

IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCH 'A', BANGALORE

BEFORE SHRI. SUNIL KUMAR YADAV, JUDICIAL MEMBER

AND

SHRI. ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

I.T.A No.248/Bang/2012 & ITA/165/Bang/2014  
(Assessment Year : 2005-06)

Shri. G. Atmaram,  
Prop : M/s. Gangarams Gallery, No.72,  
I floor, M. G Road, Bengaluru .. Appellant  
PAN : ADZPA6437D

v.

Income-tax Officer,  
Ward – 1(1), Bengaluru .. Respondent

Assessee by : Shri. S. Venkatesan, CA  
Revenue by : Dr. P. K. Srihari, Addl. CIT

Heard on : 02.05.2016  
Pronounced on : 25 .05.2016

**ORDER**

**PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER :**

These appeals are filed by the assessee. ITA.248/Bang/2012 is against an order dt.05.03.2010, passed by the CIT-1, Bengaluru, u/s.263 of the Income-tax Act, 1961 (' the Act' in short) and the appeal in

ITA.165/Bang/2014 is against order dt.21.11.2011 of the CIT (A)-I, Bengaluru.

02. Both appeals are for the same assessment year, viz., 2005-06. Appeal in ITA.165/Bang/2014 has been filed with a delay of 1359 days. Assessee has filed a petition for condoning the delay. Reason stated by the assessee in the affidavit is reproduced hereunder :

*1. That, being aggrieved by the order passed u/s. 263 of the Act by the learned Commissioner of Income-tax, Bangalore -1, BANGALORE, dated 05/03/2010 which was received by me on 12/03/2010, an appeal ought to have been filed before the Hon'ble Tribunal on or before 11/05/2010.*

*2. That, the appeal against the said appellate order came to be instituted before the Honbte Income-tax Appellate Tribunal, Bangalore Bench, Bangalore on 29/01/2014 and thus, there is a delay of 1359 days in filing the appeal. The reasons for the delay in filing the appeal are explained hereinafter.*

*3. That soon after the receipt of the above order passed u/s 263 of the Act dated 05/03/2010, the same was placed in the hands of our Auditors Mr. KIRAN S MURTHY, BANGALORE, for further action and I was advised that since the learned CIT has remanded the issue to the file of the learned A 0 and directed the Learned A 0 to re-do the assessment afresh and therefore, there was no need to file any appeal to the Hon'ble ITAT and thereafter the order of assessment u/s 143[3] rws 263 of the Act passed by the learned Income-tax Officer, Ward - 1[1], Bangalore dated 31/12/2010.*

4. *That aggrieved by the order of assessment passed u/s 143[3] rws 263 of the Act, I had filed an appeal before the learned Commissioner of Income-tax [Appeals] - I, Bangalore and the learned Commissioner of Income-tax [Appeals]- I, Bangalore vide his order in ITA NO.92/W-1[1]/A-1/10-11 dated 21/11/2011 dismissed my appeal and thereafter I had filed an appeal before the Hon'ble ITAT, Bangalore Bench, Bangalore and the same is pending disposal.*

5. *That, I recently approached Sri S. Venkatesan, FCA., of M/s. S.Venkatesan & Co., Chartered Accountants, Bangalore, to appear in my case before the Hon'ble ITAT, Bangalore Bench, Bangalore in the appeal arising out of the order passed u/s 143[3] rws 263 of the Act and on going through the papers, I was advised that I ought to have filed an appeal against the order of the CIT u/s. 263 of the Act in F No.263/CIT-1/2009-10 dated 05/03/2010 before the Hon'ble Tribunal.*

6. *That, thereupon, immediate steps were taken by me to file an appeal before the Hon'ble ITAT and accordingly the appeal against the order passed u/s. 263 of the Act dated 05/03/2010 came to be instituted before the Hon'ble Income-tax Appellate Tribunal, Bangalore Bench, Bangalore on 29/01/2014 with a delay of 1359 days in filing the appeal.*

7. *That, the delay of 1359 days in filing the appeal is neither willful nor deliberate and the same was due to the circumstances explained above and thus, there is a reasonable cause for the delay.*

8. *Hence, it is prayed that the delay in filing the appeal of 1359 days may kindly be condoned and the appeal may kindly be admitted and disposed off on merits for the advancement of substantial cause of Justice.*

03. Crux of the petition is that assessee on receipt of the order of CIT u/s.263 of the Act, given it to Mr. Kiran S. Murthy, their auditors. They had advised that there was no requirement to file any appeal and the matter could be pursued with the AO. We find that during the course of original assessment proceedings, assessee was indeed represented by Mr. Kiran S. Murthy. We also find that in the proceedings before the CIT u/s.263 of the Act, also the very same representative had appeared for the assessee. Not only had he appeared before CIT, but had also submitted detailed submissions which were considered by the CIT while passing the order u/s.263 of the Act. In these circumstances it is difficult to believe that the concerned representative, who appear to be well versed in tax law, would have advised the assessee not to move an appeal against the order u/s.263 of the Act. Had it been so, assessee could have definitely filed an affidavit from Mr. Kiran S. Murthy, in support. Nothing of that sort has been filed. In the circumstances we are of the opinion that assessee has not been able to satisfactorily explained the delay of 1359 days in filing the appeal. No doubt assessee has filed a number of case laws which inter alia mentions that technical consideration should take a back seat and endeavour should always be to hear the case on merits. But when an assessee is unable to justify the delay which was more than 1359 days, by a reasonable

explanation, it is not possible to consider it only as a technical default. In the circumstances we are not inclined to condone the delay. Appeal in ITA.165/Bang/2014, stands dismissed.

