Bombay High Court Smt. Prabhavati S. Shah vs Commissioner Of Income-Tax on 20 February, 1998 Equivalent citations: 1998 231 ITR 1 Bom Author: B Saraf Bench: B Saraf, R Desai JUDGMENT B.P. Saraf, J. 1. By this reference in compliance with the directions of this court under Section 256(2) of the Income-tax Act, 1961, the Income-tax Appellate Tribunal has referred the following questions of law to this court for opinion : "1. Whether the Tribunal committed an error in not deciding ground No. 5, viz., whether Rule 46A applied to the present case ? 2. Whether Rule 46A had any applicability to the present case ? 3. Whether the Tribunal was justified in upholding the view taken by the Appellate Assistant Commissioner of Income-tax that under Rule 46A(1), (2), (3), the evidence produced before him could not be admitted on the records ? 4. Whether, on the facts and circumstances of the case, the Tribunal was justified in sustaining the addition of Rs. 1, 43, 520 being loan from K. Commercial Company and Champaklal Dalpatrai ?" 2. The assessee is an individual. This reference pertains to the assessment of her income under the Income-tax Act, 1961, ("the Act"), for the assessment year 1971-72, the relevant previous year being previous year ended on October 30, 1970. In the course of proceedings for assessment for the above assessment year, the Income-tax Officer noticed that the assessee had taken two loans, one of Rs. 1,00,000 from one K. Commercial Company and the other of Rs. 40,000 from Shri Champaklal Dalpatrai. He called upon the assessee to produce confirmation letters in respect thereof from the concerned creditors. The assessee did not produce the same. Thereupon, the Income-tax Officer, of his own accord, tried to make necessary enquiries. In the case of K. Commercial Company, he failed to do so because the summons issued by him could not be served as the said company was not found to be in existence. In respect of the loan from Champaklal Dalpatrai, he found that the assessee had failed to identify the creditors. The Income-tax Officer, therefore, concluded that the two amounts alleged to have been borrowed by the assessee from the above creditors were bogus. Hence, he added the amount of the above loans, together with interest thereon, to the total income of the assessee as income from undisclosed sources. The addition made amounted to Rs. 1,43,520. Against the order of the Income-tax Officer, the assessee appealed to the Appellate Assistant Commissioner of Income-tax. Before the Appellate Assistant Commissioner, it was submitted by the assessee that the Income-tax Officer was not justified in treating the loans and interest paid thereon as not genuine. It was contended that the assessee had taken the loan from K. Commercial Company by cheque and that being so, the Income-tax Officer should have considered that fact and should have made enquiries with the bank. In respect of the loan from Champaklal Dalpatrai, it was contended that the said amount was received by the assessee by cheque and repayment thereof was also made by cheque. In support of this contention, the assessee produced before the Appellate Assistant Commissioner photostat copies of the cheques as also a certificate from the bank to show that the sum of Rs. 40,000 was received from Champaklal Dalpatrai. A copy of the account of the assessee with the said bank was also produced. The Appellate Assistant Commissioner, however, did not permit the assessee to produce the above additional evidence in view of Rule

46A of the Income-tax Rules, 1962 ("the Rules") as, according to him, the case of the assessee did not fall within the scope of any of the exceptions provided in Sub-rule (1) thereof. He, therefore, did not take into consideration the evidence produced by the assessee in regard to the loan of Rs. 40,000 and upheld the addition of the said amount. This order of the Appellate Assistant Commissioner was also upheld by the Income-tax Appellate Tribunal ("the Tribunal"). Dealing with the order of the Appellate Assistant Commissioner refusing to allow the assessee to produce further evidence in support of the loan of Rs. 40,000, the Tribunal observed as follows : "Admittedly, the evidence sought to be produced by the assessee before the Appellate Assistant Commissioner was not produced by her before the Income-tax Officer. There is nothing on the record to prove that the evidence sought to be produced before the Appellate Assistant Commissioner comes under any of the exceptions (a) to (d) in Sub-rule (1) of Rule 46A of the 1962 Rules. That being the position, the Appellate Assistant Commissioner, in our view, was justified in not taking on record the said evidence sought to be produced before him." 3. In view of its above findings, the Tribunal held that on the facts and circumstances of the case, and the material on record, there was no evidence on record to prove the genuineness of the loan transactions. Being aggrieved by the above order of the Tribunal, the assessee applied for reference of the questions of law arising out of the order of the Tribunal to this court for opinion under Section 256(1) of the Act. The Tribunal rejected the same. The assessee thereupon applied to this court under Section 256(2) for a direction to the Tribunal to state the case and refer the questions sought to be referred by the assessee to this court for opinion. The High Court directed the Tribunal under Section 256(2) of the Act to state the case and to refer the questions. Hence, this reference. 4. We have heard Mr. A. Jasani, learned counsel for the assessee. The main controversy in this case is about the scope and ambit of Rule 46A of the Rules. Rule 46A reads as follows : "46A. Production of additional evidence before the Appellate Assistant Commissioner.–(1) The appellant shall not be entitled to produce before the Appellate Assistant Commissioner any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the Income-tax Officer, except in the following circumstances, namely :– (a) where the Income-tax Officer has refused to admit evidence which ought to have been admitted ; or (b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the Income-tax Officer ; or (c) where the appellant was prevented by sufficient cause from producing before the Income-tax Officer any evidence which is relevant to any ground of appeal ; or (d) where the Income-tax Officer has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal. (2) No evidence shall be admitted under Sub-rule (1) unless the Appellate Assistant Commissioner records in writing the reasons for its admission. (3) The Appellate Assistant Commissioner shall not take into account any evidence produced under Sub-rule (1) unless the Income-tax Officer has been allowed a reasonable opportunity- (a) to examine the evidence or document or to cross-examine the witness produced by the appellant, or (b) to

produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant. (4) Nothing contained in this rule shall affect the power of the Appellate Assistant Commissioner to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the Income-tax Officer) under Clause (a) of Sub-section (1) of Section 251 or the imposition of penalty under Section 271." 5. On a plain reading of Rule 46A, it is clear that this rule is intended to put fetters on the right of the appellant to produce before the Appellate Assistant Commissioner any evidence, whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the Income-tax Officer, except in the circumstances set out therein. 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 Sub-section (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 wilful. 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. If the Appellate Assistant Commissioner fails to exercise his discretion judicially, and arbitrarily refuses to make enquiry in a case where the facts and circumstances so demand, his action would be open for correction by a higher authority. 6. On a conjoint reading of Section 250 of the Act and Rule 46A of the Rules, it is clear that the restrictions placed on the appellant to produce evidence do not affect the powers of the Appellate Assistant Commissioner under Sub-section (4) of Section 250 of the Act. The purpose of Rule 46A appears to be to ensure that evidence is primarily led before the Income-tax Officer. 7. We are supported in our above conclusion by the decision of the Orissa High Court in B. L. Choudhury v. CIT [1976] 105 ITR 371 in which it was held (page 376) : "Wide provision has thus been made conferring jurisdiction on the first appellate authority to make such inquiry as he deems fit. The provision seems to have been based on

the fact that before the Appellate Assistant Commissioner there is generally no opposite party. The appellate authority himself is the departmental authority representing the Revenue. Therefore, he has been invested with the power of making further inquiry. He does not exceed his jurisdiction if he asks or allows the assessee to produce or file additional papers or additional evidence in the manner he thinks fit." 8. It was further held that (page 376) : "In fact, receiving new material by the Appellate Assistant Commissioner cannot be equated with receipt of additional evidence as contemplated in Order 41, Rule 27 of the Code of Civil Procedure or even at the stage of second appeal by the Tribunal." 9. In the instant case, the Income-tax Officer treated the amount of two loans as income of the assessee from undisclosed sources because the summons issued by him could not be served on the creditors. At the time of hearing of the appeal against the above order before the Appellate Assistant Commissioner, the assessee wanted to prove the genuineness of the loan of Rs. 40,000 from one of the borrowers, viz., Champaklal Dalpatrai by relying upon the fact that the amount had been received by the assessee by cheque and repaid by cheque. In support of this contention, the assessee wanted to produce photostat copies of the cheques, a certificate from the bank to show that a sum of Rs. 40,000 was received by the assessee from Champaklal Dalpatrai by cheque and a copy of the account of the assessee with the said bank. Prima facie, this information was necessary to decide the controversy in regard to the genuineness of the loan of Rs. 40,000 taken by the assessee from Champaklal Dalpatrai. The Appellate Assistant Commissioner should have considered this evidence in exercise of his powers under Sub-sections (4) and (5) of Section 250 of the Act which he failed to do. In our opinion, it is a fit case where the Appellate Assistant Commissioner should have exercised the powers conferred upon him under Subsection (4) of Section 250 of the Act and taken on record the xerox copies of the cheque, the certificate from the bank and the copy of the account of the assessee with the said bank and considered the same for deciding the genuineness of the loan of Rs. 40,000. 10. We are also of the opinion that in the facts and circumstances of this case, even under Rule 46A of the Rules the assessee should have been allowed to produce the additional evidence. The Appellate Assistant Commissioner, in our view, was not correct in holding that the case of the assessee did not fall in any of the four exceptions set out in Sub-rule (1) of Rule 46A. In fact, the present case would fall under Clause (c) of Sub-rule (1) of Rule 46A because the assessee had no occasion to collect this evidence earlier. He could have reasonably expected that the creditors will appear before the Income-tax Officer in compliance with the summons issued by him. He was never informed by the Income-tax Officer that the creditors were not available or unidentifiable. If he had been informed by the Income-tax Officer in the course of assessment proceedings that he was not inclined to accept the loans as genuine because of the nonavailability of the creditors, he could have tried to satisfy him about the genuineness of the loan by producing other evidence. At the time of hearing of the appeal, the appellant tried to satisfy the Appellate Assistant Commissioner about the genuineness of one of the loans by producing material which he could collect in the meantime. This case, therefore, will fall

under Clause (c) of Sub-rule (1) of Rule 46A of the Rules. In any view of the matter, we are of the opinion that in the instant case, the Appellate Assistant Commissioner should have considered the evidence produced by the assessee in regard to the loan of Rs. 40,000 from Champaklal Dalpatrai. 11. In view of the above, we answer question No. 3 in the negative and in favour of the assessee. In view of the above answer to question No. 3, questions Nos. 1 and 2 need not be answered. 12. So far as question No. 4 is concerned, we are of the opinion that the question referred to us is not a question of law. We, therefore, decline to answer the same. We, however, make it clear that so far as the addition of Rs. 40,000 being loan from Champaklal Dalpatrai is concerned, the same may be examined afresh in the light of the evidence produced by the assessee. This reference is disposed of accordingly with no order as to costs.