

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC', NEW DELHI**

Before Sh. N. K. Saini, Accountant Member

ITA No. 187/Del/2018 : Asstt. Year : 2011-12

ITA No. 2959/Del/2018 : Asstt. Year : 2011-12

Gauri Nanda, B-1853, Shastri Nagar, Delhi-110052	Vs	Income Tax Officer, Ward-19(3), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAGPN1162Q		

Assessee by : Sh. S. C. Singhal, CA

Revenue by : Ms. Ashima Neb, Sr. DR

Date of Hearing : 06.06.2018	Date of Pronouncement : 08.06.2018
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ORDER

These two appeals by the assessee are directed against the orders dated 30.10.2017 and 22.03.2018 of ld. CIT(A)-12, New Delhi.

2. Both the appeals relate to the same assessee and were heard together, so, these are being disposed off by this consolidated for the sake of convenience and brevity.

3. In ITA No. 187/Del/2018, following grounds have been raised:

“1. The CIT (A) erred in dismissing the appeal without ensuring the service of his letter dt 03/10/2017 to the assessee. For want of communication, no one attended before CIT (A) and taking a stern view to reject the appeal is not correct, justified and is against the principle of natural justice. CIT (A) had not given a new date of hearing when certificate from advocate Bharat Bhushan Khanna and affidavit were filed before him on 24/08/2017 and 04/09/2017.

2. *The then advocate Bharat Bhushan Khanna had changed his office after issue of a letter to the assessee but before the CIT (A) attempted a service of verification letter to him in Sept 2017. Had the assessee information about return of CIT (A) letter, new address would have been intimated to CIT (A).*
 3. *That the CIT (A) erred in not granting the condonation of delay in filing of appeal the appellant was prevented by a valid reason.*
 4. *The learned ITO erred in making an ex-parte assessment u/s 144 without property service of notice on the assessee. Notice u/s 143 (2) is essential precondition before any **asst.** order can be made and that is missing in this case.*
 5. *Copy of PNB a/c obtained by the AO directly from bank u/s 133 (6) was not provided to the appellant to comment on it. Evidences collected behind the back of assessee not provided to him, cannot be used against him.*
 6. *PNB a/c show deposits and withdrawals at regular interval and no cash is short in cash flow chart. Same money has been re-routed again. AO erred in picking only deposit side and ignoring simultaneous withdrawals also. Peak cash theory of deposits can be used in this case or a fixed percentage of total deposits can be determined to be taxable income and not the total of all the deposits.*
 7. *Expenses at registrar office Rs. 10,000 being deed writer fee, premium on stamp papers, registrar office expenses and photocopy exp etc. are essential for any property registry. The AO has disallowed Rs. 10,000 in full for these expenses while calculating capital gain.”*
4. In ITA No. 2959/Del/2018, following grounds have been raised:
1. *Each appeal is independent and separate. The Id. CIT(Appeals) erred in dismissing this appeal solely relying on his finding in quantum appeal. In that appeal his letter dated 03.10.2017 could not be served on the appellant as confirmed by postal department,*

even then he rejected the appeal ex-parte. Later on his appellate order in quantum appeal, hearing notice in penalty appeal and penalty appeal dismissal order all sent at the same address by registered post had been served on the assessee and acted upon. No new effort was made by the CIT(A) in penalty appeal to verify the earlier facts.

2. The appeal right granted in law is a valuable right and it should not be dismissed in such a casual manner by CIT(A). By rejecting the request for condonation of delay in filing of appeal, the CIT(A) has confirmed the total act and decision of the AO which on facts and law is not correct. The Id. CIT(A) never went into the facts of the case to consider the merits of this appeal.

3. That in penalty proceedings, the assessee has a right to furnish fresh evidences and plea. No such opportunity was ever afforded by the AO and/or CIT(A) to the appellant which is not justified.

4. That the CIT(A) erred in not granting the condonation of delay in filing of appeal for a valid reason which prevented her from filing the appeal within given time. Affidavit on oath of appellant was filed before CIT(A) which has been rejected without any verification. Law empowers the CIT(A) to grant condonation of delay in a suitable case.

5. That the grounds of appeal in quantum appeal no. ITA No. 187/Del/2018 filed on 08.01.2018 which is pending before ITAT, Delhi be considered as a part of this appeal- copy enclosed.

