

आयकर अपीलीय अधिकरण “एक-सदस्य मामला” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH, MUMBAI

श्री शमीम याहया, लेखा सदस्य के समक्ष ।
BEFORE SHRI SHAMIM YAHYA, AM

आयकर अपील सं./I.T.A. No.235/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2009-10)

Ashraf Aziz Kasmani Mistri Building, 1 st Floor, Terri Gali, Versova, Andheri (W), Mumbai-400 061	बनाम/ Vs.	ITO-24(1)(2), Piramal Chambers, Lalbaug, Mumbai-400 012
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. ANKPK 4918 Q		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	None
प्रत्यर्थी की ओर से/Respondent by	:	Ms. N. Hemalatha
सुनवाई की तारीख / Date of Hearing	:	28.03.2018
घोषणा की तारीख / Date of Pronouncement	:	02.04.2018

आदेश / ORDER

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against the order by the Commissioner of Income Tax (Appeals) dated 30.10.2017 and pertains to the assessment year 2009-10.

2. The grounds of appeal read as under:

1. On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) -36 has erred in rejecting the Appeal filed by the Assessee manually and not electronically.

2. The Learned Commissioner of Income Tax (Appeals) - 36 ought to have appreciated that as per Notification No. SO 637(E) (No. 11/2016 (F. No. 149/150/2015-TPL)], dated 01.03.2016, all the appeals against the Assessment Order passed on or before 01.03.2016 has to be filed manually and all the Appeals in respect of Assessment Order passed on or after 01.03.2016 be filed electronically.
3. This case pertains to 100% addition on account of bogus purchases. In this case, the appeal was filed before the Id. Commissioner of Income Tax (Appeals) on 30.6.2016 against the order passed by the Assessing Officer which was dated 14.02.2016. In the first paragraph of his order, the Id. Commissioner of Income Tax (Appeals) noted that “In absence of any information from the AO to this effect, the appeal filed by the assessee is treated being well within time.”
4. Thereafter, the Id. Commissioner of Income Tax (Appeals) considered the admissibility of appeal filed in manual form on 30.6.2016. In this regard, he referred to be CBDT Notification No. SO 637(E) [No. 11/2016 dated 01.03.2016] and has referred as under:

"In exercise of the powers conferred by sub-section (1) of section 249, read with section 295 of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby makes the following rules further to amend the Income-tax Rules, 1962, namely>

1. (1) These rules may be called the Income-tax (3rd Amendment) Rules, 2016.
- (2) They shall come into force on the date of their publication in the Official Gazette.
2. In the Income-tax Rules, 1962 (herein after referred to as the said rules), for rule 45, the following rule shall be substituted, namely:-
 45. Form of appeal to Commissioner (Appeals).-
 - (1) An appeal to the Commissioner (Appeals) shall be made in Form No. 35,
 - (2) Form No. 35 shall be furnished in the following manner, namely:-

- (a) in the case of a person who is required to furnish return of income electronically under sub-rule(3) of rule 12,~
- (i) by furnishing the form electronically under digital signature, if the return of income is furnished under digital signature;
- (ii) by furnishing the form electronically through electronic verification code in a case not covered under sub-clause (i);
- (b) in a case where the assessee has the option to furnish the return of income in paper form, by furnishing the form electronically in accordance with clause (a) of sub rule(2) or in paper form.
- (3) The form of appeal referred to in sub-rule (1), shall be verified by the person who is authorized to verify the return of income under section 140 of the Act, as applicable to the assesses.
- (4) Any document accompanying Form No. 35 shall be furnished in the manner in which the said form is furnished.
- (5) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems), as the case may be, shall-
- (i) specify the procedure for electronic filing of Form No. 35 and documents;
- (ii) specify the data structure, standards and manner of generation of electronic verification code, referred to in sub-rule(2), for the purpose of verification of the person furnishing the said form; and
- (iii) be responsible for formulating and implementing appropriate security, archival and retrieval of policies in relation to the said form so furnished."
5. Thereafter, he referred to the amendment to Rule 2(3) of the Income Tax Act, 1962 where the mode of filing of the return income in electronically form is specified. Thereafter, the Id. Commissioner of Income Tax (Appeals) referred to another CBDT Circular whereby the CBDT has subsequently extended the period of filing of appeal electronically till 15.06.2016, the said CBDT Circular No. 20 dated 26.5.2016 reads as under:

“Rule 45 of the Income Tax Rules, 1962 mandates compulsory e-filing of appeals before Id. Commissioner of Income Tax (Appeals) with effect from 01.03.2016 in respect of persons who are required to furnish return of income electronically. It has come to the notice of the Central Board of Direct Taxes (hereinafter referred to as the Board) that in some cases the taxpayers who were required to e-file Form 35, were unable to do so due to lack of knowledge about e-filing procedure and/or technical issues in e-filing. Also, the EVC functionality for verification of e-

appeal/s was made operational from 12.05.2016 for individuals and from 19.05.2016 for other persons. Word limit for filing grounds of appeal and mapping of jurisdiction of Commissioners of Income Tax (Appeals) were also a cause of grievance in some cases.

2. The matter has been examined by the Board. While the underlying issues relating to e-filing of appeals have since been addressed and resolved, in order to mitigate any inconvenience caused to the taxpayers on account of the new requirement of mandatory e-filing appeals, it has been decided to extend the time limit for filing of such e-appeals. E-appeals which were due to be filed by 15.05.2016 can be filed upto 15.06.2016. All e-appeal/s filed within this extended period would be treated as appeals filed in time.

3. In view of the extended window for filing e-appeals, taxpayers who could not successfully e-file their appeal and had filed paper appeals and required to file an e-appeal in accordance with Rule 45 before the extended period i.e. 15.06.2016. Such e-appeals would also be treated as appeals filed within time."

6. From the above, the Id. Commissioner of Income Tax (Appeals) noted that the assessee was required to file this appeal only in electronic form latest by 15.06.2016. However, since the appeal was filed manually as a paper appeal, the Id. Commissioner of Income Tax (Appeals) held that since the same was not electronically filed, he treated the appeal is not maintainable.

7. Against the above order, the assessee is in appeal before the ITAT.

8. I have heard the Id. Departmental Representative. None appeared on behalf of the assessee. The notice for hearing has also returned unserved. Hence, I proceeded to adjudicate the case by hearing the Id. Departmental Representative and perusing the records. From the grounds of appeal in this case, it transpires that the assessee has raised a ground that the CBDT Circular which mandated appeals before the Id. Commissioner of Income Tax (Appeals) to be filed electronically was dated 01.3.2016 and, hence, it is the plea of the assessee that the appeals against the assessment order passed on or before

01.03.2016 can be filed manually and all the appeals in respect of assessment order passed on or after 01.3.2016 to be filed electronically.

9. First of all I note that the Id. Commissioner of Income Tax (Appeals) has himself noted in the first paragraph of his order that the appeal is “well within time”. Thereafter, the Id. Commissioner of Income Tax (Appeals) has opined that the assessee should have filed the appeal electronically by referring the CDBT Circular.

10. I find that there is no clarification in the said CDBT Circular, regarding the applicability of the same with regard to the date of assessment order passed. In the present case, admittedly the assessment order has been passed before 01.03.2016, so the claim of the assessee that the said Circular is applicable to assessment orders passed after 01.03.2016, cannot be brushed aside summarily. When this question was put to the Id. Departmental Representative, she replied that since the assessment order has been served to the assessee after 01.03.2016, the assessee’s ground taken cannot be sustained.

11. Upon careful consideration, I find that in the above CDBT Circular, admittedly there is no discussion about the date of assessment order, with respect to which the said Circular is applicable. A construction that the said Circular is not applicable to assessment orders passed prior to 01.3.2016, cannot be said to be totally unsustainable. The Hon’ble Apex Court in the case of *CIT v. Vegetable Products Ltd.* [1973] 88 ITR 192 (SC) has expounded that if two constructions are possible, one in favour of the assessee should be applied. On the facts of the present case, and on the touch stone of the

above said Hon'ble Apex Court decision, I am of the considered opinion that the assessee's plea that the appeal filed manually for assessment order passed prior to 01.03.2016, should be admitted by the Id. Commissioner of Income Tax (Appeals), is cogent. More so, when the Id. Commissioner of Income Tax (Appeals) in his earlier paragraph has accepted that the appeal is well within time. Accordingly I direct the Id. Commissioner of Income Tax (Appeals) to admit the aforesaid appeal of the assessee and pass an order on the merits of the case. Needless to add, the assessee should be granted adequate opportunity of being heard.

11. In the result, the appeal by the assessee stands allowed for statistical purpose.

Order pronounced in the open court on 02.04.2018

Sd/-

(Shamim Yahya)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 02.04.2018

व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai