*   IN THE HIGH COURT OF DELHI AT NEW DELHI

\+   INCOME TAX APPEAL NO.928/2011

Reserved on : November 04, 2011.

% **Date of Decision** :November 15, 2011.

COMMISSIONER OF INCOME TAX (CENTRAL)-I .... Appellant
Through: Mr. Sanjeev Rajpal, Advocate.

VERSUS

MANISH BUILD WELL PVT. LTD. …..Respondent
Through : Mr.Siddharth S. Dev, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in the Digest? Yes

R.V. EASWAR, J.:

This is an appeal filed by the Revenue against the order passed by the Income Tax Appellate Tribunal (Tribunal, for short), New Delhi in ITA No.3062/(Del)/2010 dated 22.12.2010. The following questions have been

raised in the appeal and the Revenue seeks admission and disposal as substantial questions of law under Section 260A of the Income tax Act 1961 :

> "1. Whether the assessing officer was not right in law in raising the adverse inference qua the cancellation charges amount to Rs.10,97,850/- retained by the respondent while adding it to its income for the relevant year which the respondent failed to explain to his satisfaction?
>
> 2. Whether the assessing officer wrongly held that the determination of income by the respondent on completion of its projects amounts to deferment of payment of taxes which is assessable annually under the existing tax law of the land?
>
> 3. Whether the addition of Rs.28,21,000/- made by the assessing officer to the income of the respondent for the relevant year based on percentage completion method was not correct as held by the ITAT?
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> 4. Whether the undisclosed transfer charge/s received by the respondent from sale of space to its buyers was not liable to be added to its income @ 3.6% during the relevant year?
>
> 5. Whether the amount of Rs.3,82,94,536/- recoverable by the respondent for payment of stamp duty including the electrification charges for spaces sold out was not liable to be added back to its income being revenue in nature as held by the ITAT?
>
> 6. Whether the assessing officer incorrectly invoked the provision of Sec.68 of the Act, in the case of the respondent qua to the advances received by it for sum of Rs.1,61,67,000/- from its buyers in the relevant year

> though it failed to lead positive evidence to rebut the statutory presumption under the law?
>
> 7. Whether the ITAT rightly upheld the action of the CIT (A) as correct in law while taking the evidence led by the respondent before him in to consideration without any opportunity in rebuttal to the assessing officer which the respondent did not furnish during the assessment proceeding?."

2. The assessee is a private limited company engaged in the business of development of real estate projects. On 16.3.2007 the Income Tax Department conducted a search on the assessee's premises and on the basis of the materials found during search an assessment order was passed under Section 153A read with Section 143(3) on 31.12.2008. The first addition made therein is the sum of Rs. 10,97,850/- as cancellation charges. It was found from the seized documents that the assessee charged 25% earnest money amounting to Rs.4,17,425/- on cancellation of the booking of a shop from Kailash Chand Khandelwal. On the basis of the seized document, the assessing officer asked the assessee to show cause why 25% of the earnest money should not be added in all cases where the bookings were cancelled. The assessee raised several objections to the proposal, the main objection

being that from a single instance found in the seized document an inference that in all such cases the assessee was forfeiting a part of the booking amount, which should be assessed as its income, cannot be drawn. It was also pointed out that the seized document did not relate to any transaction which Khandelwal had with the assessee. These objections were over-ruled by the assessing officer who held that the booking forms seized during the search revealed that they were all identical to one another and in each case it was mentioned that in the event of cancellation, cancellation charges would be levied. He found that the booking forms in respect of the connected firms and companies carrying on the same business as that of the assessee were identically worded. In this view of the matter, he added 25% of the total value of the space whose booking was cancelled during the relevant accounting year. The total cancellation amount was Rs.43,91,400/- of which 25%, namely Rs.10,97,850/- was added.

3. On appeal the CIT (Appeals) noted that no evidence was found during the search to suggest that any cancellation charges were received by the assessee outside the books of accounts. He, therefore, held that in the absence

of any adverse material brought on record, no addition could be made. He further noted that the transaction of Kailash Chand Khandewala was related to the case of M/s. K.K. Enterprises which was a separate assessee though belonging to the assessee's group and in that case 25% of the earnest money was forfeited for default in paying the instalments in spite of repeated demands. It was noted by the CIT (A) that it was a specific case of forfeiture and not cancellation of the booking. Thus on a factual analysis of the matter he came to the conclusion that the addition for cancellation charges was not justified.

4. On appeal by the Revenue to the Tribunal it was held in paragraph 17 of the order of the Tribunal that there was no infirmity in the order of the CIT (A) inasmuch as the addition was made by the assessing officer on the ground that the assessee ought to have charged cancellation charges from customers who cancelled their bookings and not on the basis of any material found during search. In this view of the matter, the decision of the CIT (A) was confirmed.

5. It will be seen from the above discussion that question No.1 sought to be raised by the Revenue as a substantial question of law is a pure question of fact. The income tax authorities as well as the Tribunal have decided the matter on the basis of the facts brought on record including the seized document. The CIT (A) has examined the facts as well as the seized document and took the decision that there was no basis for the addition. His decision was upheld by the Tribunal. In our opinion, no substantial question of law arises from the order of the Tribunal. We, therefore, decline to admit question No.1.

6. Questions Nos. 2 and 3 are connected. They assail the decision of the Tribunal rendered in paragraph 20 of its order. An addition of Rs.28,21,000/- was made by the assessing officer on the footing that the assessee was adopting the project completion method or the completed contract method, which was not proper and the profits of the business should be computed on the basis of the percentage completion method under which the profits of the development and construction business of the assessee get assessed over a period of years, keeping pace with the progress in the

construction/development of the project. The CIT (A) however held that the assessee had no reason to withhold the handing over of possession of the space to the purchaser in respect of a project which is completed and that wherever possession was not handed over to the purchaser, it was for the reason that the project was not completed. He further found that a buyer who has paid the entire sale consideration would immediately demand possession and the entire sale consideration could be received by the assessee only on completion of the project. On these facts it was noted by the CIT (A) that unless the buyer makes full payment the assessee could not hand over possession nor get the sale transaction registered. A further finding recorded by the CIT (A) was that the impugned project was completed only in the accounting period relevant to the assessment year 2008-09 and in support of this finding, he noted that a copy of the completion/occupancy certificate was placed on the record of the Assessing Officer. He further recorded a finding that after the issue of the occupancy certificate and till the date of the assessment order, possession of almost 75% of the developed area was handed over to the buyers who made full payment and the sale deeds were also executed. Thereafter, possession of 20% of the remaining area was

handed over to the buyers. The possession of the balance 5% of the developed area could not be handed over to the remaining buyers because they could not make full payment and take possession. On these findings the CIT (A) held that the allegation of the assessing officer that the assessee was adopting a method of accounting namely the project completion method, to suit its convenience to book income was baseless. A further finding recorded by the CIT (A) is that there was no manipulation in the books of accounts. So far as the method of accounting is concerned, the CIT (A) held that the project completion method is a well recognized and accepted method of accounting and was the only method suitable for any developer who has to deliver a completed product to the buyer. Ultimately the CIT (A) held as under:-

> "Thus on overall perusal of the assessment order it is seen that neither any defect has been pointed out by the assessing officer in the method of accounting followed by the appellant nor any finding has been given that true and fair profits cannot be deduced following the said method of accounting. No evidence was found during the course of search to show that the books of account are not properly maintained by the appellant. The main thrust of the assessing officer in making the addition is that the assessee is deferring the payment of taxes. But this allegation of the assessing officer cannot be accepted as the assessee is consistently following a method of

> accounting which is well recognized in development business and has been accepted by the assessing officer also in the other group cases. Thus the addition is hereby deleted."

7. The aforesaid finding of the CIT (A) was approved by the Tribunal with the observation that the department has accepted the assessee's method of accounting namely, the project completion method and therefore there was no justification for adopting the percentage completion method for one year on selective basis.

8. It is well settled that the project completion method is one of the recognized methods of accounting. In ***Commissioner Income-Tax And Another v. Hyundai Heavy Industries Co. Ltd. (*****2007) 291 ITR 482 (SC)** the Supreme Court held as follows:-

> "Lastly, there is a concept in accounts which is called the concept of contract accounts. Under that concept, two methods exist for ascertaining profit for contracts, namely, "completed contract method" and "percentage of completion method". To know the results of his operations, the contractor prepares what is called a contract account which is debited with various costs and which is credited with revenue associated with a particular contract. However, the rules of recognition of cost and

> revenue depend on the method of accounting. Two methods are prescribed in Accounting Standard No.7. They are "completed contract method" and "percentage of completion method".

This view was reiterated by the Supreme Court in ***Commissioner of Income-Tax v. Bilahari Investment P. Ltd. (2008) 299 ITR 1 (SC)*** with the following observations:

> "Recognition/identification of income under the 1961 Act is attainable by several methods of accounting. It may be noted that the same result could be attained by any one of the accounting methods. The completed contract method is one such method. Similarly, the percentage of completion method is another such method.
>
> Under the completed contract method, the revenue is not recognized until the contract is complete. Under the said method, costs are accumulated during the course of the contract. The profit and loss is established in the last accounting period and transferred to the profit and loss account. The said method determines results only when the contract is completed. This method leads to objective assessment of the results of the contract.
>
> On the other hand, the percentage of completion method tries to attain periodic recognition of income in order to reflect current performance. The amount of revenue recognized

> under this method is determined by reference to the stage of completion of the contract. The stage of completion can be looked at under this method by taking into consideration the proportion that costs incurred to date bears to the estimated total costs of contract.
>
> The above indicates the difference between the completed contract method and the percentage of completion method." (underlining ours)

9. After the above judgments of the Supreme Court it cannot be said that the project completion method followed by the assessee would result in deferment of the payment of the taxes which are to be assessed annually under the Income Tax Act. Accounting Standards 7 (AS7) issued by the Institute of Chartered Accountants of India also recognize the position that in the case of construction contracts, the assessee can follow either the project completion method or the percentage completion method. In view of the judgments of the Supreme Court (Supra), the finding of the CIT (A), upheld by the Tribunal, does not give rise to any substantial question of law. Further, the Tribunal has also found that there was no justification on the part of the assessing officer to adopt the percentage completion method for one year (the

year under appeal) on selective basis. This will distort the computation of the true profits and gains of the business. For these reasons, we are of the view that no substantial question of law arises. We, therefore, decline to admit question Nos. 2 and 3.

10. So far as the question No.4 is concerned, it is seen that before the Assessing Officer, in response to a query raised by him, the assessee submitted that merely on the basis of the seized material showing one transaction in respect of which the assessee had received transfer charges at 3.6% of the cost of the shop it should not be assumed that similar transfer charges had been received from all customers in whose cases such transfers were effected. The assessing officer did not accept the contention and proceeded to make an addition of Rs.2,19,701/- at 3.6% of Rs. 61,02,800/- which was the value of flats/space transferred during the relevant accounting year. The CIT (A) held on a perusal of the seized receipt that it mentioned the names of only the seller and the purchaser and the name of the assessee was not mentioned therein either as recipient or payer. He also found that the receipt did not mention any transfer charges being received by the assessee.

It was found to mention that allied charges were "to be paid" by the buyers from which the CIT (A) concluded that the receipt cannot be taken as evidence for actual payment of any transfer charges to the assessee. In this view of the matter and for lack of any evidence he deleted the addition. In the appeal filed by the Revenue to the Tribunal we do not find any ground taken to challenge the decision of the CIT (A) to delete the addition of Rs.2,19,701/-. The order of the Tribunal also does not show that any additional ground was filed by the Revenue which was admitted and adjudicated upon. In this view of the matter, question No.4 does not arise from the order of the Tribunal and we, therefore, decline to admit the same.

11. Question No.5 relates to the addition of Rs.3,82,94,536/- being stamp duty and electrification charges recoverable by the assessee. This issue is dealt with in paragraph 7 of the assessment order. The Assessing Officer stated that the seized documents revealed that the assessee was charging registration charges @ 7% and was showing the same as loans and advances recoverable from the customers. According to him this was a wrong method of accounting. A similar procedure was found to have been adopted by the

assessee in respect of electrification charges which were charged @ 15% and shown to be recoverable as loans and advances. According to the assessing officer these were not items of revenue expenditure since they related to the flats/space and formed part of the cost thereof and therefore they were not adjustable against the revenue of the assessee. According to the assessing officer these items of expenditure could be capitalized and added as part of the work in progress. On these facts he called upon the assessee to explain why the registration and electrification charges collected from customers cannot be added as revenue receipts. The assessee submitted that according to the system of accounting followed, the registration and electrification charges were not included either in the cost of land or in the work in progress or as cost of the project and they were rightly shown to be recoverable from the buyers. It was also explained that in case there is any surplus of the registration and electrification charges collected from the customers over the amounts paid to the State Government, the surplus would be shown as income in the year of receipt. The assessing officer rejected the explanation on the ground that revenue receipts and capital expenditure cannot be adjusted

against each other. He, therefore, added the amount of Rs.3,82,94,536/- as the assessee's income.

12. On appeal the CIT (A) recorded the following findings:-

a) The assessee declared the amount as advances recoverable in its balance sheet.

b) The electrification and registration charges did not represent capital expenditure because they were incurred in relation to the construction of the mall project which was stock-in-trade for the assessee as he is engaged in the business of developing and selling real estate.

c) The amount paid has not been claimed as expenses in the profit and loss account and was shown in the asset side of the balance sheet as recoverable from the customers.

d) When the registration and electrification charges are recovered from the buyer later they are duly recorded in the books of accounts. This is at the time of handing over possession or execution of sale deeds. Neither the payment of the registration and electrification charges nor the recovery

thereof from the buyers is shown in the profit and loss account and thus there is no revenue effect.

e) The finding of the AO that the capital expenditure has been adjusted against revenue receipts is not factually correct since no such adjustment has been made in the books of accounts.

13. On the above factual findings, the CIT (A) deleted the addition of Rs.3,82,94,536/-.

14. On appeal by the Revenue to the Tribunal it was held that the assessee could have adopted two ways of recording the transaction – either by crediting the amount received from the buyers in the cost of the project account and claiming the payment of the registration and electrification charges as an expense on the debit side or to make an entry in such a manner that the amount is shown as recoverable from the buyers, credit the account with recoveries made from the buyers and if there is any surplus of the recoveries over and above the amount shown as recoverable, offer the same for income tax. The Tribunal held that the assessee has adopted the second of these two methods and both the methods were acceptable. It was also found

by the Tribunal that when the assessee paid the registration and electrification charges they were not claimed as deduction in the profit and loss account. On these findings of fact the Tribunal agreed with the CIT(A) that the amount cannot be added.

15. The aforesaid discussion would show that the decision of the Tribunal is based on factual findings recorded by the CIT (A) with which it agreed. No material was brought before the Tribunal or before us to disturb the factual findings recorded by the aforesaid authorities. The decision of the Tribunal is not therefore open to the challenge as being perverse. Further since the Tribunal's decision is based on findings of fact recorded on the basis of the entries made in the books of accounts, no question of law can be said to arise from the order of the Tribunal on this point. Question No.5 is therefore not admitted.

16. Question Nos.6 and 7 can be taken together. The brief facts in this connection are that the Assessing Officer noticed that the assessee made huge investments in the purchase of land. He also noticed that a large amount of advances were shown to have been received by the assessee from its

customers. In order to verify the genuineness of the advances the assessee company was asked to furnish the relevant details. The assessee filed its reply submitting the relevant details from which the Assessing Officer noticed that in many of the cases there were a number of customers who had booked flats/spaces against which the sales were still to be shown. The Assessing Officer, therefore, called upon the assessee to submit confirmation letters from these customers. The assessee was not able to furnish such conformation letters in respect of many of the parties. Taking the view that the assessee did not discharge the burden placed on it under Section 68 of the Act, the assessing officer held that all the advances received by the assessee were unexplained cash credits. In all there were 28 customers who had advanced an aggregate amount of Rs. 1,61,67,600/-. This amount was added under Section 68.

17. On appeal it was pointed out by the assessee that the assessing officer had required him to furnish confirmations only from those customers who had advanced the monies in cash and in respect of cheque receipts, the AO had not required the assessee to furnish any confirmation. It was also pointed out

that in compliance with this requirement the assessee had furnished confirmations from those parties who advanced the monies in cash. The assessee also submitted a list to show that possession of the flats or space booked by the 19 customers out of the 28 customers had already been given to them and corresponding sales were also recorded. It would appear that before the CIT (A) the assessee submitted the confirmations from all the customers – those who paid monies in cash as well as those who paid monies by cheque. It was submitted that these confirmations cannot be treated as fresh evidence to attract Rule 46A of the Income Tax Rules, 1962 because the failure to furnish the confirmation letters from all the customers, including those who advanced monies by cheque, was not attributable to the assessee as the Assessing Officer had never required the assessee to furnish them. On these facts it was pleaded that the addition should be deleted.

18. The CIT (A) disposed of the ground in the following manner:-

> "7.2 I have considered the assessment order and submissions including the evidences placed on record by the assessee. On perusal of the questionnaire dated 21/10/08 placed in the paper book, it is seen that the assessing officer asked details of advance received against sale of property otherwise than through account payee cheques and giving complete details and confirmations

from such buyers/parties. The appellant submitted those and no addition has been made for the said advances received. Thus it is clear that the assessing officer never desired to submit any confirmation for the advances received against sale through account payee cheques and therefore correctly the same were not submitted by the appellant. However, the confirmations along with copies of ledger accounts of the said buyers in the books of the assessee were filed by the assessee during the course of appellate proceedings.

7.3 The same technically is fresh evidence to attract rule 46A as the assessing officer never called for the said confirmations. However, even if those are treated so yet the appellant was prevented from filing the said evidences which are relevant to the ground of appeal. I hereby admit the said evidence as the assessee has fulfilled the condition prescribed u/r 46A.

7.4 On perusal of the confirmations on record, it would be seen that the complete details like names, addresses, cheque number, bank details and PAN of the buyers have been duly mentioned therein. On perusal of the list submitted by the appellant, it would be seen that the sale has also been booked for 19 out of 28 buyers in the books of the appellant. Since these advances were received through account payee cheques and were duly recorded in the books of account as part of the sale proceeds and the buyers confirmed the transactions, it is clear that the appellant has discharged its onus regarding the said buyers. Thus the addition made u/s 68 stands deleted."

19. In the appeal filed before the Tribunal the Revenue contested the decision of the CIT (A) to delete the addition and in ground Nos. 6 and 7also

challenged the admission of fresh evidence by the CIT (A) allegedly in violation of Rule 46A. In ground No.7 the Revenue took a specific plea to the effect that a specific query in paragraph 27 (b) was raised by the AO in the notice issued under Section 142(1) on 21.10.2008 calling upon the assessee to furnish the confirmation letters. It was also pleaded in the aforesaid grounds that the additional evidence was admitted by the CIT (A) without affording any opportunity to the AO which was also in violation of Rule 46A.

20. The Tribunal dismissed the grounds taken by the Revenue in the following manner:-

> "21. Coming to the last issue about deletion of addition u/s 68 i.e. ground no.5, 6 & 7 we have gone through the entire material on records in this aspect and the notice issued by AO u/s 142(1). The requirement of confirmations was in respect of advances received in cash and not by account payee cheques. It is peculiar that AO has made no addition in respect of cash advances received by assessee and the same has been made in respect of advances received by account payee cheques. Be that as it may, revenue has questioned the violated Rule 46A. In our view, assessee addresses and permanent account numbers of the customers with books of accounts before AO, which is not disputed. The basis of addition i.e. non furnishing of confirmation has not been (sic) specifically insisted by AO and addition was made ignoring addresses and PAN nos. Assessee filed a specific ground of appeal before CIT(A) challenging the AO's finding for asking such confirmations. In the

> circumstances, assessee produced before CIT(A) the relevant confirmations form the same customers and their ledger accounts in their books of account claiming that 19 customers have been already sold the flats by the time of first appeal.
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> 22. In our view of these facts and circumstances it cannot be held that CIT(A) (sic) violated Rule 46A, he had acted in a judicious and proper manner and his order being based on proper appreciation of facts and record cannot be called violative of a procedural provision. CIT(A) is statutory first appellate authority and has independent power of calling for information and examination of evidences and poses conterminous power of assessment apart from appellate powers. In our view CIT(A)'s order is to be upheld. The matter should not be set aside on general ground as it amounts to causing the assessee injustice and giving the AO another innings. Besides it is not explicit that AO insisted for confirmations. In our view CIT(A) has decided the issue in just and proper manner the same is upheld."

21. In our opinion, substantial questions of law do arise out of the order of the Tribunal in respect of its decision regarding the addition of Rs.1,61,67,600/- made under Section 68. We, accordingly, re-frame the following substantial questions of law:-

> "1. Whether on the facts and in the circumstances of the case and on a proper interpretation of Rule 46A of the Income Tax Rules, 1962, the Tribunal was right in law in taking a decision on the merits of the addition made under Section 68 without affording an opportunity to the assessing officer of being heard as envisaged in sub-Rule (3) of Rule 46A?"

> 2. Whether on the facts and in the circumstances of the case the Tribunal was right in law in holding that since the CIT (A) possesses co-terminus powers over the assessment apart from appellate powers, there was no violation of Rule 46A committed by him ?"

22. As we have with the consent of the learned counsel, heard them on merits, we proceed to decide the aforesaid substantial questions of law. Since the CIT (A) himself refers to Rule 46A and has also admitted that the confirmation letters adduced by the assessee before him were technically fresh evidence, it is not possible to accept the plea of the learned counsel for the assessee that the CIT (A), in examining the confirmation letters, was exercising his independent powers of enquiry under sub-Section (4) of Section 250 of the Income tax Act. It is true that the CIT (A) as first appellate authority has conterminous powers over the sources of income constituting the subject matter of the assessment, except the power to tackle new sources of income not considered by the Assessing Officer, and can do what the Assessing Officer can do and can direct the Assessing Officer to do what he has failed to do, as held by the Supreme Court in the case of ***Commissioner of Income-Tax, U.P. v. Kanpur Coal Syndicate, (1964) 53 ITR 225,*** but in this case, the CIT (A) did not exercise this right. This power, which is

recognized in sub-Section (4) of section 250, has to be exercised by the CIT (A) and there should be material on record to show that he, while disposing of the appeal, had directed further enquiry and called for the confirmation letters from the assessee even in respect of receipt of monies from customers by way of cheques. Rule 46A is a provision in the Income Tax Rules, 1962 which is invoked, on the other hand, by the assessee who is in an appeal before the CIT (A). Once the assessee invokes Rule 46A and prays for admission of additional evidence before the CIT (A), then the procedure prescribed in the said rule has to be scrupulously followed. The fact that sub-Section (4) of Section 250 confers powers on the CIT (A) to conduct an enquiry as he thinks fit, while disposing of the appeal, cannot be relied upon to contend that the procedural requirements of Rule 46A need not be complied with. If such a plea of the assessee is accepted, it would reduce Rule 46A to a dead letter because it would then be open to every assessee to furnish additional evidence before the CIT (A) and thereafter contend that the evidence should be accepted and taken on record by the CIT (A) by virtue of his powers of enquiry under sub-Section (4) of Section 250. This would mean in turn that the requirement of recording reasons for admitting the additional evidence,

the requirement of examining whether the conditions for admitting the additional evidence are satisfied, the requirement that the assessing officer should be allowed a reasonable opportunity of examining the evidence etc. can be thrown to the winds, a position which is wholly unacceptable and may result in unacceptable and unjust consequences. The fundamental rule which is valid in all branches of law, including Income Tax Law, is that the assessee should adduce the entire evidence in his possession at the earliest point of time. This ensures full, fair and detailed enquiry and verification. A 7-Judge Bench of the Supreme Court in ***Keshav Mills Co. Ltd. v. Commissioner of Income-Tax, Bombay North, Ahmedabad (1965) 56 ITR SC 365*** had observed as under:-

> "Proceedings taken for the recovery of tax under the provisions of the Act are naturally intended to be over without unnecessary delay, and so, it is the duty of the parties, both the department and the assessee, to lead all their evidence at the stage when the matter is in charge of the Income-tax Officer."

23. It is for the aforesaid reason that Rule 46A starts in a negative manner by saying that an appellant before the CIT (A) shall not be entitled to produce

before him any evidence, whether oral or documentary, other than the evidence adduced by him before the assessing officer. After making such a general statement, which is in consonance with the principle stated in the above judgment, exceptions have been carved out that in certain circumstances it would be open to the CIT (A) to admit additional evidence. Therefore, additional evidence can be produced at the first appellate stage when conditions stipulate in the Rule 46A are satisfied and a finding is recorded. Rule 46 A reads:-

> **"Production of additional evidence before the** [**Deputy Commissioner (Appeals)**] [**and Commissioner (Appeals)**]**.**
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> **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
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> (*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.]

We are highlighting these aspects only to press home the point that the conditions prescribed in Rule 46A must be shown to exist before additional evidence is admitted and every procedural requirement mentioned in the Rule has to be strictly complied with so that the Rule is meaningfully exercised and not exercised in a routine or cursory manner. A distinction should be recognized and maintained between a case where the assessee invokes Rule 46A to adduce additional evidence before the CIT (A) and a case where the CIT (A), without being prompted by the assessee, while dealing with the appeal, considers it fit to cause or make a further enquiry by virtue of the powers vested in him under sub-Section (4) of Section 250. It is only when he exercises his statutory suo moto power under the above sub-section that the requirements of Rule 46A need not be followed. On the other hand, whenever the assessee who is in appeal before him invokes Rule 46A, it is incumbent upon the CIT (A) to comply with the requirements of the Rule strictly.

24. In the present case, the CIT (A) has observed that the additional evidence should be admitted because the assessee was prevented by adducing

them before the assessing officer. This observation takes care of clause (c) of sub-rule (1) of Rule 46A. The observation of the CIT (A) also takes care of sub-rule (2) under which he is required to record his reasons for admitting the additional evidence. Thus, the requirement of sub-rules (1) and (2) of Rule 46A have been complied with. However, sub-rule (3) which interdicts the CIT (A) from taking into account any evidence produced for the first time before him unless the Assessing Officer has had a reasonable opportunity of examining the evidence and rebut the same, has not been complied with. There is nothing in the order of the CIT (A) to show that the Assessing Officer was confronted with the confirmation letters received by the assessee from the customers who paid the amounts by cheques and asked for comments. Thus, the end result has been that additional evidence was admitted and accepted as genuine without the Assessing Officer furnishing his comments and without verification. Since this is an indispensable requirement, we are of the view that the Tribunal ought to have restored the matter to the CIT (A) with the direction to him to comply with sub-rule (3) of Rule 46A. In our opinion and with respect, the error committed by the Tribunal is that it proceeded to mix up the powers of the CIT (A) under sub-

section (4) of Section 250 with the powers vested in him under Rule 46A. The Tribunal seems to have overlooked sub-rule(4) of Rule 46A which itself takes note of the distinction between the powers conferred by the CIT (A) under the statute while disposing of the assessee's appeal and the powers conferred upon him under Rule 46A. The Tribunal erred in its interpretation of the provisions of Rule 46A vis-à-vis Section 250(4). Its view that since in any case the CIT (A), by virtue of his conterminous powers over the assessment order, was empowered to call for any document or make any further enquiry as he thinks fit, there was no violation of Rule 46A is erroneous. The Tribunal appears to have not appreciated the distinction between the two provisions. If the view of the Tribunal is accepted, it would make Rule 46A otiose and it would open up the possibility of the assessees' contending that any additional evidence sought to be introduced by them before the CIT (A) cannot be subjected to the conditions prescribed in Rule 46A because in any case the CIT (A) is vested with conterminous powers over the assessment orders or powers of independent enquiry under sub-section (4) of Section 250. That is a consequence which cannot at all be countenanced.

25. For the above reasons, we answer the substantial questions of law framed in paragraph 21 above, in favour of the Revenue and against the assessee. The issue relating to the addition of Rs. 1,61,67,600/- made under Section 68 of the Act is restored to the CIT (A) who shall comply with the requirements of Rule 46A and take a fresh decision on the merits of the addition in accordance with law.

26. The appeal filed by the Revenue is disposed of accordingly. No costs.

(R.V. EASWAR)
JUDGE

(SANJIV KHANNA)
JUDGE

NOVEMBER 15, 2011
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