Ufo India Ltd., New Delhi vs Department Of Income Tax on 10 January, 2011

IN THE INCOME TAX APPELLATE TRIBUNAL DELHI 'H' BENCH
BEFORE SHRI A.N. PAHUJA, AM & SHRI C.M. GARG, JM

ITA no.1400/Del/2011
With
CO no.122/Del./2011
Assessment year:2007-08

ACIT,Circle-18(1), Room no.211A, C.R. Building, IP Estate,New Delhi	V/s.	UFO India Ltd., 202, F-46, Bhagat Singh Market, New Delhi
[PAN : AABCV 8900 E]		
(Appellant)		(Respondent)

Assessee by	None
Revenue by	Shri B.R.R. Kumar,DR
Date of hearing	23-05-2012
Date of pronouncement	31-05-2012

ORDER

A.N.Pahuja:-This appeal filed on 18.03.2011 by the Revenue and the corresponding cross objection[CO] filed on 21.04.2011 by the assessee against an order dated 10.01.2011 of the learned CIT(A)-XXI, New Delhi, raise the following grounds:-

> I.T.A. No.1400/D/2011[Revenue] 1 The ld. CIT(A) has erred on facts and in law by restoring to the file of the AO the issue of disallowance of ``3,43,116/-

u/s 14A for recalculation, ignoring that,

i) The powers of the learned CIT(A) to set aside issues decided in scrutiny assessment have been curtailed with effect from 1.6.2001.

ii) By not calling for a remand report from the Assessing Officer on the issues set aside, the learned CIT(A) has not decided the appeal in accordance with the Board's Circular No.14 dt. 12.12.2001 on the issue.

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2 The ld. CIT(A) has erred on facts and in law by allowing depreciation @60% on UPS instead of

@15% as allowed by the Assessing Officer without examining or discussing the case on merits and by ignoring that, the UPS is a separate electrical device attached to a computer to provide battery back up only and does not constitute an integral part of the computer system.

3 The learned CIT(A) has erred on facts and in law by deleting 50% of the disallowance of ``25,48,492/- comprising legal and professional expenses of capital nature on the basis of the Hon'ble Delhi High Court order in the case of CIT Vs. OCL India Ltd., 2010-TIOL-808-HC-Del-IT wherein it was held that when the purpose of services rendered is partly related to trading activity, then the payment made for such services has to be bifurcated suitably, ignoring that,

i) In the case under consideration the purpose of services rendered was almost entirely related to benefit of enduring nature as apparent from submissions of the assessee itself during appellate proceeding cited at para 5.1 (i) on page 4 of the learned CIT(A) order.

ii) The assessee has not been able to satisfactorily establish that the said legal and professional expenses incurred chiefly in connection with drafting, revising and amending of Articles of Association, Investment Agreements etc was not for enduring benefit of the company and was in the nature of revenue expenditure.

iii) The assessee has stated in its submission during the appellate proceedings as cited at page 5 of the CIT(A) order that, without prejudice to its other submissions, the said expenditure may be amortized @1/5th for five successive years, thus showing that even the assessee itself does not believe the said expenditure to be entirely allowable during the year.

iv) There is no acceptable basis for allowance of 50% of the expenses and disallowance of 50% of the expenses since no working has been given by the learned CIT(A) to justify his stand that 50% of the expenses was related to benefit of enduring nature 3 ITA no.1400/Del./2011& CO no 122/Del./2011.

and 50% of the expenses was related to trading activity.

4 The learned CIT(A) has erred on facts and in law by holding that expenditure of ``6,29,435/- comprising rent/rates/taxes, depreciation and freight disallowed by the Assessing Officer as prior period expenses, was allowable as the liability for payment of the said expenditure was crystallized during this year, ignoring that:

i) The submissions made by the assessee in the above regard during the appellate proceeding were not made during the assessment proceedings.

ii) The Assessing Officer has not been granted an opportunity to examine the additional evidence and explanation submitted by the assessee during the appellate proceedings.

iii) The conditions laid down for admission of additional evidence under Rule 46A are not satisfied in the case.

iv) Neither the submissions of the assessee made during the appellate proceedings nor the decision of the learned CIT(A) make it abundantly clear that the liability for payment of the said expenditure pertaining to prior periods actually crystallized during the year under consideration."

CO no.122/Del./2011[Assessee]

1. "The learned CIT(A) went wrong in disallowing fifty percent the expenditure of ``25,48,492/- in respect of professional fee for conducting the legal due diligence exercise on UFO Moviez Ltd. and other subsidiaries of the company by treating the same to be of capital nature.

2. For the above other grounds that may be further adduced at the time of hearing, the order of the learned CIT(A) requires to be modified suitably."

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2. At the outset, the Bench rejected the request for adjournment on behalf of the assessee in the letter dated 23rd May, 2012 signed by one Shri Manu K Giri, Advocate, power of attorney of the signatory or of shri Anoop Sharma, having not been filed . Earlier on 16.5.2012 also , the Bench adjourned the hearing for want of power of attorney of the ld. AR. Considering the nature of issues, the Bench proceeded to dispose of these appeals after hearing the ld. DR.

3. Adverting first to ground no.1 in the appeal, facts, in brief, as per relevant orders are that e-return declaring loss of ``25,21,37,436/- filed on 28.10.2007 by the assessee, engaged in the business of Digital Cinema System, after being processed u/s 143(1) of the Income-tax Act, 1961 (hereinafter referred to as the Act) was selected for scrutiny with the service of a notice u/s 143(2) of the Act issued on 23.09.2008. During the course of assessment proceedings, the Assessing Officer (A.O. in short) noticed that the assessee claimed exemption of dividend income of ``97,153/- u/s 10(34) of the Act. On perusal of details, the AO noticed that the assessee incurred an expenditure of ``27,98,84,089/- for earning gross income of ``7,92,48,938/-. Accordingly, the AO disallowed proportionate expenditure of ``3,43,116/-, having recourse to provisions of section 14A of the Act.

4. On appeal, the ld. CIT(A) restored the issue back to the file of AO for re-computing disallowance in the light of decision in the case of Godrej Boyce Mfg. Co. Ltd. Vs. DCIT and Another, 234 CTR 1 (Mumbai).

5. The Revenue is now in appeal before us against the aforesaid findings of the ld. CIT(A).The ld. DR while referring to ground no.1 in their appeal contended that the ld. CIT(A) did not have power to set aside and thus, directions of the ld. CIT(A) were contrary to the law.

6. We have heard the ld. DR and gone through the facts of the case. We find that there is nothing in assessment order or in the impugned order to 5 ITA no.1400/Del./2011& CO no 122/Del./2011.

suggest as to whether the assessee submitted any computation for disallowance in terms of the provisions of section 14A of the Act nor the AO pinpointed any specific item of expenditure incurred

for earning the dividend income. The ld.CIT(A) merely followed the aforesaid decision in Godrej Boyce Mfg. Co. Ltd. (supra) and restored the matter to the file of the AO. However, the extant provisions of section 251 of the Act do not bestow any power on the ld. CIT(A) for setting aside the issue in an assessment. A mere glance at the impugned order reveals that the order passed by the ld. CIT (A) is cryptic and grossly violative of one of the facets of the rules of natural justice, namely, that every judicial/quasi-judicial body/authority must pass reasoned order, which should reflect application of mind by the concerned authority to the issues/points raised before it. The application of mind to the material facts and the arguments should manifest itself in the order. Section 250(6) of the Act mandates that the order of the CIT(A) while disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for the decision. The requirement of recording of reasons and communication thereof by the quasi- judicial authorities has been read as an integral part of the concept of fair procedure and is an important safeguard to ensure observance of the rule of law. It introduces clarity, checks the introduction of extraneous or irrelevant considerations and minimizes arbitrariness in the decision-making process. Hon'ble jurisdictional High Court in their decision in Vodafone Essar Ltd. Vs. DRP,196 Taxman423(Delhi) held that when a quasi judicial authority deals with a lis, it is obligatory on its part to ascribe cogent and germane reasons as the same is the heart and soul of the matter and further, the same also facilitates appreciation when the order is called in question before the superior forum. We may point out that a 'decision' does not merely mean the 'conclusion'. It embraces within its fold the reasons forming basis for the 6 ITA no.1400/Del./2011& CO no 122/Del./2011.

