

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B" NEW DELHI
BEFORE SHRI R.P. TOLANI AND SHRI A.N. PAHUJA

ITA No. 4491/Del/2010

Asstt. Yr: 2007-08

DCIT, Cir. 11(1),
New Delhi.

Vs. M/s E-4 Entertainment (P) Ltd.,
E-311, East of Kailash, New Delhi.
PAN/GIR No. AABCE6843P

(Appellant)

(Respondent)

Appellant by : Shri V.K. Saksena CIT (DR)

Respondent by : Shri Ravi Gupta Adv. &
Shri Prakash Yadav Adv.

ORDER

PER R.P. TOLANI, J.M :

This is Revenue's appeal against CIT(A)'s order dated 24-8-2010, relating to A.Y. 2007-08. Following grounds are raised:

- “1. The order of Ld. CIT(A) is wrong, perverse, illegal and against the provisions of law, liable to be set aside.
 2. On the facts and circumstances of the case and in law, the CIT(A) has erred in deleting the disallowance of Rs. 1,97,61,900/- u/s 68 of the Act on account of unexplained credits.
 3. On the facts and circumstances of the case and in law, the CIT(A) has erred in deleting the disallowance of Rs. 8,92,396/- out of operation and other expenses incurred by the assessee.
 4. The appellant craves leave to add, alter or amend any ground of appeal raised above at the time of hearing.”
2. Ground nos. 1 & 4 are general in nature and requires no adjudication.

3. Brief facts are: One of the directors of the assessee company Shri Sunil Bhatia contributed following share capital and share premium:

S.No.	Name of person	Share application money received
1.	Mr. Sunil Bhatia towards share capital	11955000
2.	Towards share capital by way of take over of Mr. Sunil Bhatia's proprietary concern	2261900
3.	Mr. Sunil Bhatia towards share premium	5895000
	Total	2,01,11,900

3.1. From the bank statement, it was revealed that Sunil Bhatia had subscribed an amount of Rs. 3,50,000/- through bank, whereas for the balance amount of Rs. 1,9761,000/- the assessee furnished only copies of foreign remittance vouchers. Besides, the assessee did not furnished any RBI approval for such foreign remittance. Though it was pleaded that Shri Sunil Bhatia had filed return of income for A.Y. 2007-08 declaring income of Rs. 2,67,967/-, on computer check it was found that application for PAN was lying with ITO Ward 23(1), New Delhi. AO, therefore, could not cross check the creditworthiness of Shri Sunil Bhatia in respect of vouchers of foreign remittance. Besides, AO questioned the propriety of charging of huge premium in the very first year of incorporation of company. Assessee could not give satisfactory reply in this behalf. In these facts and circumstances, AO held it to be assessee's own money, which was routed to its books of a/c in the garb of share premium. O Relied on following case laws:

- CIT Vs. Mussadilal Ram Bharose (1987) 165 ITR 14
- Sumati Dayal Vs. CIT 214 ITR 801
- Sreelekha Banerjee (1963) 49 ITR 112 (SC)

- A. Govindarajula Mudliar (1958) 34 ITR 807 (SC).

3.2. Since the assessee failed to explain impugned cash credits satisfactorily, it was added u/s 68 as unexplained cash credit.

3.3. Aggrieved, assessee preferred first appeal before the ld. CIT(Appeals). Assessee filed application for admission of additional evidence under Rule 46A of the I.T. Rules by making following submissions:

- “1. It is requested to accord kind permission for production of additional evidence as the assessee was not provided proper opportunity of being heard. Besides the evidences go to the very root of the matter and have a direct and substantial bearing in determining the correct income and tax liability of the assessee for the year under consideration.
2. Kind permission may kindly be accorded to adduce additional evidences which are compiled in the paper book Vol. II.
3. Since the Assessee was prevented by sufficient cause from production of above evidences before the Ld. AO.
4. It has been held in number of cases including in Keshaw Mills Co. Ltd. Vs. CIT (1965) 56 ITR 365 and now recognized as Rule 46A that the appellate authority has a right to admit additional evidence in the interest of justice.
5. The enclosed paper books are in duplicate with a request to kindly allow an opportunity to the ld. AO to rebut the same in terms of Rule 46A(3).

3.4. On this application the ld. CIT(Appeals) called for AO's remand report. The AO in his remand report strongly object to the admission of additional evidenced by following observations:

“The additional ground of appeal can be admitted only in the situation provided under Rule 46A of the IT Rules which are as below:

- i) Where the Assessing Officer has refused to admit evidence which ought to have been admitted.
- ii) Where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer.
- iii) Where the appellant was prevented by sufficient cause from producing before the Assessing Officer any evidence which is relevant to any ground of appeal.
- iv) 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.

However, the case of the assessee does not fall in any of the conditions laid down in Rule 46A of the IT Rules as reproduced above. Hence, the additional grounds of appeal submitted by the assessee should not be admitted, since it is amply clear from perusal of the assessment proceedings before the AO.

However, factual report in respect of the submissions made before the Id. CIT(Appeals) is as under:

The company was incorporated on 01-07-2006, hence, the year under consideration is the first year of the assessee company. During the year under consideration, the assessee company was engaged in the business of conducting exhibition in New Delhi at DND Flyway compound.

During the course of assessment proceedings, the assessee filed copy of balance sheet, profit & loss

account and the relevant schedules and annexure. From the balance sheet filed, it is seen that the assessee has raised share capital to the tune of Rs. 1,42,66,900/- and share premium of s. 58,95,000/-. Accordingly, the assessee was asked to furnish the details of the persons/entities contributing to share capital and share premium along with documentary evidence. The assessee company vide letter dated 22-10-2009 has furnished the details of the same. From the details furnished, it is seen that Sh. Sunil Bhatia, one of the directors of the assessee company has contributed to the share capital and share premium as per following details:

Sl. No.	Particulars	Amount
1.	Towards share capital account	1,19,55,000
2.	Towards share capital by way of allotment of shares on take over of proprietor concern E-4 Entertainment	22,61,900
3.	Towards share premium	<u>58,95,000</u>
		<u>2,01,11,900</u>

The assessee has not furnished any RBI approval for the said foreign remittance. A further perusal of the I.T. details of Sh. Sunil Bhatia reveals that the assessee has filed its return for A.Y. 2007-08 declaring income of Rs. 2,67,967/-. On being inquired from the computer, it was gathered that the PAN is presently lying with ITO Ward 23(1), New Delhi. Hence, the creditworthiness of the subscriber is doubtful. Further, also the assessee has not furnished any basis of charging of such huge share premium in the very first year of the company. Hence, it is clear that the amount of Rs. 1,97,61,900/- is nothing but the assessee company's own money which has been made routed to the books of account in the garb of share capital and share premium. The assessee, therefore, could prove the creditworthiness of the subscriber.

In view of the facts as narrated above and that the assessee was provided sufficient opportunity during the assessment proceedings wherein he could not substantiate the results shown, the remand report is submitted for kind

consideration. The assessment was made after giving ample opportunity and should be sustained.”

3.5. Ld. CIT(Appeals), however, admitted the additional evidence by following observations:

“On 9-02-10 itself the appellant also filed an application for admission of additional evidence under Rule 46A of the IT Rules, whereby the AR filed copy of Bank A/c, passport and professional license issued to the firm in Dubai where Shri Sunil Bhatia, the Director of the appellant company is a partner. As the addition of income of Rs. 1,97,61,900/- was made by the AO in the case u/s 68 of the IT Act by holding that the source of this investment in name of Shri Sunil Bhatia is unexplained therefore a remand report from AO was called for. In response thereto the AO has submitted his report which is reiteration of the earlier observation in the assessment order & that as Shri Bhatia had been given sufficient opportunity during the assessments proceedings therefore, the additional evidence may not be admitted U/R 46A. In counter reply to the remand report the appellant again submitted that as Sh. Sunil Bhatia is a non-resident based in Dubai therefore it took some time to get the above documents and that in meantime the AO had passed the assessment order on 10-11-09, without providing sufficient opportunity. That as the additional evidenced pertains to creditworthiness of Shri Sunil Bhatia therefore required to be admitted.

On a consideration of reply of the appellant the objection of the AO on non-admission of additional evidence are not found acceptable as the additional evidence I form of Bank A/c, Passport and the professional license of the firm in Dubai in which Shri Sunil Bhatia is a partner are crucial to the issue in Ground nos. 1 & 2 of the present appeal. Hence these are admitted in order to impart substantive justice.

3.6. Thereafter, ld. CIT(Appeals) deleted the addition by following observations:

“I have considered the written submission of the appellant, gone through the case laws relied upon and also the additional evidence filed, the remand report & counter reply thereto. After considering the entire material, it is seen that the assessee submitted complete details of the share holders giving full name, addresses, details of payment made by cheque.

It is seen from the assessment order that the AO has made an addition of income for Rs. 1,97,61,900/- on account of unexplained cash credit in name of Shri Sunil Bhatia, the Director of the appellant company. The appellant has contended that out of the above amount an amount of Rs. 22,61,900/- is not a cash credit but relates to capital of Shri Sunil Bhatia as on 1st March 2007 on account of M/s E-4 Entertainment a proprietorship concern of Shri Sunil Bhatia being taken over as a running business by the appellant company, in terms of agreement between the two concerns on 01-03-07. Copy of the said agreement has been filed on record. It is mentioned in clause 4 of the agreement that the appellant company shall issue shares of Rs. 10% each to the proprietor of E-4 Entertainment, Shri Sunil Bhatia against his credit balance in his capital account as at 28th Feb. 2007. Copy of capital account of Shri Sunil Bhatia as on 28-02-07 in M/s E-4 Entertainment, reflecting an amount of Rs. 22,61,900/- has also been filed. It is for this reason that in the share application money ledger A/c of Shri Sunil Bhatia in the appellant company, a credit of Rs. 22,61,900/- has been made dated 01-03-2007 which has then also been credited in his share capital account. Thus from the above, it is observed that Rs. 22,61,900/- is not a cash credit in terms of S. 68, but relates to capital of Shri Sunil Bhatia in his now merged proprietary ship concern M/s E-4 Entertainment.

As regards the balance amount of Rs. 1,75,00,000/- in name of Shri Sunil Bhatia the appellant has filed his confirmation letter as well as PAN No. and assessment details. In the additional evidence the appellant submitted that the above amount has been received from Shri Sunil Bhatia as foreign remittance and in support thereto the copy of current Bank A/c no. 90010200003863 in Bank of Baroda, Dubai Main

Branch in case of E-4, Entertainment P.O. Box 48654, Dubai, United Arab Emirates was also filed for the relevant period. Copy of Passport of Shri Sunil Bhatia issued from Dubai on 09-08-2005 (Date of expiry 08-08-05) has been submitted as also the professional license dated 07-09-02 issued by the Department of Economic Development Government of Dubai in name of E-4 Entertainment. Shri Sunil Bhatia is a 50% share holder in E-4 Entertainment as per license. The licensed activities are exhibition, organizing parties & private functions, entertainment service, conferences and seminar organizing. The appellant also provided copy of current account of Shri Sunil Bhatia in books of M/s E-4 Entertainment(Dubai), from which is observed that a total amount of 14,61,175/- (DHS) has been debited, which has consequently been remitted by Shri Sunil Bhatia as share capital to E-4 Entertainment P. Ltd., for Rs. 1,75,00,000/- in Bank A/c No. 0963020000779 in Bank of Baroda, East of Kailash, New Delhi.”

4. Ld. DR at the out set vehemently argues that:
- (i) order of Id. CIT(Appeals) is illegal and perverse inasmuch as the objections raised by AO were purposely not complied by assessee to avoid investigation about huge premium charged by assessee which is a newly incorporated company.
 - (ii) Additional evidence has been admitted by Id. CIT(Appeals) only on the basis that the evidence is crucial to decide ground nos. 1 & 2, without appreciating that no ground was raised about sufficient opportunity before AO.
 - (iii) Rule 46A prescribes statutory conditions to be followed before admitting any additional evidence, which had not been complied.
 - (iv) Assessee has not whispered even a word as to how he was prevented by sufficient cause in producing the evidence before AO and Id. CIT(Appeals) glossed over this aspect which has rendered his order into perversity.

- (v) There is no allegation in appeal memo that sufficient opportunity was not given to assessee before AO to adduce evidence. Without compliance with this or other mandatory requirements, Id. CIT(Appeals) cannot accept it and award relief. Reliance is placed on Hon'ble Delhi High court judgment dated 15-11-2011 in the case of CIT Vs. Manish Build Well Pvt. Ltd. (ITA no. 928/2011).
- (vi) Further reliance is placed on Hon'ble Delhi High Court judgment in the case of Nova Promoters.
- (vii) Ld. CIT(Appeals)'s order giving relief without considering the aspect of huge share premium which is tax free in the hands of assessee, is illegal.

4.1. The assessee did not raise any ground in first appeal about insufficiency of hearing, which is evident from grounds of appeal taken by it before Id. CIT(Appeals), which are as under:

- “1. That the Ld. Assessing Officer has erred on facts and in law in making an addition of Rs. 1,97,61,900 by invoking the provisions of section 68 of the Income tax Act, 1961.
2. That the provisions of section 68 are not at all applicable in the case of the appellant.
3. That the Ld. Assessing Officer has erred on facts and in law in making a disallowance of Rs. 8,92,396 out of the operation and other expenses incurred by the appellant.
4. That the Ld. Assessing Officer has erred on facts and in law in not allowing the benefit of unabsorbed depreciation of Rs. 1,01,53,858/-.
5. That the impugned assessment order is arbitrary, illegal, bad in law and in violation of rudimentary principles of contemporary jurisprudence

6. That the appellant craves leave to add/ alter any/ all grounds of appeal before or at the time of hearing of the appeal.”

4.2. A perusal of grounds of appeal will reveal that assessee had no where raised a ground that the assessment was completed in a hurry or that sufficient opportunity of hearing was not given by AO. Having not raised any ground of appeal before Id. CIT(Appeals) it was neither justified for the assessee to make a false statement that assessee was not given proper opportunity by AO and at the same time, Id. CIT(Appeals) was not justified in admitting the additional evidence without appreciating that there was no compliance to Rule 46A. The relevant evidence was not filed before AO to avoid first hand investigations for the reasons best known to the assessee.

4.3. So called additional evidence filed by the assessee are copies of foreign records and bank statements which are neither notarized nor verified by any diplomatic agency. Ld. CIT(Appeals) without giving adequate reasons for admission of additional evidence, fully relied on all these inadmissible copies of documents. Thus, the entire relief has been given on extraneous evidence which was neither before AO nor certified properly. It is, therefore, pleaded that Id. CIT(Appeals) miscarried himself in admitting the additional evidence and giving full relief by summarily relying on all these documents without verifying their genuineness and veracity.

4.4. Ld. CIT(Appeals) has failed to rebut AO's findings and reasons as to why a freshly launched company commanded such heavy premium on its shares. In the circumstance, the burden placed on assessee to prove these transactions is heavy, which has not been discharged.

4.5. Apropos other ground about disallowance out of operation and other expenses incurred by the assessee, the necessary evidence was not filed before AO, which was disallowed by following observations:

“5.1. As it is clear from the assessee's reply itself that the company started its operation in the month of November, 2006, but has worked only for three days in the month of March, 2006, hence, the expenses claimed under the head Operation & Other Expenses to the tune of Rs. 35,69,585/- are not allowed to the assessee in this year only. Hence, keeping in view the quantum of work done in three days for the year under consideration, 25% of the expenses have been disallowed and added to the total income of the assessee.”

4.6. Ld. CIT(DR) pleads that CIT(Appeals) has allowed the expenditure only on the plea that the veracity of expenses and another evidence/ material was not questioned on the record by the AO. In case of claim of expenditure, the burden was on the assessee to prove the same which cannot be allowed on assumptions. Besides, Ld. CIT(Appeals) has not given any sound reasoning about description or nature of exhibition site, therefore the relief has been given without ascribing reasons and by sweeping findings. It is pleaded that the order of Ld. CIT(Appeals), which is illegal, may be reversed.

4.7. Reliance is placed by Ld. DR on Hon'ble Delhi High Court judgment in the case of CIT Vs. Oasis Hospitality 333 ITR 119 also.

5. Learned counsel for the assessee, on the other hand, relied on the order of Id. CIT(Appeals) and contends that the additions have been rightly deleted. There is no prejudice caused to the department inasmuch as the additional evidence filed by the assessee was duly forwarded to AO who has not passed any objective adverse comments on merit. Ld. counsel contends that Shri Sunil Bhatia is an assessee with the income-tax department; Shri Bhatia was a non-resident India (NRI), resident of Dubai. The assessee company is engaged in the business of conducting exhibitions at DND Flyway compound and other entertainment activities. The company was formed by taking over Mr. Bhatia's proprietorship concern. The question of addition, if any, arises only in the case of Shri Sunil Bhatia and not the assessee company. Shri Sunil Bhatia being an identified individual, having PAN no. and known sources of investment, the assessee had discharged its burden cast on it in terms of sec. 68. Therefore, Id. CIT(Appeals) has deleted the addition on just and proper considerations. Reliance is placed on Hon'ble Supreme Court judgments in the cases of Lovely Exports 216 ITR 195; and Oasis Hospitality 333 ITR 119.

6. We have heard rival contentions and gone through the relevant material available on record.

6.1. Coming to the additional evidence, we have perused form no. 35 i.e. memo of appeal filed by the assessee before Id. CIT(Appeals). In the grounds raised, there is neither any ground nor whisper about not providing sufficient opportunity by AO while framing the assessment. It is further evidenced from the fact that the assessment proceedings commenced on 26-9-2008 and assessment order has been passed on 10-11-2009 indicating that

sufficient time was given to assessee for compliance. Therefore, there is no justification in the averment of assessee before Id. CIT(Appeals) that sufficient opportunity was not given by AO, therefore additional evidence should be admitted. We are constrained to observe that Id. CIT(Appeals) has admitted the additional evidence in a perfunctory manner without appreciating the role of rule 46A and its requirements and verifying assessee's averments.

6.2. Ld. CIT(Appeals) has failed to give any satisfactory reasons for exercising his powers u/s 46A. Hon'ble Delhi High Court in the case of Manish Build Well Pvt. Ltd. (supra) has emphasized the mandatory characteristics of this rule and the scruples to be applied while entertaining such additional evidence. We may further add that the documents admitted by Id. CIT(Appeals) are foreign documents and are not verified properly. Besides, the AO's objection about charging huge premium remains unanswered. In our view, Id. CIT(Appeals) ought not have admitted this additional evidence inasmuch as there was no ground raised by the assessee about extension of time or opportunity.

6.3. CIT(Appeals) except relying on such evidence has not recorded any cogent reasons for giving outright relief. In view thereof we are inclined to set aside the matter back to the file of Id. CIT(Appeals) to decide the same afresh after calling the assessment record for his perusal and decide the contention of the assessee on the basis of material available on record. In view thereof ground no. 2 of the revenue is allowed for statistical purposes.

6.4. Apropos ground no. 3 i.e. operational expenses, in our view the ld. CIT(Appeals) has not given proper reasons for deleting the addition. The interest of justice would be met if the ld. CIT(Appeals) decides the same on merits after perusing the original assessment record as directed above. In view thereof, this ground of appeal taken by the revenue is also allowed for statistical purposes.

7. In the result, revenue's appeal is allowed for statistical purposes as indicated above.

Order pronounced in open court on 11-05-2012.

Sd/-
(A.N. PAHUJA)
ACCOUNTANT MEMBER
Dated: 11-05-2012.

Sd/-
(R.P. TOLANI)
JUDICIAL MEMBER

MP

Copy to :

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR

