REPORTABLE

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA Nos.2077, 2061 and 2065/2010

% *Date of Arguments: 07.01.2011*
Date of Decision: 14.01.2011

The Commissioner of Income-Tax-IV ….Appellant

Through: Ms. Rashmi Chopra for the appellant in ITA No.2077/2010.
Ms. Suruchi Aggarwal for the appellant in
ITA Nos.2061 and 2065/2010.

VERSUS

Text Hundred India Pvt. Ltd. …..Respondent

Through: Ms. Kavita Jha with Mr. Somnath Shukla

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. These three appeals concern the same assessee and the questions framed in these appeals are identical, though differently worded. It touches upon the question of allowability of management expenses allegedly incurred by the assessee in the form of those management expenses paid by it to its

The Assessing Officer had rejected the claim on the ground that the assessee was not able to prove that the group companies to whom the payment were made had rendered any services to the assessee. He, thus, opined that the entire management expenses given to the group companies of the assessee was only a device to divert its income. The CIT (A) also dismissed the appeal of the assessee forming the aforesaid decision. Before the CIT(A) the assessee had filed copies of certain agreements purportedly entered into between the assessee and its group companies to whom the management fee was given. The CIT(A) admitted this fresh evidence but still came to the conclusion that the assessee was unable to lead any credible evidence to prove that for carrying on the business it had received any inputs from the said group companies and the money to them became payable. The assessee preferred the appeal before the ITAT. Along with this appeal application for leading additional evidence under Rule 29 of the Income-Tax (Appellate Tribunal) Rules 1963 (hereinafter referred to as the 'Rules') was filed as the assessee wanted to produce some further evidence which he did not produce before the Assessing Officer and even the CIT(A). The ITAT had admitted that evidence allowing the application of the assessee under Rule 29 of the Rules and remitted the case back to the Assessing Officer to decide the issue afresh after considering the said additional evidence. The Revenue/appellant feels aggrieved against this approach of the Tribunal. It is the case of the Revenue that under no circumstance, invoking the provisions of Rule 29 of the Rules, such additional evidence could be permitted. It is also the grievance of the Revenue that even if Rule 29 of the Rules could be invoked

production of additional evidence. Keeping in view these twin contentio

the appeal was admitted on the following questions of law:-

a) Whether the ITAT erred in law and on merits in admitting fresh evidence under Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 and restoring the matter on allowability of management expenses on group companies and consequential interest claimed for the first time during the year under consideration to the AO for fresh adjudication?

b) Whether the reason of non-retrieving of e-mails due to technical difficulties for a period of almost 3 years before the lower authorities is a sufficient cause for the purpose of admitting fresh evidence as per Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963?

Re. Question No.1

2. First question relates to the applicability of Rule 29 of the Rules. This Rule reads as under:-

> "The parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal, but if the Tribunal requires any document to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or if the income-tax authorities have decided the case without giving sufficient opportunities to the assessee to adduce evidence either on points specified by them or not specified by them, the Tribunal, for reasons to be recorded, if any, allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced."

3. Neat submission made by Ms. Rashmi Chopra, learned counsel for the Revenue, was that this Rule precludes a party from producing additional evidence, oral or documentary, before the Tribunal. The Rule has limited

or witness or affidavit etc. to enable it to pass orders or for any otł substantial cause. It was, thus, submitted that the assessee had no right to move any application for additional evidence and in so far as the Tribunal is concerned, it did not *suo moto* thought it proper to ask for the production of these documents. Ms. Kavita Jha, learned counsel appearing for the assessee, on the other hand argued that this Rule is to be given liberal interpretation inasmuch as purpose behind the Rule was to do substantial justice in the matter and/or to prevent failure of justice. She submitted that the Tribunal had categorically recorded the reasons, while allowing the production of additional documents, to the effect that these were necessary to impart substantial justice.

4. We have already re-produced the language of Rule 29 of the Rules. The Tribunal has given following justification while permitting additional evidence:-

> "It is clear that such is not the situation at hand. Rule 29, in general, forbids the parties to the appeal from producing additional evidence either oral or documentary before the Tribunal. However, if the Tribunal requires any document to be produced to enable it to pass orders or for any substantial cause, it may allow such document to be produced for the reasons to be recorded and allow such evidence to be adduced. The facts of the case are that the assessee claimed deduction of a substantial amount of Rs.2.17 crores in computing the total income as expenditure incurred on availing of management services etc. from overseas group companies. There is no doubt about the payments. The expenditure was disallowed by the lower authorities on the ground that there was no evidence regarding the rendering of the services. In order to decide this substantial issue of fact on merits, it is necessary to take on record the evidence, which the

> reason for non-production of evidence before lower authorities was non-retrievable of e-mail on the date due to technological difficulties. Therefore, we are of the view that it is necessary to consider the evidence to come to appropriate conclusion in the matter. Accordingly, the evidence is admitted under Rule 29 of the Income-Tax (Appellate Tribunal) Rules, 1963."

5. No doubt, the Tribunal has stated that if the evidence produced before it is not allowed, there would be failure of justice. However, it has not at all addressed itself the question (and therefore, not answered) as to whether it is permissible for a party to file the application for adducing additional evidence having regard to the language of Rule 29. As per the language of this Rule, parties are not entitled to produce additional evidence. It is only when the Tribunal requires such additional evidence in the form of any document or affidavit or examination of a witness or through a witness it would call for the same or direct any affidavit to be filed, that too in the following circumstances:-

(a) when the Tribunal feels that it is necessary to enable it to pass orders; or

(b) for any substantial cause; or

(c) where the Income-Tax authorities did not provide sufficient opportunity to the assessee to adduce evidence.

6. In the present case it is the assessee who moved application for production of additional evidence. He had the opportunity to file evidence before the Assessing Officer or even the CIT(A) but chose not to file this

7. Fact remains that it is not the Tribunal, while hearing the case, whi asked for the production of these documents of its own. On the contrary, the Tribunal acted upon the application preferred by the assessee. That would clearly mean that it has allowed the assessee, i.e., the party to the appeal to produce the evidence. Whether this course of action would be permissible for the Tribunal under Rule 29 of the Rules? While arguing that the Tribunal is empowered to do so even in an application filed by one of the parties for production of additional evidence, Ms. Kavita Jha referred to certain judgments. Therefore, it would be of benefit to take stock of those judgments at this stage.

8. First case referred to by learned counsel for the assessee is the judgment of Madras High Court in ***Anaikar Trades and Estates Pvt. Ltd.*** **v.** ***CIT***, 186 ITR 313 (Mad.). In that case the assessee sold several plots of land to various parties and the value of the properties shown in the documents of sale was Rs.2,58,338/-. The Valuation Officer of the Department estimated the market value of the properties sold at Rs.4,17,000/- and therefore, the Income-tax Officer determined the value of the properties sold at Rs.4,17,000/- under section 52(2) of the Income Tax Act, 1961. As the cost of acquisition of the properties was Rs.1,40,934/-, the difference of Rs. 2,76,066/- was brought to tax as capital gains. On appeal, the Appellate Assistant Commissioner held that it had not been established that anything more than the disclosed consideration had been received by the assessee and therefore, directed the Income-tax Officer to recompute the capital gain taking the sale consideration at Rs. 2,58,338/-. On appeal to the Tribunal by the

applicable. The revenue relied on certain affidavits given by five of t purchasers from the assessee to the effect that the sale of plots was effected by the assessee at Rs.22,000/- per ground though the price shown in the document was Rs.16,500/- per ground. This was objected to by the assessee on the ground that though these affidavits were available at the time of the assessment proceedings and also at the time of the consideration of the appeal by the Appellate Assistant Commissioner, the Revenue did not make use of that material and therefore, the reliance on such affidavits should not be permitted. The Tribunal took the view that in order to decide the question of applicability of Section 52(2) of the Act, which was the subject matter of the appeal before it, it would be necessary, in the interest of justice, to consider these affidavits and, in that view, directed the restoration of the matter before the Appellate Assistant Commissioner.

9. It was in this backdrop, question arose as to whether the Tribunal could entertain the interest of the Revenue and allow production of those affidavits as additional evidence. The order of the Tribunal allowing additional evidence was challenged by the assessee in the High Court. The High Court took the view that the Tribunal could do so in exercise of its power under Rule 29 of the Rules. Having regard to the scope of the appeal involving the applicability of Section 52(2) of the Act to the assessee, in the opinion of the High Court, it was necessary for the Tribunal to ascertain the facts justifying such applications or otherwise and only in that view the Tribunal felt that in the interest of justice and in order to correctly adjust the liability of the assessee for payment of tax, it would be necessary to remit the matter to the

affidavits filed by the purchasers of the property. The High Court also not that there was sufficient reason for the Revenue that the Revenue was prevented by sufficient cause for not perusing these affidavits earlier as these were available in different sections of the Department and were not made available to the Assessing Authority or even the First Appellate Authority and the assessee could not be permitted to take advantage of an inadvertent omission on the part of the Department to rely on these affidavits at the earlier stage or at the appellate stage. The ambit of rule 29 of the Rules, in the process, was discussed in the following manner:-

> "10. We may in this connection refer to the scope of the powers of the Tribunal under rule 29 of the Rules. In *R.S.S. Shanmugam Pillai and Sons Vs. CIT* (1974) 95 ITR 109, this court had occasion to go into the question of the powers of the Tribunal to entertain or reject evidence. While accepting that the Tribunal has got a wide discretion to admit or reject documents at the stage of appeal, it was pointed out that such a discretion cannot be exercised in an arbitrary manner and that if the Tribunal found that the documents filed are quite relevant for the purpose of deciding the issue arising before, it would be well within its powers to admit the evidence, consider the same or remit the matter to the lower authorities for such consideration. On the facts of this case, the Tribunal felt that in the interest of justice in order to decide the question of the applicability of section 52(2) of the Act to the assessee which was agitate before it, it would be necessary to investigate and ascertain the facts in that regard, especially when certain affidavits had been relied on, which, to some extent, prima facie made out that more than the stated consideration had passed under the sale deeds. These affidavits would be relevant and necessary for deciding the question of the application of section 52(2) of the Act and that was the reason why the Tribunal, in the exercise of its discretion, directed the Appellate Assistant Commissioner to consider the issue afresh after taking into account the evidence in the shape of affidavits. We are of the view that the Tribunal, on the facts of this case, properly exercised its discretion. We may also refer to *CIT*

> additional evidence and even if there was a failure to produce the documents before the Income-tax Officer and the Appellate Assistant Commissioner, the Tribunal had the jurisdiction in the interest of justice to allow the production of such vital documents. That leaves for consideration the decision in *Velji Deoraj and Co. Vs CIT* (1968) 68 ITR 708 (Bom.). In that case while exercising its discretion, the Tribunal found that the additional evidence was unnecessary and, therefore, the refusal by the Tribunal to allow additional evidence was held to be neither illegal nor improper."

10. Second case relied upon by the learned counsel for the assessee is the decision of this Court in ***R. Dalmia* v. *CIT***, 113 IT 522 (Del.). In that case, with chequered history, the question was whether the source of cash credit in the account books of the assessee had been satisfactorily explained. The Assessing Officer had found certain cash entries and was of the opinion that since the assessee could not explain the same, he made additions on the ground of these were unexplained cash entries. It so happened that the assessee had received a sum of Rs.13.65 lakhs from Bharat Union Agencies (P) Ltd. ("BUA") in cash on 3.8.1953 and paid a sum of Rs.13,64,250/- to Jaipur Traders Ltd. ("JT") on 7.8.1953 also in cash. It was in this backdrop the assessee was asked to disclose the source from which this money came. The assessee was in control of both JT and BUA. Avoiding the details with which we are not concerned and coming to the aspect which is relevant for us, when the matter reached the Tribunal, counsel for the Revenue sought permission of the Tribunal to place on record the balance-sheet and profit and loss account of JT for relevant period as additional evidence. This request of the Revenue was opposed by the assessee. However, the Tribunal was of the opinion that additional evidence sought to be addressed was relevant and the

passed an order overruling the objection of the assessee and admitting t additional evidence. At the same time, the Tribunal thought it fair to given an opportunity to the assessee to explain the additional evidence and also certain other matters which it narrated in its order. Accordingly, direction was given to the Appellate Assistant Commissioner to record such further evidence as the Revenue may wish to produce and forward it to the Tribunal. After receiving the additional evidence and examining the same, the Tribunal heard the appeal of the assessee and by elaborate order partly allowed the same. Against this order, the assessee came in appeal and also challenged the order of the Tribunal permitting the additional evidence. The Court repelled this challenge holding that the Appellate Tribunal has a discretion to decide whether to admit the additional evidence or not and in the absence of any suggestion that it had acted on any wrong principle, no question of law can arise from the Tribunal's decision to admit the additional evidence and remand the case back to the Assistant Commissioner to give the Revenue an opportunity to produce the additional evidence as the Revenue might wish to produce and forward it to the Tribunal. The Court also observed that no prejudice whatsoever was caused to the assessee as he was given full chance to rebut the additional evidence produced by the Revenue and a chance was given to the assessee also to produce his own evidence.

11. Again in ***R.S.S. Shanmugam Pillai & Sons*** **v.** ***CIT***, 95 ITR 109 (Mad.), the High Court dwelled on the powers of the Appellate Tribunal to admit additional evidence at the appellate stage in the following manner:-

"It is no doubt true that the Tribunal has got a

> stage of the appeal. But the said discretion cannot be exercised in an arbitrary manner. If the Tribunal finds that the documents filed are quite relevant for the purpose of deciding the issue before it, it would be well within its powers to admit the evidence, consider the same or remit the matter to the lower authorities for the purpose of finding out the genuineness of the letters and considering the relevancy of the same. But if the Tribunal finds that the evidence adduced at the stage of the appeal is not quite relevant or that it is not necessary for the proper disposal of the appeal before it, in that case, the Tribunal could straigthtaway reject the evidence, which was sought to be produced for the first time at the stage of the appeal."

12. We may also quote the following observations of Calcutta High Court in ***Income-Tax Officer, Dist. III (I)*** **v.** ***B.N. Bhattacharya***, 112 ITR 423 (Cal.). In that case the Court even permitted the additional evidence before it at appellate stage where the question was as to whether the notice was properly served upon the assessee or not. Record of the process server and the Income-Tax Officer were produced and objection of the assessee that such evidence could not be produced was turned down invoking the power to admit such evidence under Order 41 Rule 27(1) of the Code of Civil Procedure. Following pertinent observations were made in the process:-

> "But it was observed by the Supreme Court in the case of ***K. Venkatramaiah*** **v.** ***A. Seetharama Reddy***, AIR 1963 SC 1526, that under rule 27(1) of Order 41 of the Code of Civil Procedure, the appellate court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment", but also for "any other substantial cause". There might well be cases where even though the court found that it was able to pronounce judgment on the state of record as it was, and so it could not strictly say that it required additional evidence to enable it to

> obscure should be filled up so that it could pronounce its judgment in a more satisfactory manner. Such a case would be one for allowing additional evidence for any other substantial cause under rule 27(1)(b) of Order 41 of the Code. In the instant case, in the affidavit-in-opposition filed before the learned trial judge, it had been stated that the notice had been served by affixation at 8/1, Dacres Lane, Calcutta."

13. The aforesaid case law clearly lays down a neat principle of law that discretion lies with the Tribunal to admit additional evidence in the interest of justice once the Tribunal affirms the opinion that doing so would be necessary for proper adjudication of the matter. This can be done even when application is filed by one of the parties to the appeal and it need not to be a *suo motto* action of the Tribunal. The aforesaid rule is made enabling the Tribunal to admit the additional evidence in its discretion if the Tribunal holds the view that such additional evidence would be necessary to do substantial justice in the matter. It is well settled that the procedure is handmade of justice and justice should not be allowed to be choked only because of some inadvertent error or omission on the part of one of the parties to lead evidence at the appropriate stage. Once it is found that the party intending to lead evidence before the Tribunal for the first time was prevented by sufficient cause to lead such an evidence and that this evidence would have material bearing on the issue which needs to be decided by the Tribunal and ends of justice demand admission of such an evidence, the Tribunal can pass an order to that effect.

14. The next question which arises for consideration is as to whether the

the Tribunal, is apposite? It is undisputed that Rule 29 of the Rules is akin Order 41 Rule 27(1) of the Code of Civil Procedure. The true test in this behalf, as laid down by the Courts, is whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. The legitimate occasion, therefore, for exercise of discretion under this rule is not before the Appellate Court hears and examines the case before it, but arises when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent to the Appellate Court coming in its way to pronounce judgment, the expression 'to enable it to pronounce judgment' can be invoked. Reference is not to pronounce any judgment or judgment in a particular way, but is to pronounce its judgment satisfactory to the mind of Court delivering it. The provision does not apply where with existing evidence on record the Appellate Court can pronounce a satisfactory judgment. It is also apparent that the requirement of the Court to enable it to pronounce judgment cannot refer to pronouncement of judgment in one way or the other but is only to the extent whether satisfactory pronouncement of judgment on the basis of material on record is possible. In ***Arjan Singh* v. *Kartar Singh***, AIR 1951 SC 193, while interpreting the provisions of Order 41 Rule 27, the court remarked as follows:-

> "The legitimate occasion for the application of Order 41, rule 27 is when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the court of fresh evidence and the application is made to impart it. **The true test, therefore, is whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced** ."

[See also ***Netha Singh Vs. Financial Commissioner,*** AIR 19 SC 1053]

15. In the present case the reason which was given by the assessee in support of its plea for admission of additional evidence was that the assessee could not produce these records before the lower authorities due to non-retrievability of e-mail on the date because of technological difficulties. This reason was specifically mentioned in the application filed. No reply to this application was filed refuting this averment, though the departmental representative had opposed the admission of the additional evidence. The ground pleaded by the assessee was not confronted. In this backdrop, the Tribunal looked into the entire matter and arrived at a conclusion that the additional evidence was necessary for deciding the issue at hand. It is, thus, clear that the Tribunal found the requirement of the said evidence for proper adjudication of the matter and in the interest of substantial cause. Rule 29 of the Income Tax (Appellate Tribunal) Rules categorically permits the Tribunal to allow such documents to be produced for any substantial cause. Once the Tribunal has predicated its decision on that basis, we do not find any reason to interfere with the same. As a result, the questions of law are answered in favour of the assessee and against the Revenue resulting into dismissal of these appeals. No costs.

(A.K. SIKRI)
JUDGE

(SURESH KAIT)
JUDGE