आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "B", JAIPUR

श्री संदीप गोसाईं, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 375/JP/2016
निर्धारण वर्ष/Assessment Year :2008-09

Shri Sanjay Matai, Prop.-M/s Metro Wines, Madar Gate, Ajmer.	बनाम Vs.	I.T.O., Ward-1(2), Ajmer.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ALKPM 9533 D		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Mahendra Gargieya (Adv.)
राजस्व की ओर से/ Revenue by : Smt. Monisha Choudhary (JCIT)

सुनवाई की तारीख/ Date of Hearing : 15/06/2021
उदघोषणा की तारीख/ Date of Pronouncement : 08/09/2021

आदेश/ ORDER

PER: SANDEEP GOSAIN, J.M.

This is an appeal filed by the assessee against the order of ld. CIT(A), Ajmer dated 25/01/2016 for the A.Y. 2008-09 in the matter of order passed U/s 143(3) of the Income Tax Act, 1961 (in short, the Act), wherein following grounds have been taken.

"1. Whereas on the facts and in the circumstances of the case, the Learned CIT(A), Ajmer has grossly erred in not accepting the application under Rule 46-A submitted during the course of appeal proceedings stating there in that though complete details & evidence were filed before the Assessing Officer during the course of assessment proceedings which were not considered prospectively. It is therefore respectfully requested before your honour that application under Rule 46A of the I.T.Act,1961 of the appellant deserves to be accepted.

2. *Whereas on the facts and in the circumstances of the case, the Learned CIT(A) Ajmer ought to have accepted the appellant's application Under Rule 46A of the I.T.Rules 1962 as the Assessing Officer had failed to reconcile /consider the documents submitted before him during the course of assessment proceedings.*

3. *That the Learned CIT (A), Ajmer, erred on facts and in law in confirming the addition of Rs.500000/- which was made by the Assessing Officer as unexplained investment in the building, whereas the appellant has paid a sum of Rs.450000/- jointly with his mother for purchase of property at Darji Mohalla, Lakhan kotri, Ajmer and further incurred a sum of Rs.50000/- as its stamp & registration charges. Thus the Learned CIT(A) , Ajmer has wrongly confirmed the addition of Rs.500000/- which may kindly be deleted.*

4. *That the Learned CIT(A), Ajmer erred on facts and in law in confirming the addition of Rs.514400/- which was treated by the AO being unexplained credit in the name of Shri Ashok Matai, whereas said loan was given by Shri Ashok Matai at the time of starting the business of M/s Metro Filling Station. Thus an addition so confirmed by the CIT(A), Ajmer deserves to be deleted.*

5. *That the Learned CIT(A), Ajmer erred on facts and in law in confirming an addition of Rs.75000/- made by the ITO on account of unexplained credit U/s 68 of the I.T.Act,1961, whereas said sum of Rs.75000/- related to Shri Kamal Matai & shown in the balance sheet under head "current a/c balance . Thus addition of Rs.75000/- so confined by the CIT(A), deserves to be deleted.*

6. *That the Learned CIT(A), Ajmer erred on facts and in law in confirming an addition of Rs.221000/- made by the ITO being cash deposit in firm's Bank a/c as unexplained credit, whereas the appellant is proprietor for both the firm M/s Metro Wines & Metro Filing Station & cash sales of Metro Wines have been deposited in the Metro Wine UCO Bank A/c. Keeping these facts in view, an addition of Rs.221000/- so confirmed by the Ld. CIT(A) deserves to be deleted.*

7. *That the Learned CIT(A), Ajmer erred on facts and in law in confirming the following various disallowances made by the ITO & added in the total income of the appellant.*

a. Disallowed out of Conveyance Exp.	*13700.00*	*(8500 + 5200)*
b. Disallowed out of Depreciation	*3707.00*	
c. Disallowed out of Telephone Exp.	*8990.00*	
d. Disallowed out of Shop Exp.	*5300.00*	

The above disallowed expenses are totally wrong as the same have been incurred exclusively for business purpose. Thus disallowed expenses so confirmed by the Learned CIT(A), Ajmer deserves to be deleted.

8) That the Learned CIT(A), Ajmer erred on facts and in law in confirming the addition made at Rs.95400/- on account of rent, whereas the appellant has paid rent for Bubani Shop at Rs.1200/- P.M. & Rs.6750/- for Ajmer Shop. Thus addition so made by the ITO & confirmed by CIT(A) on account of rent paid at Rs.95400/- deserves to be deleted."

2. The hearing of the appeal was concluded through video conference in view of the prevailing situation of Covid-19 Pandemic.

3. At the very outset, we noticed that grounds No. 1 and 2 of the appeal raised by the assessee are interrelated and interconnected and relates to challenging the order of the ld. CIT(A) in rejecting the application moved by the assessee under Rule 46A of the Income Tax Rules, 1962 for leading the additional evidence. Since both these grounds relates to the same issue, therefore, we consider it fit to decide both the grounds by the present consolidated order.

4. The ld. AR appearing on behalf of the assessee has relied upon the written submissions in order to support his contention for raising ground Nos. 1 and 2 before us and the same is reproduced below:

"1. At the outset it is submitted that the assessee filed additional evidences during the first appellate proceedings itself and notably, the then ld. CIT (A) even called for remand report from AO vide letter no. CIT (A)/AJM/2011-12/901 dated 05.09.2011, pursuant thereto the AO granted opportunity to the assessee and in response, very pertinently, the AIR attended and filed relevant documents along with Books of accounts. This fact is even admitted by the then AO (PB 74-79).

2. During the remand proceedings (first round) the AO extensively examined the Books of Accounts and the records w.r.t. the addition & disallowances and observed as under:

S.No.	Addition / Disallowance	AO's Comments
1.	Trading Addition of Rs.34,183/-.	*"Since the apparent error rectified u/s 154 as appealed for, hence no more comments needed, the assessee has also not pressed upon the issue."* (Deleted) (PB 75)
2.	Addition of Rs.5,00,000/- as unexplained investment u/s 69.	*"The copy of registry of property dated 17.11.2017 at Darji Mohalla, Lakhan Kotari Ajmer along with bank O/D a/c no/ 06089 of M/s Metro Filling Station copy of statement has also been filed as per paper book page no. 9 to 21. Thus the investment has been found recorded and is verifiable from the records. It is requested to look into the circumstances by Ld. CIT(A) before considering the facts.* (PB 76)
3.	Loan of Rs.5,14,400/- as unexplained credit u/s 68	*"On going through paper book pages no. 32 to 40 it is true that Shri Sanjay Matai* (Assessee) *& Ashok Matai are co-owners of this land at Lamana. It is also true that Shri Ashok Matai has shown a sum of Rs.4,40,000/- a loan to Sanjay as per details filed in return of income vide PAN ADEPM6643E. The interest as credited in account have also been shown as income by Shri Sanjay Matai.* (Typing mistake should be Ashok Matai) Only *since the business of M/s Metro Filling Station proprietor Sanjay Matai started during' the year hence the personal loan was brought to books of firm & thus in earlier period was not verifiable. The Ld. CIT(A) requested to look into the merits of the facts before deciding the issue" (PB* 77)
4.	Treating creditors of Rs.75,000/- as unexplained credit u/s 68.	*"The assessee has also filed copy of A/c & other details as per paper book page no. 41 to 42. Thus, the facts of the assessee are verifiable & may not be denied for, still requested to look into the merits of facts.* (PB 78)

5.	Addition of Rs.2,21,000/- for cash deposit.	*"The assessee intends to justify his stand by stating that AO should himself examine the records whereas the onus is on the assessee. However, it is true that the details as per paper book page no. 44 to 56 justifies the statement of assessee but were since not explained earlier to addition made."* (PB 79)
6.	Addition of Rs.95,400/- for Rent paid (since no verification filed)	*"Now vide paper book page no. 58 to 59 & 60 to 71 the assessee has filed the rent details, the ld. CIT(A) requested to take decision accordingly.* (PB 79)

From a bare perusal of the above chart, which is based on the remand report dated 22.10.2011 (PB 74-79) it is thus, clear that the AO himself has accepted after due verification of the books and other records stating that the impugned additions/disallowances made in the impugned assessment, are not justified (though indirectly and in guarded language). Thereafter, the ld. CIT(A) after examining the record granted relief in the first appellate proceedings.

3.1 In the set aside appellate proceedings however, the ld. CIT(A) has now taken a complete U-turn and wrongly denied the admission and consideration of the additional evidences submitted earlier as also again repeated before him.

3.2 As a matter of fact, the said ITAT order was decided in absence of the Respondent-assessee and therefore the facts and the legal position could not be brought in the notice of the Hon'ble members of the ITAT, who decided the above appeal.

4. Case referred by the Deptt. is distinguishable: 4.1 It is respectfully submitted that the reliance placed by the, while restoring the issue to the file of the ld. CIT(A), in the case of CIT vs. Manish Buildwell 245 CTR 397 (Del.) is completely misplaced in as much as, the Hon'ble court has only relied upon Rule-463) which requires the Ld. CIT(A) to provide an opportunity of examining and rebutting the additional evidence by the ld. CIT(A). In that case the Ld. CIT(A) though admitted confirmatory letters produced by the assessee but the same were not confronted to the AO / no opportunity was given to him to furnish his comments. In that context, the matter was restored to the file of the Ld. CIT(A) to comply with the requirement of Rule-46A. Whereas in the present case the earlier CIT(A) specifically confronted all the additional evidences produced before him by the assessee vide letter dated 02.08.2011 reproduced at Pg-2 of Ld. CIT(A) order and a

remand report of the AO dated 22.10.2011 (PB 74-79) was obtained from him. Interestingly on examination of these evidences the AO rather supported the case of the assessee on merits.

5. *Grounds under rule 46A did exist: it is submitted that Ld. CIT(A) completely ignored that there did exist grounds (as submitted below), based on which, these additional evidences must have been admitted (therefore were rightly admitted by his Ld. predecessor). The relevant clauses of Rule 46A, which are applicable on the facts of the present case, are reproduced here under:*

   (a) Where the AO has refused to admit evidence which outght to have been admitted.

   (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.

5.1 *No reasonable opportunity given by the AO: 5.1.1 A perusal of the assessment order shall reveal that the AO provided very short time to the assessee to file the required documents or submit its explanations. It is not a case where sufficient and reasonable opportunities were granted to the assessee to defend the case in accordance with the principle of natural justice as would appear from the following table.*

S. No.	Date of the notice Issued	Date when assessee received	Nature of Notices	Date of hearing fixed	Remark
1.	02.07.2010	03.07.2010	Notice u/s 143(2) issued.	04.08.2010	A/R of the assessee appeared time to time and filed details as required.
2.	07.12.2010			10.12.2010	AIR attended filed required details e was asked to file details as regard the building account.
3.	24.12.2010		Show cause notice issued	28.12.2010	Only 4 days' time was granted by the AO for filing voluminous details.

5.	29.12.2010				-The AO passed the order.
	30.09.2008				ROI Filed

5.1.2 The AO did not appreciate that the assessee at his best supplied the documents as required and filed its explanation as per queries raised by the AO However, the AO did not comply with the obligations as provided under the law.

5.1.3 It is pertinent to note that the return of income in this case was filed on 30.09.2008 whereas, the AO himself has taken around two years in commencing the process of hearing (the assessment proceeding). The first notice u/s 142(1) along with a letter 02.07.2010, through which the assessee was asked for the first time to submit various and voluminous details and clarification were sought. The case was entirely proceeded within Dec 2010 only (pls. ref. remand report CIT(A) pg.5).

5.1.4 From the above facts it is evident that firstly, it was not a case of granting repeated opportunities in as much as the AO issued show cause notice dated 24.12.2010, in which he asked the assessee voluminous details, after giving only four days' time and finally on 29.12.2010, he completed the assessment very hurriedly. Such a haste on the part of the AO was beyond understanding. It might be because the assessment was getting time barred on 31.12.2010. Thus, on one hand the AO was sleeping over the papers for a long period of around two years after filling of the ROI but then he woke up at the fag end when limitation was going to expire. And after giving a few opportunities that too of a smaller period, he alleged that umpteen number of opportunities were granted the Ld. CIT(A) also closed his eyes from these facts (Pg-8 & 9 Pr-4.1).

5.1.5 Needless to say that the Legislature has intentionally kept a reasonable period of around more than 2 years to complete the assessment after filing the return, considering the practical difficulties of both the side. This way, even though some opportunities might have been granted but were illusory and not effective. Kindly refer Harendra Singh Dhillon, Naagaon v/s ITO (2012) 32 CCH 103 (Del). Hence it is a case of gross violation of principle of natural justice which has vitiated the assessment

proceedings. Consequently, the impugned assessment should be quashed.

5.2 The allegation of non-production of the Books of Accounts in hard form has been repeatedly made however, at the same time it has also been repeatedly admitted that the assessee did submit a CD containing the complete accounts in soft form, right from the very first assessment proceedings itself. What the assessee allegedly failed was only to produce the printed copies in Hard Form of the Books of Accounts. However, all concerned have completely ignored the prevailing legal position, at all the stages that:

5.2.1 the books of accounts now also include those maintained in soft form as defined u/s 2 (12A) "books or books of account" includes ledgers, day-books, cash books, account-books and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device;"

5.2.2 Clause (22AA) was inserted by Finance Act, 2000, in Section 2 to define that the term "document", includes an electronic record as defined u/s 2(1)(t) of the Information Technology Act, 2000. Moreover, Sec. 2(23C) provide that "hearing" includes communication of data and documents through electronic mode;

5.2.3 Sec. 132 also recognize information in soft form as S.132(1)(iib) requiring any person who is found to be in possession or control of any books of account or other documents maintained in the form of electronic record as defined in u/s 2(1)(t) of the I.T. Act, to afford the authorized officer the necessary facility to inspect such books of account or other documents;

5.2.4 Finance Act, 2009, of Section 282(1) (c) provides that service of notice in the electronic form. Thus, it is evident that the above provisions now recognize the complete assessment proceedings to be made electronically. This legal positions duly applies in the year under consideration in as much as the assessment was completed on 29.12.2010 (or in any case the proceedings were now open before the Ld. CIT(A) (in the second round) when he passed the order on 25.01.2016).

Now a day, the Government and the legislature itself wants the assessee to upload all the bulky returns along with (enclosure-24) not only under the income tax return but also under provisions of the Companies Act and other Acts. The legislature must not have imagined that despite this legal position, the assessee will be asked to produce the bulky books of accounts. The Ld. CIT(A) in the first round very clearly stated that "Since the books are maintained on computer and are also subject to audit, physical printouts were not produced. However data was furnished in the form of CD"

Otherwise also because of the voluminous and bulky Books of Accounts, it was not practically possible to produce the same in physical form and there was nothing wrong if it was produced in the CD form as permitted by law.

It is really a matter of surprise that still an objection is being raised on this count. Unfortunately, this legal position perhaps was not brought by the D/R to the notice of the Hon'ble ITAT, though the appellant certainly elaborated the same in the written submissions filed before them (PB 89-97) but appears to have escaped kind attention.

5.3 Even Audited accounts is an admissible material and cannot be ignored as held in Addl. CIT v/s Jay Engineering Works Ltd. (1978) 113 ITR 389 (Delhi) (DPB-9-11).

5.4 Interestingly, S.145 does not specify any set of accounts to be maintained by an assessee. Also, Rule 6F of Income Tax Rules, 1962 prescribes certain set of books only for professionals and not for other assessee's or businesses or traders.

5.5 Even Rule 46A (b) & (c) were fully applicable.

6. Legal Position as regards Power of CIT(A): 6.1 It is submitted that the settled legal position is that proposition that the powers of the first appellate authority are very vide and co-terminus with those of the AO and what AO can do, he can do and what AO fail to do, that also he can do. Kindly refer Kanpur Coal Syndicate 53. ITR 225 (SC).Section 251 and 252 of the Act has also been worded keeping the same spirit, as also rule 46A. Section 250(4) empowers the CIT(A) to make further inquiries on its own or to direct the AO to make further inquiry and to report him. The embargo put on his power u/r 46A (1) & (2) has also

been loosened by sub-rule 4, which also empower the CIT(A) to direct the production of any document/the examination of witness, to enable him to dispose of the appeal. Thus, the legislative intent is quite clear that the Ld. CIT(A) should not straight away reject, evidence/s filed before him under rule 46A(1).

The powers of CIT(A), as submitted above are also to be interpreted in the context of the amended law, wherein, he is no more empowered to set aside to the AO which was available earlier u/s 251 (1) (a), necessitating (compulsory) admission of the evidence before him in the larger interest of justice. This matter has been dealt with elaborately in CIT vs. K. Ravindranathan Nayyar (2003) 184 CTR 46 (Ker.), which has held that the CIT (A) was not justified in rejecting the admission of confirmatory letter straight away on the plea that the case of the appellant does not fall under any of the circumstances given under clause (a) to (b) of Rule 46A (1). This ratio squarely applies on the facts of the present case.

6.2. Other supporting case laws:

6.2.1 In Pr. CIT v. Daljit Singh Sra [2017] 80 taxmann.com 271 (P&H) (DPB 1-5) held that:

> *"In view of the above facts and circumstances, there is no doubt assessee did not co-operate with the Assessing Officer in completion of assessment proceedings but the fact remains that in the delivery of justice the real income of assessee has to be assessed and that too after hearing the assessee. The Commissioner (Appeals) has not commented upon the nature of evidence filed under rule 46A. Such evidence might have been relevant for the calculation of real income of the assessee, therefore, in view of the substantial justice, Commissioner (Appeals) was directed to admit additional evidence and decide the case afresh after affording a reasonable opportunity to the assessee of being heard. (Para 4.1"*

6.2.2 In VishwanathAcharya vs. ACIT (2016) 157 ITD 1032 (Mumbai) it was held that:

"There was sufficient cause shown by the assesse which prevented the assesse from producing the additional evidence during the assessment proceedings. Therefore, the AO was to admit the additional evidence and decide the issue afresh on the merits after giving sufficient opportunity of being heard to the assessee. Matter remanded. (AY. 2007-08")

6.2.3 In CIT v/s Surtech Hospital & Research center ltd. (2007) 293 ITR 0053 (Born.) (DPB 6-8) wherein it has been held:

"Appeal [CIT(A)]-Additional evidence—Admissibility—Rule 46A(4) provides that notwithstanding r. 46A(1) the appellate authority can permit production of documents to enable him to dispose of the appeal—Finding recorded by the Tribunal that the documents produced by the assessee before the CIT(A) were necessary for disposal of the appeal on merits—It was justified in holding that the CIT(A) ought to have exercised its power to admit additional evidence—No question of law arises".

6.2.4 In the above case, the decision in the case of Smt. Prabhavati S. Shah v/s CIT(1998) 148 CTR (Born) 192 Pg 56, para 7, was followed.

6.2.5 CIT vs. Jind Co-Operative Sugar Mills Ltd. (2011) 51 DTR 121 (P&H)

"Appeal [CIT(A)]—Additional evidence—Remand to AO vis-a-vis consideration by CIT(A)—It is not necessary that when additional evidence is furnished, the matter must be remanded to the AO—It depends on nature of issue and nature of evidence—In an appropriate case, without any prejudice to either of the parties, the evidence can be looked into by the appellate authority itself—In such a case, it may not be necessary to remand the matter to the AO—In the present case, the material produced by the assessee to the CIT(A) was duly furnished to the AO and his comments were taken by way of written communication which was due compliance of r. 46A—Remand report of the AO was duly considered by the CIT(A) on merits—Contention that the matter should have been remanded to the AO instead of considering the evidence by the appellate authority is not therefore sustainable."

5. On the other hand, the ld. DR has relied upon the orders passed by the Revenue authorities and also relied on the following case laws:

(i) N.B. Surti Family Trust Vs CIT (2006) 153 Taxman 31 (Guj) &

(ii) Kanniapaan Murugadoss Vs ITO, Non-corporate Ward 7(4), Chennai (2017) 79 taxmann.com 244 (Chennai-Trib).

6. Having considered the rival contentions and carefully perused the material available on record. From perusal of record, we observed that Section 254 of the Act read with Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 states about power to admit additional evidences, whether mere fact that evidence sought to be produced is vital and important does not provide a substantial cause to allow its admission at appellate stage, especially when evidence was available to party at initial state and had not been produced at that time. Rule 46A of the Rules speaks about production of additional evidence before the [Deputy Commissioner (Appeals)] [and Commissioner (Appeals)]. The additional evidences submitted by the assessee at this stage are the first time and are necessary for deciding the appeal. Even otherwise, all the documents so placed on record by the assessee by way of additional evidences before the ld. CIT(A) are necessary to adjudicate the controversy between the parties. Moreover, in case, the additional evidence so placed on record by the assessee is allowed then in that eventuality, no prejudice shall be caused to the rights of the Revenue. Whereas on the contrary, in case, the said additional

evidences placed on record by the assessee is not considered then in that eventuality the rights of the assessee shall be prejudiced. Therefore, in view of the substantial justice, we direct the ld. CIT(A) to admit additional evidences so placed on record by the assessee. Therefore, grounds No.1 and 2 of the appeal raised by the assessee are allowed.

7. Since, we have allowed grounds No. 1 and 2 raised by the assessee and directed the ld.CIT(A) to admit the additional evidences placed on record by the assessee and decide the case afresh after considering those additional evidences and also after providing reasonable opportunity of hearing to the assessee. Therefore, in view of our above findings, we see no need to adjudicate the other grounds so raised by the assessee.

8. In the result, this appeal of the assessee is allowed for statistical purposes only.

Order pronounced in the open court on 08th September, 2021.

Sd/-	Sd/-
(विक्रम सिंह यादव)	(संदीप गोसाईं)
(VIKRAM SINGH YADAV)	(SANDEEP GOSAIN)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 08/09/2021

*Ranjan
आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:
1. अपीलार्थी / The Appellant- Shri Sanjay Matai, Ajmer.

2. प्रत्यर्थी / The Respondent- The I.T.O., Ward-1(2), Ajmer.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 375/JP/2016)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar