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Case for amendment of rule 46A

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CBDT need to chew the cud on a fifty-year-old 1973 borne rule 46A of the Income-tax Rules,1962.

Sub-rule (1) to rule 46A in this regard state 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 :—
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> (*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
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> (*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.

The Kerala High Court in *C Unnikrishnan* v. *CIT* [1998] 233 ITR 485 also held that production of additional evidence is conditioned by certain situations. The assessee has to show that the Assessing Officer has refused to admit the evidence. The assessee also has to show alternatively that he was prevented by sufficient cause from producing the evidence before the Assessing Officer. Alternatively, further, the assessee also has to show its relevancy to the grounds of appeal sought to be urged. Lastly, the assessee also has to establish that the Assessing Officer did not afford him sufficient opportunity in regard thereto. Further this rule has remained static in the last 50 years.

Recently in a non-income tax case (State sales tax/GST subject) before the Calcutta High Court in Nipika Agarwal Proprietress of S.N. Trading Vs. Assistant Commissioner of State Tax, [MAT 15 of 2022, dated 9-6-2022] the assessee claimed relief from tax liability on the basis additional/further evidence of receipt of Certificate of Export subsequent to the order of refund passed in its case. More particularly the facts in this case were that the order of refund was passed on May 3, 2021. Subsequent thereto, the assessee received Certificate of Export of August 25, 2021. The Assistant Commissioner/revisional authority declined to consider the same forcing the assessee to knock the doors of the Court under article 226 of the Constitution. The Single Member bench of the Court held in the order dated February 9, 2022 passed in WPA 1745 of 2021 held that despite the assessee receiving further evidences with regard to the quantum of tax liability subsequent to the conclusion of the order of refund, there was no material irregularity in the order of refund warranting interference under Article 226 of the Constitution of India.

At the first place section 108 of the Central Goods and Services Act, 2017 (CGST Act), is against the rule of law that one can approach the Revisional Authority only if they have reason to believe that a subordinate officer has passed an order that is erroneous in so far as it is **prejudicial to the interest of revenue**. It reads prejudicial to interest of revenue whereas interest of assessee remains at a pinch. Though It also reads "...or has not taken into account certain material

facts, whether available at the time of issuance of the said order or not…". Thus the instant case was a fit case to put before the revisional authorities after the export certificate was received by the assessee.

The division bench of the Court taking cognizance of this matter in their order observed that no doubt, the revisional authority passed an order assessing the tax liability of the appellant/writ petitioner on May 3, 2021the document dated August 25, 2021 received subsequently did impact the tax liability of the appellant/writ petitioner. The appellant/writ petitioner is not at all at fault in not receiving the document dated August 25, 2021 that the appellant/writ petitioner seeks to place before the revisional authority. It is not a case that the appellant/writ petitioner was in possession of certain documents which the appellant/writ petitioner did not place before the revisional authority. Rather, it is a case where the appellant/writ petitioner received a document subsequent to the order of the revisional authority.

The High Court held that the tax authorities are to adjudicate upon the tax liability in accordance with law. The liability to taxation in respect of assessee should not escape assessee and likewise where the assessee was not in a position to show certain evidences which impacts the tax liability, reasonable opportunity should be afforded to such assessee to bring such evidences to the notice of the tax authorities. In such circumstances, we are of the view that another opportunity should be granted to the appellant/writ petitioner to place the document dated August 25, 2021 before the revisional authority. The appellant/writ petitioner is at liberty to approach the revisional authority within fortnight from date with regard to the order of assessment dated May 3, 2021. If so approached, the revisional authority is requested to reconsider its order passed on refund taking into account the document dated August 25, 2021 in accordance with law.

Rule 46A of the Income tax Rules however is silent on production of additional evidence pertaining to some material fact which could not be produced earlier at the time of assessment of tax liability for being received only subsequent to the date of assessment which is an achilles' heels. In the absence of such entry in rule 46A the assessee has no choice but to knock the doors of Tribunal or the High Court. The Calcutta High Court ruling in the above is a good pointer to the CBDT to bring an amendment in rule 46A to enable taxpayers to submit

further evidences before Commissioner (Appeals) where these are received subsequent to the date of assessment and hold material facts effecting the taxability. These could be in the form of a party confirmation, bank statement, updated tax statements, court orders etc.

In their Fifth Edition to the commentary on Income Tax Law by Chaturvedi and Shah's (page 7664), it has been pointed out that subsequent events otherwise may be taken note of by the appellate authority drawing reference from Supreme Court rulings in *Pasupuleti Venkateswarlu* v. *Motor ans General Traders* AIR 1975 SC 1409; *Hasmat Rai* v. *Raghunath Prasad* AIR 1981 SC 1711. The Commentary reads further that during the progress and passage of proceeding from the taxing authority to appellate authority or authorities if subsequent events occur, the appellate authority has to examine and evaluate the same and mould the relief accordingly. This is so because for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceedings provided the rules of fairness to both sides are scrupulously obeyed.

Thus the law as declared by the Hon'ble Supreme Court does support the case to bring an amendment in rule 46A to bring it in parity with the rule of law to include a right to the taxpayer to submit further/additional evidence which is received subsequent to the date of assessment for appropriate relief in accordance with the law. And we hope that CBDT being on the driving seat will do the amendment / justice which ought to have been done almost 50 years ago on such pronouncements from the High Courts and Apex Court as it is definitely not a blind alley.

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