6. That in determining the income, the AO has taken into consideration only the cash deposited in PNB a/c whereas there are regular cash withdrawals also from the same bank a/c. The same money has been re-routed time and again and there is no cash short in cash flow chart. Only a fixed percentage of total deposits could have been adopted as income and not the entire total of deposits. Past records of the case and case laws approve the percentage method to be adopted as income liable to tax and not full total of deposits.

7. *The notice of CIT(A) carried a line that submissions in appeal can be filed online also. An email was sent on 20/03/2018 and the appellate order is dated 22.03.2018. The CIT(A) has not considered the reply so sent by email on 20/03/2018 in his order which is against the principle of natural justice and bad in law. Without considering what the appellant says, the order of CIT(A) is against the established canons of the law and standard judicial practice, liable to be set aside.*

8. *There is no initiation of penalty u/s 271(1)(c) in case of addition of Rs 10000 made in the ex-parte assessment order. Without recording of satisfaction and proper initiation by the AO, no penalty can be validly imposed.*

9. *That section 271(1)(c) has two separate and independent limbs. The concept about the applicability of any one of them, must be clear to the ITO while initiating the penalty or issuing show cause notice or imposing the penalty. In this case, para 4 of the assessment order or concluding line in the end of assessment order do not reveal as to which of the two limbs of section 271(1)(c), the ITO has found to be applicable in this case. The show cause notice too is not specific and none of the two parts has been marked to be applicable in this case. Kindly refer to Karnataka High Court decision in CIT vs Manjunatha Cotton & Ginning Factory 359 ITR 565 (Kar) followed by various courts including recently in ITA No. 118/Agra/2015 in Sachin Arora vs ITO order dt 19/12/2017 by ITAT, Agra Bench (co-ordinated Bench) have cancelled penalty in similar circumstances.”*

5. From grounds no. 1 to 3 of each appeal, it is clear that the grievance of the assessee relates to the *ex-parte* order passed by the Id. CIT(A) while deciding the appeals on quantum and penalty.

6. During the course of hearing, the Id. Counsel for the assessee submitted that no notice of hearing was served upon the assessee and the appeals have been

dismissed by the Id. CIT(A) *ex-parte* without deciding the issues on merit. A reference was made to para 7 of each of the impugned orders.

7. In her rival submissions, the Id. Sr. DR supported the orders of the authorities below and submitted that the notices were sent to the assessee at the given address but the assessee did not appear before the Id. CIT(A). Therefore, the appeals were rightly dismissed by the Id. CIT(A).

8. I have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is noticed that the Id. CIT(A) dismissed the appeals *ex-parte* and did not adjudicate the issues on merit. It has been mentioned in para 7 of the each of the impugned orders as under:

“7. The letter sent by Speed Post was returned with remarks “No Such Person” on 26.09.2017. Since, the very contention on which the Appellant has sought condonation of delay was not verified to be true, a letter no. 03.10.2017 was sent to the Assessee for her comments. This letter has also been received back unserved. The office generated the status of this letter on the site of postal department and it was found that the postal personnel went to the address of the Assessee on 06.10.2017 and reported that 'Item delivery attempted door locked - intimation served'. Further, the postal personnel went to the address of the Assessee on 07.10.2017 but the It-tier could not be served for which the postal personnel reported – “Item delivery attempted unclaimed”. From the narration of above sequence of events, it may be seen that the Advocate who was stated to be attributable for delay in filing the appeal did not confirm the letter issued from him. Further, the Assessee did not claim the delivery of the letter issued from this office. On these facts and in the circumstances the reason claimed by the Assessee for delay in filing the appeal has not been found genuine.”

9. From the above notings, it is clear that the postal personnel mentioned that delivery was attempted but door was locked and that the letter could not be served. Therefore, it is clear that notices sent by the Id. CIT(A) were not served upon the assessee. It is well settled that nobody should be condemned unheard as per the *maxim "audi alteram partem"*. I, therefore, by keeping in view the principles of natural justice, deem it appropriate to set aside this issue back to the file of the Id. CIT(A) to be adjudicated afresh in accordance with law after providing due and reasonable opportunity of being heard to the assessee.

10. In the result, the appeal of the assessee is allowed for statistical purposes.
(Order Pronounced in the Court on 08/06/2018)

Sd/-
(N. K. Saini)
ACCOUNTANT MEMBER

Dated: 08/06/2018

Subodh

Copy forwarded to:

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

ASSISTANT REGISTRAR