

**In the Income-Tax Appellate Tribunal,
Delhi Bench 'E', New Delhi**

**Before : Shri Amit Shukla, Judicial Member And
Shri L.P. Sahu, Accountant Member**

**ITA No. 6313/Del/2014
Assessment Year: 2011-12**

N-Serve Software Pvt. Ltd.,(formerly Known as NSYS Design System Pvt. Ltd.), 31, 2 nd Floor, Ashoka Park Extn., Punjabi Bagh, New Delhi. PAN : AABCN0032D (Appellant)	vs.	Income-tax Officer, Ward 13(1), New Delhi (Respondent)
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Appellant by	Sh. Ravi Sharma, Advocate & Sh. Rishabh Malhotra, AR
Respondent by	Sh. Sridhar Dora, Sr. DR

Date of Hearing	25.01.2019
Date of Pronouncement	01.04.2019

ORDER

Per L.P. Sahu, A.M.:

This is an appeal filed by the assessee against the order passed by the Id. CIT(A)-VIX, Delhi dated 29.08.2014 for the assessment year 2011-12 on the following grounds :

- "1. That on the facts and circumstances of the case and in law, the order passed by CIT (A) is contrary to facts and bad in law.*
- 2. That on the facts and circumstances of the case the CIT(A) was not justified in not providing proper and reasonable opportunity of being heard to the assessee during the course of the appellate proceedings.*

3. *That on the facts and circumstances of the case the order passed by CIT(A) is evidently pre-dated, since the affidavit of CA Ravinder Goel was filed vide letter dated 27.08.2014 which was dispatched by Speed Post on 28.08.2014 (under tracking no. ED 650676719IN) was delivered in the office of CIT(A) at 18.04 hrs. on 29.8.2014 as per online tracking system of India Post.*

4. *That on the facts and circumstances of the case and in law, the CIT (A) was not justified in upholding the action of the assessing officer in treating assessee's genuine mistake as deliberate and malafide act and imposition of penalty aggregating Rs. 2,04,02,170/- u/s 271 (1)(c) of the I.T. Act mentioning that the assessee has concealed its income by filing inaccurate particulars of its income."*

2. The learned AR of the assessee also filed following additional grounds signed by nServe Software LLP :

"Whether on the facts and in the circumstances of the case, the penalty proceeding stand vitiated on the ground that the assessing officer has failed to specify the precise charge in the penalty notice under section 274 r.w.s. 271(1)(c) and hence, the same is bad in law and invalid."

3. For admission of above additional ground, the assessee has relied on the decision of Hon'ble Apex Court in the case of Jute Corporation of India Ltd. vs. CIT, 187 ITR 688 and in CIT vs. SSA's Emerald Meadows, 73 taxmann.com 248.

4. A perusal of record reveals that the additional ground so filed by assessee is signed and stamped by nServe Software LLP and not by the appellant here. Therefore, the case was listed for hearing to clarify and remove the defect on 22.01.2019, but none attended on this date of hearing.

Thereafter, it was fixed for hearing on 25.01.2019, when the above defect was brought to the notice of assessee, but still the said defect neither stands removed nor is there any clarification from the side of assessee as to how the additional ground signed by a person other than appellant can be admitted on record for consideration. We, therefore, do not find any justification to admit such additional ground on record and in these peculiar circumstances, the decision relied by the Id. AR does not render any help to the assessee. Accordingly, the additional ground raised by the assessee is dismissed.

5. The brief facts of the case are that the assessee company is registered with STPI (Software Technology Park) and is engaged in the business of development of software. It assessee filed its return of income on 29.09.2011 declaring an income of Rs.17,25,935/-. The Assessing Officer noticed that the assessee had claimed deduction of Rs.6,80,07,232/- u/s. 10A of the IT Act. Since the initial assessment year was 2000-01 and the assessee was getting benefit of exemption u/s. 10A continuously for 10 years preceding to the year under consideration, therefore, the Assessing Officer observed that the assessee was not eligible for claiming exemption u/s. 10A of the Act in the disputed year. Accordingly, the Assessing Officer made addition to the extent of exemption claimed by the assessee and no further appeal was filed by the assessee against the assessment order. On being asked, the assessee filed revised computation of income and deposited the tax on the claim wrongly made by the assessee. The Assessing Officer, based on the above addition, imposed penalty u/s. 271(1)(c) of the Act for filing inaccurate particulars of income to the extent of tax sought to be evaded amounting to Rs.2,04,02,170/-

and in support relied on various case laws. The assessee carried the matter of penalty in appeal before the Id. CIT(A), who after considering the written submissions made by the assessee upheld the action of the Assessing Officer vide impugned order. Aggrieved, the assessee is in appeal before the Tribunal.

6. The Id. AR of the assessee, reiterating its submissions made before the Id. CIT(A), submitted that the Id. CIT(A) while affirming the penalty imposed, did not give proper and adequate opportunity of being heard and assessee's submissions were not paid any heed in the appellate proceedings by the Id. CIT(A) due to his busy state of affairs in election duty etc. and the assessee was not given time to plead its case properly. The Id. AR has also filed a small written synopsis and a paper book containing 76 pages before us which are placed on record. It was also submitted that the Id. CIT(A) was not justified in not admitting the affidavit of assessee's AR Shri Ravinder Goel, Chartered Accountant, who deposed to have given wrong advice to the assessee to claim the impugned deduction during the year under consideration.

7. On the other hand, the Id. DR supported the orders of the authorities below and submitted that had the case of assessee not been taken for scrutiny, the assessee would have escaped from payment of tax as well as penalty. The claim of the assessee was not bona fide. His claim of exemption during the year under consideration was available to him u/s. 10A and was beyond the provisions of law, as the assessee had already exhausted the limitation of such exemption upto the preceding assessment year. The Chartered Accountant had also certified form No. 56F in which he has clearly mentioned that it is 11th year of exemption and thus, in view of this noting of CA, the affidavit given by the Chartered Accountant needed verification, as it was afterthought.

It was also submitted that the assessee had sufficient time to revise its return, but he filed only the revised computation that too when the Assessing Officer issued show cause notice to the assessee. The Id. CIT(A) has given ample opportunity of being heard to the assessee and the case laws relied by the assessee are not applicable to the facts of the present case.

8. We have considered the rival submissions and have gone through the entire material available on record and we find that vide ground NO. 2, the assessee has contended that proper opportunity of hearing was not given to the assessee to put up its case before the Id. CIT(A). The version of the assessee is discernible from the letter dated 27.08.2014, the relevant contents of which read as under :

2. *A notice dated 30.06.2014 was issued by your office on 07.07.2014 fixing the case for hearing on 24.07.2014.*
3. *An adjournment was sought on 24.07.2014 which your office was pleased to grant fixing the next date of hearing on 26.08.2014.*
4. *On the date of hearing i.e. 26.08.2014 the undersigned appeared in your office at about 12 Noon and was informed by the staff that you will be coming late to the office and was therefore advised either to seek an adjournment or come again after 2.30 pm. The undersigned was also informed by the staff that in other matters fixed for the day, adjournments had been taken. It was further informed that you shall be on election duty from 30th August onwards and therefore if an adjournment is sought the next date of hearing would be fixed somewhere in the 3rd week of Sep., 2014. Since the undersigned was interested in early disposal of the captioned appeal, no adjournment was sought.*
5. *On the same date i.e. 26.08.2014 the undersigned appeared in your office for a personal hearing at about 5 pm. The matter was heard by you for about 10-15 minutes. Written Submissions and Power of*

Attorney were filed. It was, thereafter, said by you that since you are busy in finalizing some urgent report the undersigned may come to your office again on the next day i.e. 27.08.2014 for personal hearing. However, as far as the order sheet entry is concerned it was recorded as "Case Discussed".

6. *The undersigned appeared in your office on 27.08.2014 at about 12.45 pm. There were two more appellants waiting for their turn at that point of time, since presumably you were-giving dictation. Thereafter, you took a lunch break and the undersigned's turn for hearing finally came at about 3.15 pm. Since the hearing had been shifted by one day (from 26th 27th August, 2014), the undersigned wanted to place on record the following*
 - a) *Copy of Form No. 56F dated 27.09.2011 wherein it has been clearly stated that it is the 11th consecutive year for which deduction u/s 10A is being claimed;*
 - b) *Affidavit of Sh. Ravinder Goel, CA duly notarized stating that the deduction had been claimed mistakenly.*
 - c) *Certain citations in support of the appeal.*
7. *In the hearing held on 27.08.2014 you only accepted the copy of Form No. 56F and refused to take on record the affidavit of Sh. Ravinder Goel, CA stating that since it was not filed before the A.O., you shall not accept the same. At this, the undersigned tried to explain that even in the case of Price Water House Coopers Pvt. Ltd. Vs. CIT 348 ITR 306 (SC) the Supreme Court had taken cognizance of an affidavit which was filed for the first time before them and was not available with any of the lower authorities. The undersigned also requested that the affidavit may be taken on record and the office of CIT (Appeals) may choose to deal with it in any manner as it may deem fit, either by not admitting the same or rejecting the contents thereof, but in any case the right given to the appellant under the Act cannot be denied by refusing to take any material being filed in support of the appeal.*
8. *Since the appellant is left with no other option the above referred covering letter along with affidavit is being furnished by way of the*

present covering letter which is being sent through Speed Post/AD. Your office may choose to deal with the same in any manner as it may deem fit.

7. *It may also be brought on record that when the undersigned attempted to make an argument and draw your attention to the proposition of law laid down in certain citations enclosed alongwith the written submissions, you categorically denied the opportunity by stating that it is not required. Such approach defeats the very purpose of personal hearing which is the right of every tax-payer not only under the Income Tax Act but is also the basic principle of jurisprudence known as "natural justice".*
8. *Due to paucity of time and urgency of matter the present letter is being addressed to your office with a request to take on record the affidavit of Sh. Ravinder Goel, CA. However, the contents of the present letter will also be brought on record by way of sworn affidavit of the undersigned, subsequently."*
9. The contents of aforesaid letter are also supported by the affidavit of Sh. Hirend Mehta, Chartered Accountant of the assessee. This letter of the assessee further speaks a lot as to why the assessee sent this reply alongwith relevant evidences through speed post. The ld. DR also could not properly object to the allegations of the assessee made in this letter. The ld. CIT(A) appears to have termed the affidavit of CA as self serving evidence, as it was not filed before the Assessing Officer. However, the fact of wrong interpretation of amendment relating to section 10A under the wrong advice by the Chartered Accountant stood raised before the Assessing Officer in the penalty proceedings. However, without going deep into this controversy, we think it appropriate in the interest of natural justice that the assessee should be given one more opportunity of being heard and the matter should go back to the file of ld. CIT(A) to decide the appeal afresh after giving reasonable and proper opportunity hearing and due consideration and verification of all the

contentions and supporting evidences thereto. The assessee is directed to put up its case with supporting evidence before the Id. CIT(A). We order accordingly. In view of our this finding, we need not to enter into other contentions on merits of the case.

10. In the result, the appeal is allowed for statistical purposes.

Order pronounced in the open court on 01.04.2019.

Sd/-

(Amit Shukla)
Judicial member

Sd/-

(L.P. Sahu)
Accountant Member

Dated: 01.04.2019

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Copy of order forwarded to:

<i>(1) The appellant</i>	<i>(2) The respondent</i>
<i>(3) Commissioner</i>	<i>(4) CIT(A)</i>
<i>(5) Departmental Representative</i>	<i>(6) Guard File</i>

By order

Assistant Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi