IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI

BEFORE SHRI G. MANJUNATHA (AM) AND SHRI RAM LAL NEGI (JM)

ITA No. 5652/MUM/2017
Assessment Year: 2009-10

The ACIT 24(1), Room No. 604, 6th Floor, Piramal Chambers, Lalbaug, Parel, Mumbai - 400012	**Vs.**	Anil Tilakraj Mehra, 204, Madhu Industrial Estate, Old Nagardas Road, Andheri (E), Mumbai - 400069 PAN: AAHPM1904A
(Appellant)		**(Respondent)**

&

ITA No. 4139/MUM/2018
Assessment Year: 2013-14

Anil Tilakraj Mehra, 204, Madhu Industrial Estate, Old Nagardas Road, Andheri (E), Mumbai - 400069 PAN: AAHPM1904A	**Vs.**	The Income Tax Officer-24(1)(2), Piramal Chamber, Room No. 605, Lalbaug, Mumbai - 12
(Appellant)		**(Respondent)**

Revenue by : Shri N. Padmanaban/ Satishchandra Rajore (DRs)

Assessee by : Shri S.S. Phadkar/Kalpesh Turalkar (ARs)

Date of Hearing: 08/11/2019
Date of Pronouncement: 22/11/2019

O R D E R

PER RAM LAL NEGI, JM

These are the two appeals one filed by the revenue against the order dated 09.06.2017 passed by the Commissioner of Income Tax (Appeals)-39 (for short 'the CIT (A)'), Mumbai, and another by the assessee against the order dated 28.03.2018 passed by the CIT(A) Mumbai, whereby the Ld. CIT (A) has allowed the appeal filed by the assessee against the assessment order passed by the AO

u/s 147 r.w.s 143 (3) of the Income Tax Act, 1961 (for short the 'Act') pertaining to the assessment year 2009-10 and dismissed the appeal filed by the assessee against the assessment order passed by the AO u/s 143(3) of the Act pertaining to the assessment year 2013-14. Since both the appeals pertain to the same assessee, these were clubbed, heard together and are being disposed of by this common order for the sake of convenience.

ITA No. 5652/MUM/2017 (Assessment Year: 2009-10)

Brief facts of the case are that the assessee an individual, engaged in the business of construction and deriving income from civil works and road contracts, filed its return of income for the assessment year under consideration declaring the total income of Rs. 15,83,700/-. The assessment was completed u/s 143(3) of the Act determining the total income at Rs. 58,30,320/-. Subsequently, the case was reopened u/s 147 of the Act by issuing notice u/s 148 on the ground that the assessee had offered gross receipt of Rs. 7,28,78,932/- instead of Rs. 12,53,60,952/-. Accordingly, the AO issued notice to the assessee u/s 143 (2) and 142 (1) of the Act. In response thereof, the authorized representative of the assessee appeared before the AO and filed the details and discussed the case of the assessee. The assessee objected the reopening, however, the AO rejected the objection raised by the assessee and asked the assessee to show cause as to why profit from civil construction should not be estimated @ 8% of the gross receipt of Rs. 12,53,60,452/- received during the year relevant to the assessment year under consideration. The AR submitted that the turnover of Rs. 7,28,78,932/- is supported by the profit and loss account, balance sheet and the tax audit report u/s 44AB in Form No. 3CB and 3CD. The AR further contended that the term sales and closing in stock are two different terms and are not inter-changeable. The goods which are not sold have to be shown under the head closing stock to arrive at just figure of profit earned in the business. The word turnover does not include stock in trade in the accounting year. However, the AO rejecting the contention of the assessee determined the total income of the assessee after making addition @ 8% of the total amount of Rs. 12,53,60,952/-

The assessee challenged the assessment order before the Ld.CIT (A). The Ld. CIT (A) after hearing the assessee allowed the appeal and set aside the re-assessment proceedings holding the same *void-ab-initio*. Against the said findings, the revenue is in appeal before the Tribunal.

2. The revenue has challenged the impugned order passed by the Ld. CIT(A) by raising the following effective grounds:

1. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in holding the 148 proceedings as void ab initio.*
2. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in holding the proceedings u/s 148 are not valid in law, ignoring the fact that the assesse had not provided the basis information with regard to gross receipts/stock-in-hand at the time of original assessment proceedings.*
3. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in holding the proceedings u/s 148 are not valid in law, ignoring the fact that the assesse had not filed any information at the time of original assessment proceedings and hence there is no possibility of any application of mind to term the re-opening as change of opinion.*
4. *The applicant prays that the order of the CIT (Appeals) on the above ground be set aside and that of the AO be restored".*

3. Before us, the Ld. Departmental Representative (DR) submitted that the Ld. CIT (A) has erred in holding that the proceedings u/s 147 read with section 148 of the Act, is void, ignoring the fact that the assessee had not provided the basic information with regard to gross receipt/stock in hand at the time of original assessment proceedings. The Ld. DR further submitted that the Ld. CIT(A) has further erred in holding that the AO has initiated the proceedings u/s 147 of the Act, without application of mind and without conducting verification of the facts and documents submitted by the assessee. In view of the aforesaid facts, the Ld. DR submitted that the impugned order is erroneous and liable to be set aside.

4. On the other hand, the Ld. counsel for the assessee relying on the order passed by the Ld. CIT (A) submitted that since the findings of the Ld. CIT (A)

are based on the principles of law laid down by the Hon'ble Supreme Court and the various High Courts, the same does not suffer from any infirmity to interfere with. The Ld. counsel further pointed out that since the AO had wrongly included the value of closing work in progress of Rs. 5,21,81,520/- as part of gross receipts and determined the total sales at Rs. 12,53,60,452/- as against the actual sale of Rs. 7,28,78,932/- shown in the books of account, the Ld CIT(A) has rightly held the proceedings as void. The Ld. counsel further pointed out that in view of the aforesaid facts, the Ld.CIT (A) has rightly held that the proceedings initiated u/s 147 of the Act by the AO is illegal and without jurisdiction.

5. We have heard the rival submissions made on behalf of the revenue and the assessee also perused the material on record in the light of the rival submissions of the parties. The only grievance of the revenue is that the Ld. CIT(A) has wrongly set aside reassessment proceedings and the order passed u/s 143(3) read with section 147 of the Act. The Ld CIT(A) has allowed the appeal of the assessee holding as under:-

> *"6.5 In the given facts and circumstances of the case, I am construed to believe that the condition precedent to a valid exercise of the power to reopen the assessment is absent in the reason recorded by the ld. AO as recourse to the power under Section 147 was taken merely on the basis of change of opinion on same set of facts which were very much there in his knowledge and consideration at the time of original assessment. Hence, the basic condition prescribed by the statute for assumption of jurisdiction for reassessment has not been fulfilled and the exceptional power which is conferred upon the ld. AO. It is, therefore, held that notice issued under section 148 of the Act in this case is void-ab-initio and the impugned order of reassessment passed in consequence to the same is accordingly held to be null and void. The grounds are accordingly allowed."*

6. In the present case, the undisputed facts are that the assessee's original assessment was passed u/s 143(3) of the Act, computing the income of the

assessee at 8% of the gross receipts of Rs. 7,28,78,932/- offered by the assessee. Subsequently, the AO reopened the assessment u/s 147 read with section 148 of the Act on the ground that in the assessment order passed u/s 143(3) of the Act, the gross receipts were wrongly taken as Rs 7,28,78,932/- instead of 12,53,60 452/- for computing the income of the assessee. In the light of the aforesaid facts, we are of the considered view that reopening in the present case is bad in law in view of the judgment of the Hon'ble Supreme Court in the case of *Commissioner of Income Tax vs. Kalvinator of India Ltd. 256 ITR 1 (SC)* in which the Hon'ble Supreme Court has held that in order to exercise powers u/s 147 of the Act, there should be tangible material to come to the conclusion that there is escapement of income from assessment and the reason must have live link with the formation of the belief. The relevant portion of the judgment reads as under:-

> *"…. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to re-assess. But reassessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief.*

7. As pointed out by the Ld. counsel for the assessee, the AO has made robbing enquiries regarding the nature of closing stock which is not permitted

u/s 147 of the Act. Under the garb of section 147 the AO cannot reopen the assessment in order to ascertain whether any income has escaped, but the powers u/s 147 can be exercised only when the AO has reason to believe, before initiating the proceedings that income has escaped assessment. As per the settled law, when a regular order of assessment is passed u/s 143 (3) of the Act, presumption can be raised that the order has been passed after due application of mind. Hence, we find merit in the contention of the Ld counsel for assessee that since the AO has issued notice u/s 148 of the Act, merely on suspicion, the reopening is bad in law. Therefore, in our considered view, the order passed by the Ld. CIT (A) is in accordance with the settled principles of law and there is no infirmity in the order to interfere with the same. We accordingly, uphold the findings of the Ld. CIT (A) and dismiss the appeal of the revenue.

ITA No. 4139/MUM/2018 (Assessment Year: 2013-14)

In the present case, the assessee filed appeal against the assessment order passed u/s 143 (3) of the Act manually in paper form on 23.03.2016. The Ld. CIT (A) referring the notification No. SO 637 (E) dated 1st March, 2016 issued by the CBDT dismissed the appeal of the assessee in *limine,* holding that in view of the aforesaid Circular of the CBDT, the manual appeal filed is invalid, therefore not maintainable. The assessee is in appeal against the said order of the Ld. CIT (A).

2. The assessee has challenged the impugned order passed by the Ld. CIT (A) o by raising the following effective grounds:

1. *"On the facts and in the circumstances of the case and in law, the learned C.I.T. (A) erred in dismissing the appeal mentioning the assessment year as 2012-2013 for which the appeal was filed manually in time. Since the demand notice for the Assessment Year 2013-14 was annexed to the appellate order, it is presumed that the appellate order is passed for the Assessment Year 2013-2014 and hence the appeal.*
2. *On the facts and in the circumstances of the case and in law, the learned C.I.T. (A) erred in dismissing the appeal in limini filed manually on 23.03.2016 after hearing the appeal for*

period of 7 months commencing from September 2017 to March 2018.

3. *On the facts and in the circumstances of the case and in law, the learned C.I.T. (A) ought to have held that the manually filed appeal on 23.03.2016 suffered from technical defect should have considered the same and disposed off on merit after hearing the appeal for nearly 7 months.*
4. *On the facts and in the circumstances of the case and in law, the learned C.I.T.(A) erred in dismissing the appeal in limini thereby refusing the appellant the opportunity to have the decision of the appeal on merits since the additions are made capriciously & arbitrary."*

3. At the outset, the Ld. counsel for the assessee submitted that this issue is covered in favour of the assessee by the order of the Mumbai Tribunal in ITA No. 7134/Mum/2017 in the case of *All India Federation of Tax Practitioners vs. ITO-1 (2)*. The Ld. counsel further submitted that since the Tribunal has decided the identical issue in favour of the assessee in the similar set of facts, the present appeal may be allowed and the assessee may be granted an opportunity to present its case on merits.

4. On the other hand, the Ld. Departmental Representative (DR) submitted that the notification No. SO 673 (E) aforesaid issued by the Central Board of Direct Taxes, mandates compulsory e-filing of the appeal before the Appellate Commissioner w.e.f. 1st March 2016 in respect of all persons, who are required to furnish their return of income electronically. Since, the assessee failed to comply with the notification aforesaid, the Ld.CIT (A) has rightly dismissed the appeal filed by the assessee. Therefore, there is no infirmity in the order passed by the Ld.CIT (A).

5. We have heard the rival submission of the parties and also gone through the entire material on record. As pointed out by the Ld. counsel for the assessee, the coordinate Bench has decided the identical issue in favour of the assessee in the case of *All India Federation of Tax Practitioners* (supra). The findings of the coordinate Bench read as under:-

"6. We have heard the counsels for both the parties and we have also perused the material placed on record as well as orders passed by the revenue authorities. From the records we noticed that electronically filing of the appeals was introduced for the first time vide rule 45 of I.T. Rules 1962, mandating compulsory e-filing of appeals before appellate Commissioner with effect from 1stMarch 2016. We noticed that in this respect, there is no corresponding amendment in any of the provisions of the substantive law i.e I.T. Act, 1961.

As per the facts of the present case, the assessment in the above case was completed u/s 143(3) of the I.T. Act 1961. However the assessee has filed appeal before Ld. CIT(A) in paper form as prescribed under the provisions of I.T. Act 1961 within the prescribed period of limitation. But the same was dismissed by Ld. CIT(A) by holding that assessee had not filed appeal through electronic form, which is mandatory as per I.T. Rules 1962.

After having considered the entire factual position, we find that Hon'ble Supreme Court in the case of 'State of Punjab Vs.ShyamalalMurari and others reported in AIR 1976 (SC) 1177' has categorically held that courts should not go strictly by the rulebook to deny justice to the deserving litigant as it would lead to miscarriage of justice. It has been reiterated by the Hon'ble Supreme Court that all the rules of procedure are handmaid of Justice. The language employed by the draftsman of procedural law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of Justice.
The Hon'ble Apex Court has said in an 'adversarial' system, no party should ordinarily be denied the opportunity of participating in the process of Justice dispensation.

The Hon'ble Supreme Court in its judgment reported as AIR 2005 (SC) 3304 in the case of 'RaniKusumVrs. Kanchan Devi,' reiterated that, a procedural law should not ordinarily be construed as mandatory, as it is always subservient to and is in aid of Justice. Any interpretation, which eludes or frustrates the recipient of Justice, is not to be followed.

From the facts of the present case, we gathered that the assessee had already filed the appeal in paper form, however only the e-filing of appeal has not been done by the assessee and according to us, the same is only a technical consideration. In this respect, we rely upon the judgment of Hon'ble Supreme Court, wherein the Hon'ble Supreme Court has reiterated that if in a given circumstances, the technical consideration and substantial Justice are pitted against each other, then in that eventuality the cause of substantial Justice deserves to be preferred and cannot be overshadowed or negatived by such technical considerations.

Apart from above we have also noticed that the Coordinate Bench of Hon'ble ITAT Delhi Bench in appeal ITA No. 6595/Del/16 in case titled Gurinder Singh Dhillon Vrs. ITO had restored the matter to the file of Ld. CIT(a) under identical circumstances with a direction do decide appeal afresh on merit, after condoning the delay, if any.

Since in the present case, we find that appeal in the paper form was already with Ld. CIT(A), therefore in that eventuality the Ld. CIT(A) ought not to have dismissed the appeal solely on the ground that the assessee has not filed the appeal electronically before the appellate Commissioner.

Keeping in view the facts and circumstances as well as the case laws discussed and relied upon above, we are of the considered view that the cause of Justice would be served in case, we set aside the orders of Ld. CIT(A) & allow the present appeal. While seeking the compliance, we direct the assessee to file the appeal electronically within 10 days from the date of receipt of this order. In case, the directions are followed then in that eventuality, the delay in e-filing the appeal shall stand condoned. Ld. CIT(A) is further directed to consider the appeal filed by the assessee on merits by passing a speaking order. Resultantly, we allow the appeal filed by the assessee".

6. The coordinate Bench has decided the identical issue in favour of the assessee by following the ratio of law laid down by the Hon'ble Supreme Court

in the case of *State of Punjab vs. Shyamlal Murari and Others AIR 1976 (SC) 1177*, *Rani Kusum vs. Kanchan Devi, AIR 2005 (SC) 3304* and the decision of the Delhi Bench of ITAT in the case of *Gurinder Singh Dhillo vs. ITO ITA No. 6595//Del/2016.* Since, the coordinate Bench has set aside the order of the CIT (A) and directed the Ld. CIT (A) to decide the appeal filed by the assessee on merit by passing speaking order, we respectfully following the order of the coordinate Bench allow the appeal of the assessee and send the appeal back to the Ld. CIT (A) for deciding the same on merits.

In the result, appeal filed by the revenue for assessment years 2009-2010 is dismissed and appeal filed by the assessee for AY 2013-14 is allowed.

Order pronounced in the open court on 22nd November, 2019.

Sd/-	*Sd/-*
(G.MANJUNATHA)	(RAM LAL NEGI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 22/11/2019

Alindra, PS

आदेश 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
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**