

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: "F", NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI O.P. KANT, ACCOUNTANT MEMBER**

**ITA Nos.- 1077/Del/2017
(Assessment Years: 2012-13)**

Jaidev Yadhuwanshi, 185, Bindukhera, Chatarpur Dam, Rudrapur.	Vs.	ITO, Ward- 1(4), Rudrapur.
PAN No: ACAPY7703L		
APPELLANT		RESPONDENT

Assessee by : Sh. Prakash Sinha (CA) &
Ms. Tanya
Revenue by : Sh. Rakesh Kumar (Sr.DR)

Date of Hearing : 24.05.2018.
Date of Pronouncement : 31/05/2018.

ORDER

PER : O.P.KANT, JM

This appeal by the assessee is directed against order dated 03/11/2016 passed by the Ld. Commissioner of Income-tax (Appeals), Haldwani [in short the Ld. CIT(A)] for Assessment Year 2012-13 raising following grounds:

“ 1. *The appellant is an individual carrying on the business of*

estate agents and earning commission. He has filed his return of income declaring a total income of Rs.2,16,130/-. The income assessed by the Ld. A.O was Rs. 10,30,201/-.

- 2. The order of the learned income tax officer is erroneous on the facts and in the law. As per the Ld. AO, he had issued a verification letter on 21.01.2014 on the basis of AIR information of cash deposit of more than Rs.10 Lac in the saving bank account and issued a notice u/s 148 on 21.03.2014 requiring the appellant to file an income tax return. The verification letter has not been received by the appellant. Notice u/s 148 sent via email. But at that time there were rumors that concerned ITO That time AO Mr. Arun Kumar Ranjan) is issuing notices fraudulently and later allegedly caught taking bride by the vigilance department. Hence, the appellant did not consider the notice as valid one.*
- 3. The Ld. AO is not justified in making the addition on the fact that the appellant had not replied for the notice issued on 15.10.2014 as the said notice had also been not received by the assessee on time due to poor quality postal services in that area. A Notice u/s 142(1) had received by appellant on 07.04.2015 and on the very next day i.e. on 08.04.2015, when he met AO personally the appellant came to know that assessment have been done u/s 144 by Ld. AO and there he received a notice of demand with assessment order. The Ld. AO failed to appreciate the fact that appellant had not receiving the notices sent by the department.*
- 4. The addition was erroneous on the basis of the fact that the appellant did not get the opportunity of being heard and hence the order is against the natural justice of law. Therefore the various reasons given by the Ld. AO to uphold the ex parte assessment u/s 144 and addition of Rs.814,071/- to the income of appellant on account of unexplained cash deposit are misconceived and incorrect.*
- 5. Later an appeal against this order was filed with CIT(A) where Ld. CIT(A) asked the Ld. A.O to submit remand report in the case. And after submitting all evidences, Ld. AO issued the remand report in appellant favor and submitted it to Ld. CIT(A).*

6. *But on the final phase of hearing, Ld. CIT(A) finds defects in appeal and dismissed the appeal.”*

7. Defects in Appeal Memo:-

a. *The Commissioner of Income Tax was not justified in contending that the appellant has not filed appeal against the assessment order u/s 144/147 of the act dated 09.03.2015, but has appealed against the order u/s 154 of the act dated 08.04.2015, due to this the grounds of appeal raised in this appeal were inadmissible, as they are not arising from the impugned order. The decision given by Ld. CIT(A) is as under:*

“...it is clear that the appellant has challenged the order u/s 144/147 and the addition made in the same, whereas the appeal has been filed against the order u/s 154 i.e. rectification of the income taken in the assessment order. Therefore, neither the grounds of appeal are arising from this order nor is there cause of grievance arising from the order u/s 154 which is being appealed against. It is further seen that the provisions of law do not provide for relief on the additions made in assessment u/s 144/147, when the appellant has not filed appeal against this assessment order. Therefore the grounds of appeal raised are inadmissible, as they are not arising from the impugned order u/s 154. The case laws cited by appellant, can't help him because they lay down general principle for admission of appeal or rectification of grounds of appeal, which are not applicable on the fact of present case. The issue here is not one of a venial mistake or a curable defect in filling of appeal or in the memorandum or ground of appeal, but a basic defect rendering the appeal is invalid. Therefore in view of the above, the submission of the appellant on the merit of addition made by the A.O. can't be adjudicated upon. Accordingly, the appeal being dismissed on the grounds of the same being invalid.”

- b. *The learned CIT(A) order is contradictory to law & facts of the case. He mentioned in the decision that the appeal has been filed against the order u/s 154 but in actual appeal filed u/s 154/144. Reference given to 154 was merely an clerical error in appeal memo which could be rectified. And the decision refusing to cure clerical error in appeal memo is not justified and bad in law. Despite of Highlighting and giving some reference of judgments where the facts was quite similar to our case, Ld. CIT(A) dismissed the appeal without considering the merits of the case.*
- c. *For you kind reference we hereby referring some important judgments which clearly states that defect in memorandum or any error on part of counsel cannot be a ground to dismissed a appeal:-*

Case No. 1- M/s Malani Trading Co. vs. CIT (2001) 252 ITR 670 (Bom.) it was held that merely because of there is a Defect in memorandum of appeal, the dismissal of appeal without giving an opportunity to cure the said effect will be improper- Registrar must point out the defect and give reasonable opportunity to rectify the defect.

Case No. 2- M/s Prayag Udhyog (P) Ltd. Vs. ITAT [2000] 245 ITR 288(Allahabad) where it was held that the appeal can't be dismissed because of defect in memorandum of appeal which is due to default on the part of assessee's counsel.

Case No 3:- CIT Vs S.Chenniappa Mudaliar 1969 74 ITR 41, SC held that an appeal under the income Tax Act has to be decided on the merits and can't be dismissed for defaults.

Case No. 4:- In the case of Jai Jai Ram Manohar lal vs

National Building material Supply “A party cannot be refused just relief merely because of some mistake, negligence, Inadvertence or even infraction of the rule of procedure”

8. *The information of the defects came in the knowledge of Ld. CIT(A) at the time when all proceedings have been done and also the remand report issued by the assessing officer have been submitted to him. Defects in Memo to appeal could had been easily rectified but Ld. CIT(A) was not consider the merits of the case & decided to dismissed an appeal. Such kind of dismissals unnecessary burdened the judiciary and on assessee as well.*
9. *In view of all these and other reasons, which may be produced during the process of hearing of appeal, the appeal may please be allowed and justice rendered.”*

2. Briefly stated facts of the case as culled out from the order of the lower authorities are that that the assessee is an individual from Rudrapur, Uttrakhand, and was engaged in the business of property dealing. For the year under consideration i.e. Assessment Year 2012-13, the assessee filed return of income on 04/12/2012 declaring total income of Rs. 2,16,130/-. Subsequently, on the basis of Annual Information Report (AIR) filed by the relevant persons, the Income Tax Department observed cash deposits of Rs. 10 Lacs in saving account of the assessee and issued letter on 21/01/2014 and 21/02/2014 for verifying source of the said cash deposit. In view of non-compliance by the assessee, the

Assessing Officer issued notice under section 148 of the Income-tax Act, 1961 (in short the 'Act') on 21/03/2014 requiring the assessee to file the return of income, but no return of income was filed by the assessee in response to said notice. Subsequently notice under section 142(1) of the Act was issued on 15/10/2014 to explain the cash deposits of Rs. 12,10,000/-in the saving bank account of the assessee . But no compliance was made of the said notice also. Under the circumstances, the Assessing Officer completed the assessment under section 147 read with section 144 of the Act, on 09/03/2015. No appeal was filed by the assessee before the Ld. CIT(A) against the said order. Subsequently, the Assessing Officer passed rectification order dated 08/04/2015, rectifying the amount of addition in the assessment order dated 09/03/2015.

3. The assessee preferred appeal against the order dated 08/04/2015 before the Ld. CIT(A) and raised the grounds challenging the reopening proceedings as well as amount of addition in the main assessment order dated 09/03/2015 . The Ld. CIT(A) dismissed the appeal as non-maintainable. Aggrieved, the assessee is before the Tribunal raising the grounds as reproduced above.

4. The Ld. Counsel submitted that the assessment order passed by the Assessing Officer was without jurisdiction and void ab initio due to reason that no notice under section 143(2) of the Act was issued in respect of return of

income dated 04/12/2012 up to the limitation period of 30/09/2013 and the return could have been processed under section 143(1) of the Act upto one year from the end of the assessment year i.e. 31/03/2004 and therefore, the action of the Assessing Officer of invoking section 147 of the Act during pendency of proceedings under section 143(1) of the Act, was not permitted in law.

5. Then the Ld. Counsel argued another ground to challenges the validity of the reassessment proceedings. According to him, the assessee was not provided copy of reasons to believe, recorded for reopening the assessment under section 147 of the Act as directed by the Hon'ble Supreme Court in the case of **GKN Driveshaft (India) Ltd. vs. ITO (2003) 179 CTR (SC) 11: (2003) 259 ITR 19 (SC)**, and completed the assessment without giving opportunity of being heard to the assessee, thus assessee has been deprived of natural Justice.

6. The Ld. Counsel, then argued merit of the addition and submitted that the remand report submitted by the Assessing Officer was in favour of the assessee and therefore the Ld. CIT(A) was not justified in dismissing the appeal of the assessee on mere technical ground that appeal has been filed against the order under section 154 of the Act rather than order under section 147 of the Act. The Ld. counsel submitted that it was merely a clerical error in the Form No. 35 i.e. the prescribed format for filing of appeal before the Ld. CIT(A). The Ld. Counsel

submitted that by mistake, the assessee referred order under challenge before the Ld. CIT(A) as under section 154/144 and actually the order which was challenged was under section 144 only.

7. The Ld. DR relying on the order of the lower authorities opposed the arguments of the Ld. Counsel.

8. We have heard the rival submissions and perused the relevant material on record. Before adjudicating on the legal grounds challenging the validity of the reassessment, we first take up the ground of the assessee challenging the issue of non-maintainability. We note that the Ld. CIT(A) has dismissed the appeal of the assessee on maintainability itself. The relevant finding of the Ld. CIT(A) is reproduced as under:

"Therefore from the above grounds it is dear that the Appellant has challenged the order u/s 144/147 and the addition made in the same, whereas the Appeal has been filed against the order u/s 154 i.e. rectification of the income taken in the Assessment Order. Therefore neither the grounds of Appeal are arising from this order nor is there cause of grievance arising from the Order u/s 154 which is being appealed against. It is further seen that the provisions of law do provide for relief on the additions made in Assessment u/s 144/ 147 when the Appellant has not filed Appeal against this Assessment order. Therefore the grounds of Appeal raised are inadmissible, as they are not arising from the impugned order u/s 154. The case cited by the Appellant cannot help him because they lay down general principles for admission of Appeal or rectification of Grounds of Appeal, which are not applicable on the facts of the present case issue here is not one of a venial mistake

or a curable defect in filling of Appeal or in the memorandum or grounds of Appeal, but a defect rendering the Appeal invalid. Therefore in view of the above, the submissions of the Appellant on the merit of the addition made by the AO cannot be adjudicated upon. Accordingly the Appeal is being dismissed on the grounds of the same being invalid.”

9. The Ld. Counsel has submitted before us that the section of order appealed was mentioned wrongly in Form No. 35 of the appeal filed before the Ld. CIT(A). On perusal of the said copy of Form No. 35 filed before us by the Ld. Counsel of the assessee, we find that against the column prescribed in Form No. 35 for section and subsection of the Income-tax Act under which the Assessing Officer passed/the order appealed against and date of such order, the assessee mentioned the order under section 154/144 dated 08/04/2015. We have already mentioned in brief facts above that the rectification order under section 154 of the Act has been passed on 08/04/2015. In our opinion, therefore there is no inadvertent mistake of mentioning wrong section of the order appealed against and it is clearly the rectification order, which has only been challenged by the assessee before the Ld. CIT(A). We agree with the observation of the Ld. CIT(A) that the grounds raised in the appeal before him were not arising from the order appealed against and therefore grounds of appeal were inadmissible. This is not a venial mistake or curable defect. The appellant should challenge the order against which it is seeking remedy. It cannot be allowed that appellant is

seeking remedy against one order but order appealed is another order. Here in this case, the issue of reopening of assessment are nor arising from the order u/s 154 of the Act. Thus, in our opinion, the finding of the Ld. CIT(A) on the issue in-dispute is well reasoned. We do not find any error in the action of the Ld. CIT(A) for dismissing the appeal for non-maintainability. Accordingly, the grounds raised in this respect are also dismissed.

10. Further, we find that the issues challenging the validity of reassessment have not been adjudicated by the Ld. CIT(A). In our opinion, if any issue has not been adjudicated by the Ld. CIT(A), the assessee should have raised the issue by way of additional grounds before the Tribunal, whereas the assessee has raised those objections by way of ground of appeal only. Since we have already upheld the non-maintainability of the appeal before the Ld. CIT(A), we are not adjudicating the legal grounds raised challenging the validity of reassessment proceedings.

11. Before parting, we may like to mention that assessee may file appeal before the Ld. CIT(A) along with an application for condonation of the delay in filing the appeal, against the order under section 147/144 dated 09/03/2015 in accordance with law, if so advised and the Ld. CIT(A) may consider condoning the delay in accordance with law and then decide the appeal accordingly.

12. In result, the appeal filed by the assessee is dismissed.

Order pronounced in the open court on 31/5/2018.

Sd/-

AMIT SHUKLA
(JUDICIAL MEMBER)

Sd/-

O.P.KANT
(ACCOUNTANT MEMBER)

Dated: 31.05.2018

Pooja/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

