that Commissioner (Appeals) can dispose of the appeal by directing the assessee to produce any evidence which is needed. In our opinion and according to our understanding of the judgment cited, this is not what is intended to be conveyed by the Hon'ble Bombay High Court. The first thing to be noted is that, at the outset, assessee is not entitled to produce any evidence before the Commissioner (Appeals) for the first time. However, if the situation as mentioned in clauses (a) to (d) of sub-rule

(1) exist, then Commissioner (Appeals) has the power to allow the assessee to admit the evidence for the first time. However, before admitting the evidence, he has to record the reasons in writing for its admission. Further, before, taking into account, the evidence so produced, it is obligatory on his part to give an opportunity to the assessing officer to examine the evidence. If the argument of the learned counsel is to be accepted based on sub-rule

(4) then sub-rule

(1) to

(3) shall be rendered otios. In other words, what the learned counsel wants us to accept is that sub-rule

(4) overrides the provisions of sub-rules

(1) to (3). In our opinion, this is not intended by the decision of the Bombay High Court. The intention of sub-rule

(4) is that the appellate authority should not bind itself by the fetters placed on him by the provision of sub-rule (4). In other words, though sub-rule

(1) does not entitle the assessee to produce additional evidence except in the four circumstances mentioned therein, Commissioner (Appeals) is expected to exercise his powers judiciously while considering the request for additional evidence. In the case of Smt. Prabhavati S. Shah (supra), the Appellate Assistant Commissioner did not permit the assessee to produce additional evidence in view of rule 46A, as according to him, the case of the assessee did not fall within the scope of any of the exceptions provided in sub-rule

(1) thereof. It was under these' circumstances, High Court held that the case of the assessee in that case fell under clause (c) of sub-rule

(1) because, assessee had no occasion to collect the evidence earlier. Thus, we reiterate that sub-rule

(4) is meant to empower the Commissioner (Appeals) assessee to exercise the same judiciously when the assessee is seeking an admission of additional evidence. Once, Commissioner (Appeals) exercises the power under sub-rule (4), he has to record the reasons for doing so as required under sub-rule

(2) and he has to give an opportunity to the assessing officer as required under sub-rule (3). Therefore, sub-rule

(4) does not, in anyway, overrule the provisions of sub-rules

(2) and

(3) of rule 46A. Accordingly, we hold that hence of the learned counsel on the decision cited supra is not well-placed and his arguments that Commissioner (Appeals) admitted additional evidence in conformity with the powers under sub-rule

(4) are rejected.⁹ Coming to the facts of the present case, it cannot be disputed that assessee did file the details of expenses which were not furnished before the assessing officer. However, on a careful perusal of the order of the Commissioner (Appeals), we find that Commissioner (Appeals) restricted the disallowance of expenses to 10 per cent on the basis of the additional evidence filed by the

assessee but merely on the scrutiny of P&L; a/c which was already filed with the return of income before the assessing officer. Hence, on the facts of this case, it cannot be said that assessee got relief on the basis of additional evidence filed. Admittedly, assessing officer also had the P&L; a/c before him which could have enabled him, had he applied his mind judiciously to make a proper assessment of the income. But not having done so, arbitrariness crept in the assessment which resulted in higher assessment. Therefore, on the facts of the case, we hold that the argument of the learned departmental Representative that the Commissioner (Appeals) decided the issue by admitting additional evidence in violation of rule 46A is rejected. We categorically hold that Commissioner (Appeals) did admit the additional evidence but while deciding the issue on merits, he had not taken the same into account and hence there is no violation of rule 46A of the rules. Accordingly, the first ground of the revenue is rejected.¹⁰ In the second ground, revenue has challenged the restriction of disallowance of expenses to 10 per cent and deletion of additional hire charges. On perusal of the P&L; a/c placed on record, we find that the restriction of disallowance to 10 per cent by the Commissioner (Appeals) is quite justified. Major expenses are those of salary to the driver amounting to Rs. 18,450. Petrol and diesel charges to the tune of Rs. 79,620 which is roughly at 13 per cent of the gross receipts, depreciation is of Rs. 3,15,575 and interest amount to Rs. 60,962. Rest of the expenses are quite meagre and cannot be said to be unreasonable. Hence, the restriction to 10 per cent is quite fair and reasonable and we do not see any reason to interfere. As regards hire charges, there is no basis at all to enhance it by 20 per cent and the Commissioner (Appeals) has rightly deleted the same. In fact, it may be clarified that in respect of hire charges, there was no additional evidence filed by the assessee before the Commissioner (Appeals). Hence, the determination of this part of the ground is not affected by deciding the first ground against the revenue. Accordingly, the second ground is also rejected.¹¹ In the result, the appeal of the department is dismissed.