04. In ITA.248/Bang/2012, assessee has filed amended the grounds and such amended grounds runs into six paragraphs. Of this, grounds 1 and 6 are general in nature. Grounds 3, 4 and 5 are on merits of the additions made by the AO. Vide its ground 2 assessee assails the order of CIT(A) in that he refused to admit to adjudicate the appeal of the assessee.

05. Ld. AR submitted that CIT (A) had considered himself as not competent to consider the appeal on merits, for a reason that assessee had not preferred any appeal against the order passed u/s.263 of the Act, pursuant to which the assessment was redone. Ld. AR submitted that CIT was under a wrong impression that the order of the AO pursuant to proceedings u/s.263 of the Act, was not an appealable one. As per the Ld. AR, CIT placed wrong reliance on the judgment of Hon'ble Kerala High Court in the case of Season Rubber Ltd v. CIT [(2003) 263 ITR 385] that of the Hyderabad Bench of the Tribunal in the case of Dr. A. Naresh Babu v. ITO [(2010) 124 ITD 28] and that of Mumbai Bench of ITAT in Sadharam Patel & Sons v. ITO [(2009)120 ITD 291]. As per the Ld. AR,

Section 246A of the Act which defines the orders that are appealable included an order of assessment u/ss.(3) of Section 143 of the Act, and the only exclusion was for an order passed under the said section in pursuance of directions of DRP.

06. Per contra, Ld. DR supported the order of CIT (A).

07. We have perused the orders and heard the rival contentions. CIT (A) had held that he had no power to adjudicate the issues raised by assessee in its appeal. As per the CIT (A), the issues which were raised by the assessee in the appeal were those which were considered by the CIT in a proceedings u/s.263 of the Act, and assessee having preferred no appeal against the latter order, such findings of the CIT in the proceedings u/s.263 of the Act, had become final. In the case of Season Rubber Ltd (supra) Hon'ble Kerala High Court, relied on by the CIT (A), assessee had preferred a revision petition u/s.264 of the Act, seeking waiver of interest u/s.215 of the Act. Hon'ble Kerala High Court held that CIT having passed an order u/s.264 of the Act, an appeal against the order of AO levying interest u/s.215 of the Act could not be maintained. However in the case before us, revisionary proceedings were initiated by the CIT were suo-motu and not on any application filed by the assessee. Therefore the above

judgment cannot be quoted as an authority for the proposition that an assessee cannot prefer an appeal before the CIT (A) on an order passed by the AO pursuant to proceedings u/s.263 of the Act. As for the decision of Hyderabad Bench of this Tribunal in the case of Dr. A. Naresh Babu (supra), the question was whether CIT (A) could entertain an appeal on issues which were conclusively decided in a proceeding u/s.264 of the Act. In the case of Sadhuram Patel & Sons (supra) decided by the Mumbai Bench also, again relied on by the CIT (A), this Tribunal had held that an observation by CIT in a proceeding u/s.263 of the Act, that an amount was prima facie taxable, would not impinge on the powers of a CIT (A) to entertain an appeal against a resultant order of the AO. Directions given by the CIT in the order passed u/s.263 of the Act in the impugned case is reproduced hereunder :

*“In view of the above, the relevant assessment order, which has been held to be erroneous and prejudicial to the interest of the revenue, is set aside and the Assessing Officer is directed to make a fresh assessment, in the light of my observations above, after giving the assessee a reasonable opportunity of being heard.”*

It is clear from the above directions that the assessment itself was set aside and the AO was directed to make a fresh assessment. It was not a conclusive direction by the CIT to make the additions or disallowances.

AO was given free hand and the assessee was to be accorded an opportunity. In such circumstances, we are of the opinion that the CIT had the powers for entertaining the appeal filed by the assessee against the orders passed by the AO u/s.143(3) of the Act, pursuant to proceedings u/s.263 of the Act. We, therefore, set aside the order of CIT (A) and remit the appeal back to his file for consideration afresh in accordance with law.

08. In the result, appeal of the assessee in ITA.165/Bang/2014 is dismissed, whereas appeal in ITA.258/Bang/2012 is treated as allowed for statistical purpose.

Order pronounced in the open court on 25<sup>th</sup> day of May, 2016.

Sd/-

(SUNIL KUMAR YADAV)  
JUDICIAL MEMBER

MCN\*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

Sd/-

(ABRAHAM P GEORGE)  
ACCOUNTANT MEMBER

By Order

Assistant Registrar