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

Reserved on: 12.07.2018

% ***Pronounced on: 26.11.2018***

\+ **ITA No.90/2004**

M/S MATHUR MARKETING PVT. LTD. ..... Appellant
Through : Ms. Shashi M. Kapila, Mr. Pravesh Sharma, Mr. Siddarath Kapila and Mr. Sushil Kumar, Advs.

versus

COMMISSIONER OF INCOME TAX DELHI & ANR. ..... Respondents
Through : Mr. Ruchir Bhatia, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K.CHAWLA

S. RAVINDRA BHAT, J.

1. By this judgment, we propose to dispose of an appeal under Section 260A of the Income Tax Act, 1961 (hereafter "the Act"). The original order, disposing of the appeal, was of 17 January, 2006. That order was carried in appeal by special leave, to the Supreme Court, which disposed of the petition, in the following terms:

> *"We have heard learned counsel for the parties and perused the impugned order. Vide order dated 10.08.2017, this Court had permitted the appellant to examine as to whether the oral arguments were advanced on substantial question No.3 raised in the Memo of Appeal filed before the High Court under Section 260A of the Income Tax Act, 1961. An affidavit· has been filed on behalf of the appellant in which it has been stated that the issue of powers of Commissioner (Appeals) had come in appeal under Rule 46A and were specifically raised before the High Court.*

'In that view of the matter, in our considered opinion, if indeed such issue was raised specifically before the High Court and it has not been taken into consideration by the High Court by passing the impugned order dated 17.01.2006, the appropriate remedy for the appellant would be to file an application for review of the said order.

Accordingly, we permit the appellant to file a review application before the High Court within two weeks from today. If such an application is filed, the same shall be considered in accordance with law without raising the question of limitation."

All the questions raised in this appeal are left open to be raised again, if occasion so arises. The Civil Appeal is disposed of with aforesaid observations."

2. In the appeal, under Section 260A, several questions of law were urged. The one relating to additional evidence, read as follows:

"Whether in the absence of any ground against admission of additional evidence, the Tribunal was right in law in holding that the CIT(A) was not entitled to consider the evidence of payment to the commission agent;"

3. The original order of this court, dismissing the appeal, reads as follows:

"Sub-Section (3) of Section 145 of the Income Tax Act, 1961 empowers an assessing officer to proceed to make assessment of the total income or loss to the best of his judgment and determine the sum payable by the assessee, as envisaged under Section 144, in a case where he is not satisfied about the correctness or completeness of the accounts of the assessee or where the method of accounting provided in sub-Section (1) or accounting standards as notified under sub-Section (2) have not been regularly followed by the assessee. In the present case, we are not concerned with latter situation. Clearly, it is only in the eventuality of the assessing officer not being satisfied about the correctness or completeness of the accounts of the assessee that he can exercise his discretion of making the assessment based on best of his judgment. Conversely, therefore, where the assessing officer is satisfied about the correctness of entries relating to profit-making transactions, he cannot proceed to make

assessment based on best of his judgment. In the circumstances, the argument advanced on behalf of the assessee that while ignoring the two loss-making entries in its books of account, the assessing officer could not have proceeded to accept the entries relating to profit-making transactions, cannot be appreciated. Since the assessee had in its return voluntarily made mention of the two profit-making transactions which came to be accepted by the assessing officer, it could not turn around to question the correctness of disclosure regarding profit-making transactions in its return and that of related entries in respect thereto in its books of account simply because the assessing officer doubted the correctness of the two entries pertaining to loss-making transactions and, consequently, proceeded to make the assessment to the best of his judgment. The books of account or any other material produced before the assessing officer by the assessee were simply meant to support the disclosure of profit or loss set out in its return and it was always open to the assessing officer to scrutinize such material or entries in the books of account before accepting the same for the purpose of assessment. There is, thus, no merit in the contention on behalf of the assessee that the assessing officer could not have disregarded the two entries pertaining to loss-making transaction while accepting the other two entries in the books of account relating to profit-making transactions. The tribunal was, in the circumstances, justified in repelling the contention so raised."

4. By the order of 17 January, 2017, this court had admitted the appeal and clarified that it was confined to the question pertaining to Rule 46A – i.e. whether the ITAT was correct in holding that the Appellate Commissioner was not entitled to consider the evidence of payment to the commission agent. Thus, the present appeal is confined to that question of law.

5. The facts are that the assessee traded in rice. In relation to some of its transactions, the assessee claimed loss. All the transactions of purchase and sale were carried by the assessee through M/s Ramkishan Dass Narender Prakash who acted as commission agent on the assessee's behalf. The

Assessing Officer (AO) summoned Shri Ramkishan Dass of the above concern under Section 131 of I.T. Act and recorded his statement. The AO obtained information about parties who had purchased and sold rice and basmati to M/s Ramkishan Dass Narender Prakash, who acted as the assessee's agent. The transactions of rice shown to have been purchased from M/s Vijay Kumar Anil Kumar and M/s Ramkishan Aggarwal and Company were doubted. Similarly, the transaction with Shri Dinesh Trading company was doubted and the party was summoned under Section 131 of I.T. Act. From the statement made by that party, the AO concluded that M/s Ramkishan Dass Narender Prakash sold basmati to the party and statement of Shri Ramkishan Dass that no quality of rice was specified in the bills, was incorrect. The Assessing Officer also relied upon enquiries made through the Assessing Officers at Karnal, Kirkshetra and Jind to conclude that transactions shown in the accounts of several concerns were bonus as those concerns denied the disclosed sales. It was discerned that some parties did not even exist.

6. The AO sent enquiries to Kaithal about purchases and sales without success; his opinion was that the result of investigations carried on by ACIT, Company Circle 2(1) regarding the purchase of rice by M/s Indian Biotechnical (P) Ltd., was not genuine as it did not show any purchase in its accounts. M/s Ramkishan Dass Narender Prakash also did not account for expenditure on transportation or rice. The trucks in which rice was claimed to have been transported too were non-existent. There were also other observations about purchases and sales claimed in different accounts. Furthermore, the rates disclosed by the assessee too did not match with rates of basmati and parmal rice as reported in Financial Express, New Delhi of relevant period.

7. Based on this information, the AO issued notice dated 6.3.1992 under sec. 142(1) of Act calling upon the assessee to show cause why on the basis of information gathered from M/s Ramkishan Dass Narender Prakash and some other parties, the loss claimed on rice on specified transactions be allowed. The case was fixed for 12-03-1992 and was adjourned. Later, the assessee filed a written reply, which contained its version and explanation. It *inter alia* is as follows:

> *"Now coming to your order sheet entry dated 18-2-92 it is seen that it has been alleged that three out of seven parties who had supplied the rice has allegedly denied that any rice was sold by them to M/s BKAJK and the remaining four have been claimed by you are non-existing. From this alleged fact you have proposed to conclude that no rice was purchased by M/s BKAK nor the same was sold by them to M/s RDNP. It is submitted that this allegation is totally baseless. In fact to establish that the purchase of rice were not made by BKAK form the various parties as claimed by them you are requested to please summon M/s BKAK and also M/s RDNP along with their books of accounts. The assessee further requests that the assessee be supplied with the copies of the alleged inquiry report along with the statement of M/s Bhagwati Rice Mills, M/s Amar Rice Mills and Aggarwal Rice Mills to establish that their alleged statements are totally incorrect. In any case it is submitted that it can never be within the exclusive knowledge of the assessee that its commission agent purchased the rice from which source and as to who was the suppliers of the commodity sold.*
>
> *Your reliance on the market rate quoted in the Financial Express is totally misleading. It is submitted that the allegation that the rate of the rice has not fallen in the month of the sale when compared with the price at the time of purchase is also unjustified.*
>
> *It is submitted that it was specially for this purpose that the assessee had requested you to examine M/s RDNP. On inquiry had been made by you in this behalf. It is further submitted that through you have recorded the statement of on 12-2-1991, however, the same is being confronted by you in March, 1992 when the assessment is getting barred by limitation, thus providing no time to the assessee to meet any of your allegations.*

> *In this view of the matter it is submitted that the proposed disallowance of loss of Rs.79,91,056 be dropped and the loss claimed be held allowed."*

8. The assessee's objections were rejected with observation that all the parties suggested by the assessee in the reply were examined and the results confronted. The A.O. decided that sales and purchases shown by the assessee were bogus. Accordingly, loss to the tune of ₹86,11,467 was disallowed. The assessee challenged these additions upon appeal before CIT(A) and urged a number of grounds including that fair and proper opportunities were not granted to the assessee company before rejecting its claim of loss. In the ground of appeal (i.e. No. 6) it was claimed that the AO ought to have summoned the suppliers and also supplied copies of the alleged inquiry report along with the statement of the various parties' particulars when request to do so was specifically made. The CIT(A) examined reasons given by the AO in detail affirmed it, holding that loss claimed remained unsubstantiated and was rightly disallowed.

9. The assessee appealed to the ITAT, which disposed of the appeal, holding that reasonable opportunity had to be given to the assessee. After remand, the assessee sought the following information from the assessee, in a communication:

> *"(a) Neither seller nor purchaser of the rice have debited transportation charges in their books. You are required to produce documentary evidence to prove that who borne the transportation charges in the rice trading.*
> *(b) You have done rice trading through your commission agent M/s RKNDP. M/s RKNDP purchased rice from M/s Vijay Kumar Anil Kumar of Bhagwan Das Nagar. M/s Vijay Kumar Anil Kumar have shown purchases from 7 different parties. Most of these parties were found to be non-existent or denied having sold rice to M/s Vijay Kumar Anil Kumar. This way of your purchases are bogus and your books of accounts are proposed to be rejected.*

(c) You have shown purchase and sale of rice which is not in confirmation with the rates quoted in Financial Express. Complete details of rates quoted in Financial Express was given to the assessed. Since the rates quoted by you is not in confirmation with the rates quoted in Financial Express, your transactions are proposed to be treated as bogus.
(d) You have shown sundry creditors of Rs.74,790, 526/-. In the AY 1991-92 also you were required to file confirmations from these creditors and you have failed to produce/file the same. You are once again requested to file confirmations from these creditors.
(e) Please intimate the amounts paid by you to your commission agent M/s. RKDNP till date if any."

10. After considering the explanations given by the assessee, and noting the fact that on several occasions, it did not appear or could not produce the requisite information, the AO added the amounts and brought them to tax. The AO's findings indicated that the purchases said to have been made were at unrealistic prices; the sale too was likewise undervalued. The payments due to the commission agents, were disbelieved. The findings of the AO were appealed against to the CIT (A) who allowed the assessee's request to consider additional evidence and thereafter proceeded to delete the amounts brought to tax during the assessment. The revenue appealed to the ITAT, which set aside the CIT (A)'s order. The findings of the ITAT are, *inter alia,* as follows:

"11. We have considered the rival submissions at length in the light of material placed before us. From the factual position noted above it is obvious that M/s RKDNP, who acted as the agent of the SSD for sale and purchase of rice, had shown to have made purchases from the parties noted above. When the ld. AO verified the transactions of purchases made by M/s Vijay Kumar, and M/s Ram Kumar Agarwal and Company who in turn sold the rice to M/s RKDMP for the assessee. On verification it had come to light that most of the sellers to these parties were either not existing, or they denied having made any transactions with. This put the very fact of purchases into doubt. When the AO

proceeded further to examine the transportation of rice from Haryana to Delhi, it came to light that there was no evidence as to who made the payment of transportation charges. Despite giving numerous opportunities, including the one vide questionnaire dated 15.7.94 the assessee miserably failed to give any satisfactory reply on this regard. In so far as purchases by M/s Ram Kishen Das Narinder Prasad and M/s Ram Kumar Agarwal and company, the results of the investigation by the ACIT revealed that the purchase of rice M/s Indian Biotech Company Pvt. Ltd. through M/s Ramkumar Agarwal and Company was not genuine because the part was not found to have purchased any rice from various parties recorded in books of accounts and even no transportation charges were paid by that party. Even some of the trucks in which transportation of rice was claimed to have been made were found to be non-existent. This shows that the assessee could not lead any evidence with regard to the actual movement of rice from Haryana to Delhi despite the specific query raised by the AO. The ld. CIT (A) while allowing the appeal of the assessee on this ground has not at all touched the aspect of transportation as raised by the AO elaborately in the assessment order. The ld. CIT (A) relied on the submissions of the assessee with regard to making the payment by it to M/s RKDNP. From the statement of Shri Ram Kishen, partner of M/s RKDNP placed at, page numbers 271 to 275 of the paper book, it is noted that during the assessment year 1988-89 M/s RKDNP had stated on oath to have got total commission of Rs. 373781/ out of which ₹ 3 .50 lakh was obtained from the assessee and M/s Mathur Import Export private limited, sister concern of the assessee. Vide reply to the first question it was stated by Shri Rama Kishen Partner of M/s RKDNP that during the year two companies i.e. the assessee and its sister concern neither paid any price of rice no they issued any cheque and no money was received or paid by cash or by cheque or by draft. When the AO called upon the assessee to furnish details of payment, if any, having been made to M/s RKDNP, the copy of the account was filed by the assessee, which divulged that after the opening balance the debit and credit entries were only in respect of sale and purchase of rice and no payment whatsoever had been shown to have been made or received. Even during the original assessment proceedings assessee could not lead any evidence as to whether the whether any payment was made

towards advance or commission. Despite this factual position learning CIT (A) entertained the submissions of the assessee that it had actually made the payment to M/s RKDNP. When the statement of Shri Rama Krishna partner of RKDNP is categoric that no payment is made throughout the year by the assessee and no further evidence was produced either before or the during the original proceeding or in second round it is not known as to how the Ld CIT (A) entertained the contention of the assessee with regard payments. Rule 46A of the IT rules, 1962, clearly provides that the assessee shall not be entitled to produce before the first appellate authority any evidence, whether oral or documentary, other than the evidence produced by him during the course of the assessment proceedings. Few exceptions have been carved out this rule, and we find that the case of the assessee does not fall in any of them. In view of this fact we hold that the CIT (A) was not entitled to consider any additional evidence during the course of the first appellate proceedings. When the AO specifically required the assessee to produce certain in evidence and despite several opportunities granted by him there is no compliance on behalf of the assessee and natural corollary that follows is that the AO is entitled to draw adverse inference against assessee on this aspect. Our view is fortified by the recent decision of the Hon'ble Delhi High Court case of CIT v Motor General Traders(2002 254 ITR 450) in which it was held so after taking into consideration the provisions of Section 114 Evidence Act 1870. It is further noted that the Ld. AO had pointed out infirmities with regard to the rate at which the transactions were said to have been actually entered into by the assessee and the rates prevailing on the dates, as quoted in the Financial Express. It is beyond our comprehension as to when a particular item is available in the market at a price of Rs. 100/-why a any prudent businessman would go to purchase the same item at Rs.120 and the same manner when an item is available in the market and Rs. 100/-why should a businessman then sell the same for Rs. 80 or Rs. 90. This is what has been shown to have actually happened in the present case. Rice is a standard item easily tradable the market. No specific circumstances were brought to the notice of the authorities below showing as to why the assessee made costly purchases and/or sold cheaper. It was contended before the first appellate authority that the rates for basmati were even quoted in the Hindustan Times on a number times during the relevant dates

of sale which are different from the rates quoted by the Financial Express and the assessee 's transactions were within those range. The learned CIT (A) admitted this fact, while allowing relief by clearly recording the relevant cuttings from the newspapers were not furnished before him but he was inclined to agree with the contention of the assessee with regard to the rates quoted in the newspapers. We are at a loss to understand how the CIT (A) could have admitted any such contention which was not substantiated with any evidence disregarding the AO's observations which was on based on specific reports. It is further noted, that the AO had held that no commission or advance was paid by the assessee to RKDNP, whereas the CIT (A) held that it was duly shown in the account and the findings of the AO were incorrect. From the perusal of the assessment order will find what the AO had stated in his order is the factum of non-payment of any advance of commission by the assessee to M/s RKDN Pand not the fact that no commission was shown to have become due to them. It becomes more apparent from the assessment order and the statement of Shri Ram Krishna recorded by the AO in which it was stated in reply to the last question whether total commission on by the assessee to M/s RKDNP was Rs. 3.77 lakhs out of which a sum of Rs. 3.50 lakhs was obtained from the assessee and its sister concern. It is further noted that the opening and closing balance of M/s RKDNP in the books of the assessee was exceeding Rs. 55 lakhs on which no interest was charged by them. Even if we go by the ordinary rate of interest charged by the bank at the rate of 15% on the advances made by them to the borrowers the cost on account of interest along comes to Rs. 8.25 lakhs (on Rs. 55 lakhs) whereas M/s RKDNP had shown to have commission of ₹ 3.5 Lacs only from the assessee and its sister concern. It is not understandable as to how any businessmen can survive with this kind of practice. That apart, it is very difficult to believe that any commission agent would enter into transactions of crores on behalf of the customer without receiving any advance at all. The above discussion shows the fact of the actual purchases having been made by M/s RKDNP on behalf of the assessee stands falsified with the enquiry made by the AO and the further fact that even the movement of goods and payment of transportation cost could not be established beyond any iota of doubt. Once it is proved that the purchases were not genuinely made further consequences of

the transactions itself stands disproved because the cycle of trade begins with the purchase and ends with the sale. If the beginning itself stands disproved the further transactions cannot be conceived to be genuine. The factual position showing the in genuineness of the transactions has been clearly proved by the AO and the tribunal cannot act as a mute spectator by simply relying on the observations made by the first appellate authority, which does not have any legs to stand on. When genuineness of the entire transactions is visible to the naked we cannot resist ourselves overturning the decision of the CIT (A). All the above noted facts clearly leads to the conclusion that the transactions of purchase and sale, which resulted in the loss of Rs. 86.11 lakhs were sham, motivated and reducing the income of the assessee."

12. Before parting with this appeal, we could like to deal with certain other issues raised by the assessee's counsel. The first contention in this regard was that the Id. AO had not allowed opportunity to the assessee to cross examine the parties whose statements were recorded and were used against the assessee. On a specific query raised from the Bench it was stated that the assessee did ask for cross examination of the parties. Reliance was placed on the letter dated 18.3.1992 placed at pages 197 and198 of the paper book. We have pursued the orders of the authorities below and this letter as well. It is seen that the grievance of the assessee even before the tribunal at the first round of proceedings was that the material used against the assessee was not supplied to it for rebuttal. It is obvious from the assessment order in the second round that the assessee made inspection of the file and also obtained photocopies of all relevant documents which are listed as item nos. 1 to 11 on page 11 of the assessment order. After going through the aforesaid letter dated 18.3.92 in entirety we could not find even a single work requesting the AO to allow cross examination of the concerned parties. Even the 4th line of page 15 of the assessment order clearly reveals that the consequence of the enquiries were confronted to the assessee and the photocopies were copies given on 24.8.94. This shows that the assessee was not interested at any stage to make cross examination of the parties. It is too late in the day to come out with such a contention, after the gap of around 15 years from the relevant time.

13. The next alternate contention raised by the assessee's counsel was that in the absence of any purchase and sale of rice it should be treated as speculative transactions and the profits should be adjusted against the speculation loss of the other two sets of transactions. Having considered this contention we find that the same is without any merit for the clear reason that the speculative transaction pre-supposes its genuineness. When a transaction is held to be bogus, there is no point in holding it speculative or otherwise.

14. Another contention raised on belief of the assessee was that since the AO has applied the provisions of sec. 145, it was therefore not permissible to assess the profit in respect of the other two transactions offered by the assessee itself. On the perusal of the assessment order it is found that the AO found specific detects with regard to these sets of transaction leaving the other part of accounts undisturbed. What the AO has disregarded is only two sets of transactions in which there was a loss. The provisions of sec. 145 (1) were applied only with respect to those two sets transactions and after detailed verification it was held that those two sets of transactions were bogus. The reliability of the books of accounts for the other two sets of transactions which resulted into profit was not disputed by the AO. Naturally the assessee can't have dispute about the other two sets of transactions which resulted into profit for the palpable reason that income was voluntarily offered by the assessee and there was no reason for the AO to ignore the same. In view of the factual and legal position discussed above, we are of the considered opinion that the Id. CIT(A) was not justified in deleting the addition of Rs. 86.11 lakhs which was rightly made by the AO on appreciation of the entire factual position. We therefore reverse his finding and sustain the addition.

11. The appellant's counsel, Ms. Shashi Kapila, argues that the CIT (A) acted within its jurisdiction, in considering the additional documents in question. She urged that the CIT(A) obtained a copy of the account of the assessee in the books of the commission agent RKDNP for preceding & subsequent years. He noted that in the period from 1.7.86 to 30.6.87 preceding the relevant assessment year 1988-89, the assessee had done

extensive trading in rice through the same broker. Thereafter there were purchase and sale in the subsequent year as well. The accounts revealed that all purchases and sales were being adjusted *inter se* by the agent, and there was an actual payment of ₹8.25 lacs on 27.8.87 by cheque. The commission agent would credit the account of the appellant with the sale proceeds less their commission and debit the account with purchases plus commission. Ultimately, the net outstanding balance was paid by the assessee to the commission agent through twelve cheques between 22-10-1990 and 29-01-1991. These clarified that the assessee was a trusted client of the commission agent. If the AO thought that transactions were false on this ground the A.O should have cross examined both, the commission agent and the petitioner, to draw any possible adverse inference. This was not done by the AO.

12. Learned counsel also argued that the CIT(A) noted that the transactions have been accepted by the revenue in the earlier assessment year under Section 143(3). For the subsequent year the return had been accepted u/s 143(1) and there is no indication that the case has been selected for scrutiny. All payments had been much later than the dates of transactions.

13. Learned counsel submitted that the decision in *Commissioner of Income Tax UP v. Kanpur Coal Syndicate* [53 ITR 225 (SC)] of the Supreme Court has held that :

> *"The Appellate Assistant Commissioner has plenary powers in disposing of an appeal. The scope of his powers is conterminous with that of the Income-tax Officer. He can do what the Income-tax Officer can do and can also direct him to do what he has failed to do. "*

14. Reliance was also placed on *Smt Mohindar Kaur v Central Government* (1976) (104 ITR 120). It was argued that the Court analyzed

the provisions of section 250(4) and section250(5) of the Act and observed that no part of Rule46A whittles down or impairs the power of CIT(A) to make further inquiry, conferred upon the first appellate authority by section 250(4). Similarly, section 250(5) confers powers upon CIT(A) to permit the appellant to raise a fresh point which has not been even touched by Rule 46A.

15. Ms. Kapila urges that the Courts have also held that clarificatory nature of materials is not additional evidence. This issue arose before the Karnataka High Court in *Sri Shankar Khandasari Sugar Mills vs. Commissioner of Income Tax* (1992) 193ITR 669. Before the CIT(A), the assessee produced sales tax assessment order for the first time who refused to look into the same on the pretext of additional evidence. Holding the action of the CIT(A) to be unjustified, the court observed-

> *"The appellate authority should have accepted the material produced by the assessee as clarificatory in nature and considered the same to test the fairness and propriety of the estimate of income made by the Income-tax Officer. Though it was belated production of very relevant material, no prejudice (in its legal sense) would have resulted to the Revenue by considering the material produced by the assessee. In the absence of any prejudice to the Revenue, and the basis of the tax under the Act being to levy tax, as far as possible, on the real income, the approach should be liberal in applying the procedural provisions of the Act. An appeal is but a continuation of the original proceeding and what the Income-tax Officer could have done, the appellate authority also could do. "*

16. Counsel argued that Section 250(4) gives wide discretion to the CIT(A) to make such further inquiry as he thinks fit or to direct the AO. to make further inquiry and report the result to him. Rule 46A(4) enshrines the power when providing that nothing contained in Rule 46A affect the CIT(A)'s power to direct the production of any document or the

examination of any witness to enable him to dispose of the appeal. Even Circular no.108 dated 20.3.1973 explaining the amendment pertaining to introduction of Rule 46A echoes the same view.

17. It is argued that the additional evidence produced before the CIT(A) pursuant to his direction stand on a different footing than the new evidences produced before him by the assessee. In the former case, the restriction contained in sub-clause (1) of Rule 46A shall not be applicable and there shall not be any necessity on the part of the CIT(A) to get them subjected to scrutiny by the AO. Counsel also relied on the Bombay High Court decision in *Smt. Prabhavati Shah 's* (1998) 231 ITR 1 which explained the provisions relating to admission of new evidence before the CIT(A) under Rule 46A of the Income tax Rules 1962. The Court held that

> *"It does not deal with the powers of the Appellate Assistant Commissioner to make further enquiry or to direct the Income-tax officer to make further enquiry and to report the result of the same to him. This position has been made clear by sub-rule (4) which specifically provides that the restrictions placed on the production of additional evidence by the appellant would not affect the powers of the Appellate Assistant Commissioner to call for the production of any document or the examination of any witness to enable him to dispose of the appeal. Under subsection (4) of section 250 of the Act, the Appellate Assistant Commissioner is empowered to make such further inquiry as he thinks fit or to direct the Income Tax Officer to make further inquiry and to report the result of the same to him. Sub-section (5) of section 250 of the Act empowers the Appellate Assistant Commissioner to allow the appellant, at the hearing of the appeal, to go into any ground of appeal not specified in the grounds of appeal, on his being satisfied that the omission of the ground from the form of appeal was not willful. It is clear from the above provisions that the powers of the Appellate Assistant Commissioner are much wider than the powers of an ordinary court of appeal. The scope of his powers is coterminous with that of the Income-tax Officer. He can do what the Income-tax Officer can do. He can also direct the Income-tax Officer to do what he*

failed to do. The power conferred on the Appellate Assistant Commissioner under sub-section (4) of section 250 being a quasi-judicial power, it is incumbent on him to exercise the same if the facts and circumstances justify."

18. What can be seen from the above factual discussion is that the original assessment was affirmed, in the first instance, by the CIT (A). However, the ITAT remitted the matter for reconsideration after granting appropriate hearing to the assessee. This time, the AO listed out several queries; they were either not answered at all, or answered inadequately. The AO therefore, proceeded to analyze the record. More importantly, in the remanded assessment proceedings, the AO made inquiries into the amounts said to have been payable to the commission agents, the other commercial entities with which the assessee reported transactions and also looked into the rates of rice procured and sold. The CIT (A), in the second round, set aside those findings. There were two premises for the appellate order: first, that the CIT (A) differed from the AO with regard to appreciation of evidence: it was held, in the appellate order, that some discrepancies with respect to the supplier's books and the statements by them could not result in such an adverse finding as to reject the assessee's claims as bogus, and two, that the previous years' assessments had showed a consistent pattern with regard to the Revenue's behavior, accepting the assessee's claims regarding the same suppliers and agents.

19. This court is of the opinion that the ITAT's reasoning is not entirely based on the consideration of the fresh evidence under Rule 46-A. It is based on its independent analysis and appreciation of the evidence on record. The assessee's counsel is correct in contending that the powers of the CIT (A) are wide under Section 250 of the Act; that the authority can adduce fresh findings.

20. A close scrutiny of the ITAT's findings – impugned in this case, would reveal that the tribunal took note of the assessee's lapses in replying to the AO's specific queries. It then considered the materials on record, in the form of statements made on behalf of M/s RKDNP with regard to what *was actually paid.* The other findings regarding improbability of such huge amounts remaining outstanding, no interest payable to the commission agent were to bolster the finding that the transactions reported were not credible. Furthermore, the AO went to great lengths to find out whether and if any genuine transactions were entered into by its suppliers; the CIT (A) brushed aside those findings based on a solitary instance of export: of rice by another party. However, the findings with respect to the seven supplies and those involved in it- and the statements recorded of representatives of those entities, were a matter of record.

21. In the opinion of this court, at the end of the day, what the ITAT did was to analyze the CIT (A)'s findings. That it was entitled to do, clearly. And while doing so, it frowned upon the CIT (A)'s order to the extent it considered fresh material. However, those observations by no means are the only basis for upsetting the Appellate Commissioner's order; rather they are only asides, so to speak. If those observations are ignored, what is apparent is that the ITAT's findings are based on an independent analysis of the AO's reasoning. What the CIT (A) clearly could not have done was to prefer the past orders to ignore the detailed inquiry and the facts found by the AO. While no doubt, the CIT (A) also drew inferences, and did not rest his order on the fresh material he considered, that clearly was colored by the previous orders of the revenue in relation to the assessee.

22. Upon an overall analysis of the facts, this court is of opinion that while the CIT (A) could have considered the previous orders (of the revenue relating to past assessments) they could not have been the main

bases for reversing the AO's order. The ITAT's impugned order, it is noticeable, is not based on the so called infirmity attached to the CIT (A)'s order; it is based on its own overall analysis of the evidence. Those are clearly findings of fact, which do not indicate any unreasonableness or other infirmity, calling for interference.

23. In light of the foregoing discussion, the question framed is answered against the appellant assessee and in favour of the revenue. The appeal is therefore, dismissed without order on costs.

S. RAVINDRA BHAT
(JUDGE)

A.K.CHAWLA
(JUDGE)

NOVEMBER 26, 2018