conclusion.[Mukhtiar Singh Vs. State of Punjab,(1995)1SCC 760(SC)].

6.1. Hon'ble Bombay High Court in the case of Godrej & Boyce Manufacturing Company Ltd. (supra) while adjudicating a similar issue in the context of provisions of sec. 14A of the Act and Rule 8D of the IT Rules,1962 concluded that Rule 8D, inserted w.e.f 24.3.2008 cannot be regarded as retrospective because it enacts an artificial method of estimating expenditure relatable to tax-free income. It applies only w.e.f AY 2008-09. For the assessment years where Rule 8D does not apply, the AO will have to determine the quantum of disallowable expenditure by a reasonable method having regard to all the facts and circumstances, the Hon'ble High Court concluded.

6.2 Hon'ble Supreme Court in their decision dated 6.7.2010 in CIT v. W alfort Share & Stock Brokers (P.) Ltd.,326 ITR 1, inter alia, observed that for attracting section 14A of the Act there has to be a proximate cause for disallowance, which is its relationship with the tax exempt income.

6.3 Hon'ble Punjab & Haryana High Court in their decision in CIT vs. Hero Cycles Ltd.,323 ITR 518 have observed that disallowance under section 14A requires finding of incurring of expenditure and where it is found that for earning exempted income no expenditure has been incurred, disallowance under section 14A cannot stand.

6.4 In the light of view taken in the aforesaid decisions, Hon'ble jurisdictional High Court in a recent decision dated 18.11.2011 in Maxopp Investment Ltd. vs. CIT,[2011] 15 taxmann.com 390 (Delhi) held as under:

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> "35. We are of the view that Rule 8D would operate prospectively. We agree with the submissions made by Dr Rakesh Gupta that if the said Rule were to have retrospective effect, nothing prevented the Central Board of Direct Taxes from saying so, particularly, in view of the fact that it had the power to make a rule retrospective by virtue of Section 295(4) of the said Act. Instead of making Rule 8D retrospective, clause 1(2) of the Income-tax (Fifth Amendment) Rules, 2008 made it clear that the rules would come into force from the date of their publication in the Official Gazette. It is, therefore, clear that Rule 8D, which was introduced by virtue of the Notification No.45/2008 dated 24.03.2008, was prospective in operation and cannot be regarded as being retrospective. We may also point out that we have had the benefit of the decision of the Bombay High Court in Godrej & Boyce Mfg. Co. Ltd. v Dy. CIT [2010] 328 ITR 81/194 Taxman 203, wherein it has, inter alia, been held that the provisions of Rule 8D of the said Rules has prospective effect and shall apply with effect from assessment year 2008-09 onwards.
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> 36. Insofar as sub-sections (2) and (3) of Section 14A are concerned, they have also been introduced by virtue of the Finance Act, 2006 with effect from 01.04.2007. This is apparent, first of all, from the Notes on Clauses of the Finance Bill, 2006 [Reported in 281 ITR (ST) at pages 139-140]. The said Notes on Clauses refers to clause 7 of the Bill which had sought to amend Section 14A of the said Act. It is specifically mentioned in the said Notes on Clauses that:-
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> "This amendment will take effect from 1st April, 2007 and will, accordingly, apply in relation to the assessment year 2007-08 and subsequent years."

37. Furthermore, in the Memorandum explaining the provisions in the Finance Bill, 2006 [281 ITR (ST) at pages 281-281], it is once again stated with reference to clause 7 which pertains to the amendment to Section 14A of the said Act that:-

> "This amendment will take effect from 1st April, 2007 and will, accordingly, apply in relation to the assessment year 2007-08 and subsequent years."

38. We may also refer to the CBDT Circular No.14/2006 dated 28.12.2006 and to paragraphs 11 to 11.3 thereof. Paragraph 11 dealt with the method for allocating expenditure in relation to exempt income and paragraphs 11.1 and 11.2 explained the basis and logic behind the introduction of sub-section (2) of Section 14A of the said Act. Paragraph 11.3 specifically provided for applicability of the provisions of subsection (2) and it clearly indicated that it would be applicable "from the assessment year 2007-08 onwards".

39. It is, therefore, clear that sub-sections (2) and (3) of Section 14A were introduced with prospective effect from the assessment year 2007-08 onwards. However, sub-section (2) of Section 14A remained an empty shell until the introduction of Rule 8D on 24.03.2008 which gave content to

the expression "such method as may be prescribed" appearing in Section 14A(2) of the said Act.

40. From the above discussion, it is clear that, in effect, the provisions of sub sections (2) and (3) of Section 14A would be workable only with effect from the date of introduction of Rule 8D. This is so because prior to that date, there was 8 ITA no.1400/Del./2011& CO no 122/Del./2011.

no prescribed method and sub-sections (2) and (3) of Section 14A remained unworkable."

7.. As already observed, the impugned order suffers from lack of reasoning and is not a speaking order on the issue before us. In view of the foregoing, especially when the ld. CIT(A) have not passed a speaking order on the issue raised in this appeal before us nor had the benefit of aforesaid decisions including that of the Hon'ble jurisdictional High Court, we consider it fair and appropriate to set aside the order of the ld. CIT(A) and restore the matter to his file for deciding the issue, afresh in accordance with law in the light of aforesaid judicial pronouncements, after allowing sufficient opportunity to both the parties. Needless to say that while redeciding the appeal, the ld. CIT (A) shall pass a speaking order, keeping in mind, inter alia, the mandate of provisions of sec. 250(6) of the Act. W ith these observations, ground no. 1 in the appeal of the Revenue is allowed.

8.. Ground no.2 in the appeal relates to claim of depreciation on UPS @60%. The AO noticed that the assessee claimed depreciation @60% on UPS as against admissible rate of 15%. Accordingly, the AO disallowed excess depreciation of `2,11,010.

9. On appeal, the learned CIT(A) allowed the claim of assessee for depreciation @60% as applicable to computer systems.

10. The Revenue is now in appeal before us against the aforesaid findings of the ld. CIT(A). The ld. DR merely supported the order of the AO.

11. We have heard the ld. DR and gone through the facts of the case. We find that the Hon'ble Delhi High Court in the case of CIT v. BSES Rajdhani 9 ITA no.1400/Del./2011& CO no 122/Del./2011.

Powers Ltd. in I.T. Appeal no. 1266 (Delhi) of 2010, in their decision dated 31-8- 2010 while adjudicating a similar issue, held as under:

> "We are in agreement with the view of the Tribunal that computer accessories and peripherals such as, printers, scanners and server etc. form an integral part of the computer system. In fact, the computer accessories and peripherals cannot be used without the computer. Consequently, as they are the part of the computer system, they are entitled to depreciation at the higher rate of 60 per cent."

11.1 Following the said decision, ITAT in ITO vs.v.Omni Globe Information Technologies India (P.) Ltd., 131 ITD 280(Delhi) held that if peripherals such as printers, scanners and servers etc. form integral part of the computer system, UPS will also be an integral part of the computer system, entitled for deduction of depreciation at the rate of 60 per cent. In another decision dated 9.11.2010,

Hon'ble Delhi High Court in CIT vs. Citycorp Maruti Finance Ltd. in ITA nos. 1712& 1714/2010 followed their own decision in BSES Yamuna Powers Ltd.(supra) and upheld the view of the ITAT, allowing depreciation @60% on computer accessories and peripherals like printers etc. .A similar view was taken in CIT Vs. M/s Bonanza Portfolio Ltd.: I.T.A. no.833 of 2011 by the Hon'ble jurisdictional High Court in their decision dated 10.8.2011. In the light of view taken in the aforesaid decisions, especially when the Revenue have not placed before us any contrary decision nor any other material so as to enable us to take a different view in the matter, we have no hesitation in upholding the findings of the ld. CIT(A),allowing depreciation @60% on UPS. Therefore, ground no.2 in the appeal of the Revenue is dismissed.

12.. Ground no.3 in the appeal of the Revenue and ground no.1 in the CO relate to disallowance of legal and professional charges. During the course of assessment proceedings, the AO noticed that the assessee incurred an amount of ``6,16,98,370/- towards legal and professional charges ,including an amount of `25,48,492/- paid to M/s Wadia Gandy & Co. for conducting due diligence and drafting employment agreement relating to the forthcoming merger of the company and UFO Moviez (India) Ltd. Since the said expenditure, 10 ITA no.1400/Del./2011& CO no 122/Del./2011.

according to the AO, bestowed enduring benefit, the AO added an amount of ``25,48,492/- on the ground that amount was capital in nature..

13. On appeal, the assessee contended that for carrying out due diligence exercise on the company ,UFO India and other subsidiaries, for discussing the issues arising out of legal due diligence exercise as also for drafting employment agreements in terms of the investment agreement and for revising or amending Articles of Association of the company ,UFO India and other subsidiaries, the assessee incurred the said expenditure. While pointing out that no merger took place in the year under consideration and the assessee incurred the expenditure for merely due diligence exercise, it was submitted that no disallowance could be made. Inter alia, the decision in the case of CIT Vs. Kochin Malabar Estates and Industries Ltd., 207 ITR 398 (Kerala) was relied upon. Without prejudice to these arguments, the assessee claimed that expenditure be amortised u/s 35DD of the Act. In the light of these submissions, the learned CIT(A) reduced the addition to 50% in the following terms:-

> "5.2 I have gone through the finding of the AO and submission of the ld. AR. In this regard I place my reliance on the judgment of the Hon'ble Delhi High Court in the case of CIT Vs. OCL India Ltd. reported at 2010-TIOL-808-HC-Del-IT, wherein, the Hon'ble High Court had decided similar issue in favour of the revenue holding that 40% of expenditure incurred in the nature of the capital. The finding of the Hon'ble High Court is reproduced hereunder:-
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> "Governed by the aforesaid principles, we are of the view that the Tribunal has rightly held that the scope of study was the mixture of both the areas namely part of it related to the study from which benefit of enduring nature was sought to be achieved and part thereof related to the trading activities. Therefore, the expenditure incurred was required to be apportioned between the two viz capital and revenue expenditure.

When we come to the allocation of this expenditure, the reason for allocating 20% of the expenses towards capital expenditure is not discernible from the order of the Tribunal. According to the Tribunal itself, out of the five aspects on which report to the consultant was sought, two related to expansion or starting of 11 ITA no.1400/Del./2011& CO no 122/Del./2011.

new projects. On this observation of the Tribunal there is no dispute. This is correct as areas No.4 & 5 relate to possible acquisition in southern region and expansion of existing cement plant and from these studies benefit of enduring nature was sought to be derived at. Then the obvious fallout would be to allocate 40% of the total expenditure and not 20% to the head "capital expenditure.

We, therefore, answer the question by holding that the Tribunal was not correct in sustaining addition only to the extent of 20% treating as incurred in the same capital field and it should have sustained addition to the extent of 40% of the addition on total payment of `47.25 lacs as capital expenditure. The order of the Tribunal is modified accordingly."

5.3 The ratio of the above said judgment of the Hon'ble Delhi High Court is clearly attracted in the case as there is a basic similarity in the case as above mentioned case was pertaining to the report of the consultant for starting of new projects. Herein the payment has been done in relation to merger of the company. So, I am of the considered opinion that 50% of the expenditure incurred to M/s Wadia Gandy & Co. should be treated as capital in nature. So, 50% of the addition is upheld. Thus, assessee gets a relief of `12,74,246/- on this account."

14 The Revenue is now in appeal before us for reducing the addition by 50% while the assessee is in appeal for upholding the remaining addition. The ld. DR merely supported the order of the AO while referring to decision of Hon'ble Delhi High Court in CIT Vs. OCL India Ltd., 2010-TIOL-808-HC-Del-IT.

15. We have heard the ld. DR and gone through the facts of the case. Indisputably, the amount of `25,48,492/- was incurred towards legal and professional charges paid to M/s Wadia Gandy & Co. for due legal diligence exercise of the assessee company, UFO India and other subsidiaries and revising and amending their Articles of Association pursuant to the terms of investment agreement besides drafting employment agreement etc. The exact scope of services rendered by the consultants and basis of payment is not evident from the impugned order nor the ld. DR placed before us any agreement or document in that connection. The AO treated the amount capital in nature 12 ITA no.1400/Del./2011& CO no 122/Del./2011.

while the ld. CIT(A) reduced the disallowance by 50% on the basis of decision in OCL India Ltd.(supra) . We find that the ld. CIT(A) without analyzing the basis of allocation of each of the job undertaken by M/s Wadia Gandy & Co. vis-à-vis assessee and other entities, attributed 50% of the amount in relation to merger of the company as capital in nature. The ld. CIT(A) nowhere adduced the basis of such allocation nor the ld. DR could throw any light on this aspect. In OCL India

Ltd.(supra) followed by ld. CIT(A), the Hon'ble Delhi Court after examining the agreement between the assessee and the Consultant, which delineated the scope of study as mentioned in para 7 of the said order and in the light of broad principles governing nature of expenditure mention in para 13 of the order in the light of decision in CIT Vs. J K Synthetics Ltd., 222 CTR 339(SC) ,attributed 40% of the amount as capital in nature. In the instant case before us, the ld. CIT(A) did not make elaborate discussion on the scope of study undertaken by the consultants nor the ld. DR submitted a copy of the agreement with consultants, if any, before us. In these circumstances ,especially when complete facts in relation to scope of study are not available before us nor the basis of allocation of the amount towards each of the job undertaken by the consultant and nor even as to whether portion of expenditure was attributed to other entities in the group covered in the study, we consider it fair and appropriate to vacate the findings of the ld. CIT(A) and restore the matter to his file for deciding the issue raised in the ground no.3 in the appeal of the Revenue and ground no.1 in the CO, afresh in accordance with law in the light of our aforesaid observations, after allowing sufficient opportunity to both the parties, bringing out clearly as to the nature of each of the job comprised in the scope of study and amount in relation thereto, before concluding as to whether or not such amount is capital or revenue in nature. With these observations, ground no. 3 in the appeal of the Revenue and ground no.1 in the CO are disposed of.

16.. Ground no.4 in the appeal relates to prior period expenditure of ``6,29,435/- . The AO disallowed the claim merely because the expenditure did not relate to the year under consideration.

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17. On appeal, the assessee contended that prior period expenses comprised rent rates and taxes-`4,59,705; depreciation-`92,380 & freight and forwarding charges-` 77,350. The amount of rent rates and taxes was on account cess for the FY 2005-06 paid to Navi Mumbai Municipal Corporation covered u/s 43B of the Act. As regards depreciation on lens for projectors, the assessee submitted that since capitalization of lenses was made with retrospective effect and total depreciation amounting to ``3,69,21,875/- as per books, including ``92,380/- was added back in the return of income and no additional depreciation relating to preceding year was claimed under the Act, amount could not have been disallowed again. As regards freight and forwarding charges, the assessee contended that the liability for the said amount on account of carriage, loading and octroi charges crystallized during the year under appeal. In the light of these submissions the ld. CIT(A),without analyzing the facts of the case or allowing any opportunity to the AO, allowed the claim of the assessee, holding that liability for payment of expenditure crystallized in the year under consideration.

18. The Revenue is now in appeal before us against the aforesaid findings of the ld. CIT(A).The ld. DR supported the order of the AO while contending that the ld. CIT(A) did not analyze as to how the liability for each of the expenditure comprised the amount of ``6,29,435/- crystallised in the year under consideration. The ld. DR added that the learned CIT(A) admitted additional evidence in contravention of Rule 46A of the I.T. Rules, 1962 and allowed the claim of assessee.

19. We have heard both the parties and gone through the facts of the case. As is apparent from the aforesaid facts, the AO disallowed the amount without analyzing as to how the liability for each of the expenditure comprised in the amount of ``6,29,435/- crystallised in the year under consideration . There is nothing to suggest as to whether or not any details or reply was filed before the AO and the assessment order is silent on this aspect. The ld. CIT(A) accepted 14 ITA no.1400/Del./2011& CO no 122/Del./2011.

the submissions of the assessee, without having any report from the AO on the written submissions/documents filed by the assessee and concluded that the liability for the aforesaid expenses comprising the amount of ``6,29,435/-, crystallized in the year under consideration . Admittedly, the assessee is following mercantile system of accounting. It is well settled that accrual of a statutory liability depends upon the terms of the relevant statute. The quantification or ascertainment cannot postpone its accrual to the extent of admitted liability. On the other hand, contractual liability accrues when the basis for its quantification is settled by an agreement or otherwise. As held by the Hon'ble Gujrat High Court in their decision in Saurashtra Cement & Chemical Industries Ltd. vs. CIT, 213 ITR 523(Guj) ,merely because an expense relates to a transaction of an earlier year it does not become a liability payable in the earlier year unless it can be said that the liability was determined and crystallized in the year in question on the basis of maintaining accounts on the mercantile basis. In each case where the accounts are maintained on the mercantile basis it has to be found in respect of any claim, whether such liability was crystallized and quantified during the previous year so as to be required to be adjusted in the books of account of that previous year. If any liability, though relating to the earlier year, depends upon making a demand and its acceptance by the assessee and such liability has been actually claimed and paid in the later previous years it cannot be disallowed as deduction merely on the basis the accounts are maintained on mercantile basis and that it related to a transaction of the previous year, the Hon'ble High Court observed. It was further concluded that it is actually known income or expenses, the right to receive or the liability to pay which has come to be crystallized, which is to be taken into account under the mercantile system of maintaining books of account. An estimated income or liability, which is yet to be crystallized, can only be adjusted as a contingency item but not as an accrued income or liability of that year.

19.1. In the instant case, as already stated, there is nothing to suggest as to whether or not any reply was filed before the AO. On appeal, the assessee 15 ITA no.1400/Del./2011& CO no 122/Del./2011.

submitted detailed written submissions/documents. These details/documents were not confronted to the AO, as pointed out by the ld. DR.A specific ground has been taken before us regarding violation of procedure laid down in rule 46A of the IT Rules,1962. These provisions stipulate that the ld. CIT(A) can take into account any evidence produced under sub-r. (1)(b) & (c) of Rule 46A of the IT Rules, 1962 if the assessee was prevented by sufficient cause . In Haji Lal Mohd. Biri Works' case [2005] 275 ITR 496 (All), by making an elaborate discussion on rule 46A of the Rules in paragraph 10 at page 500 and 501, it was held that under rule 46A the authority is not permitted to act whimsically while exercising the jurisdiction under it .In the case under consideration, the assessee is stated to have placed before the ld. CIT(A),certain additional documents and the said documents were not submitted before the AO. The powers of the CIT(A) in terms of rule 46A to

admit fresh evidence, entail an element of discretion which is required to be exercised in a judicious manner. The powers of the CIT(A) to admit additional evidence are not only in situations where the evidence could not be produced before lower authorities owing to lack of adequate opportunity but also in situations where the fresh evidence would enable the CIT(A) to dispose of the appeal or for any other substantial cause. Of course, the power is to be exercised judiciously and for reasons to be recorded. Here we may point out that the Hon'ble jurisdictional High Court in CIT vs. Manish Build Well (P.) Ltd.,16 Taxmann.com27(Delhi) held that that the conditions prescribed in Rule 46A must be shown to exist before additional evidence is admitted and every procedural requirement mentioned in the Rule has to be strictly complied with so that the Rule is meaningfully exercised . Once the assessee invokes Rule 46A and prays for admission of additional evidence before the CIT (A), then the procedure prescribed in the said rule has to be scrupulously followed. A distinction should be recognized and maintained between a case where the assessee invokes Rule 46A to adduce additional evidence before the CIT (A) and a case where the CIT (A), without being prompted by the assessee, while dealing with the appeal, considers it fit to cause or make a further enquiry by virtue of the powers vested in him under sub-

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Section (4) of Section 250. It is only when he exercises his statutory power suo moto under the above sub-section that the requirements of Rule 46A need not be followed. On the other hand, whenever the assessee who is in appeal before him invokes Rule 46A, it is incumbent upon the CIT (A) to comply with the requirements of the Rule strictly so that the Rule is meaningfully exercised and not exercised in a routine or cursory manner. The Hon'ble High Court held that sub-rule (3) of Rule 46A interdicts the CIT (A) from taking into account any evidence produced for the first time before him unless the AO has had a reasonable opportunity of examining the evidence and rebut the same. In the instant case, there is nothing in the impugned order of the ld. CIT (A) to suggest as to whether or not any opportunity was allowed to the AO before concluding on the issue nor the ld. CIT(A) refers to any additional evidence in terms of rule 46A of the IT Rules,1962. In these circumstances and in the interest of justice and fair play, we vacate the findings of the ld. CIT(A) and restore the issue raised in ground no.4 of appeal of the Revenue before us to his file, with the directions to follow the mandate in terms of Rule 46A of the IT Rules, 1962 as also principles of natural justice and thereafter, dispose of the matter in accordance with law after allowing sufficient opportunity to both the parties ,bringing out clearly as to whether or not the liability for each item of the expenditure comprising the amount of ```6,29,435/-, really crystallized in the hands of the assessee during the year under consideration. Needless to say that while redeciding the appeal, the ld. CIT(A) shall pass a speaking order, keeping in mind, inter alia, the mandate of provisions of sec. 250(6) of the Act. With these directions, ground no. 4 in the appeal of the Revenue is disposed of, as indicated hereinbefore.

20. Ground No.2 in the CO being general in nature, does not require any separate adjudication and is, accordingly, dismissed.

21. No other plea or argument was made before us.

17 ITA no.1400/Del./2011& CO no 122/Del./2011.

22. In the appeal of the Revenue is partly allowed while corresponding CO is allowed, but both for statistical purposes.

Order pronounced in Open Court

Sd/-	Sd/-
(C.M. GARG)	(A.N. Pahuja)
(Judicial Member)	(Accountant Member)

Copy of the Order forwarded to:-

1. Assessee

2. ACIT,Circle-18(1), Room no.211A, C.R. Building, IP Estate,New Delhi

3. CIT concerned.

4.CIT(A)-XXI, New Delhi.

5. DR, ITAT,'H' Bench, New Delhi

6. Guard File.

BY ORDER, Deputy/Asstt.Registrar ITAT, Delhi