



**INCOM TAX APPELLATE TRIBUNAL
SURAT BENCH SURAT
BEFORE SHRI C .M. GARG, JM & SHRI O. P. MEENA, AM**

I.T.A. No.	A.Y.	Appellant	V.	Respondent
2435/Ahd/2015	2010-11	Shree Padmavati Developers, 19/2/2, Sundervan Society, Silvassa PAN:ABDFS3759A		Income Tax Officer, Ward-3 Vapi

Assessee by	Smt. Urvashi Shodhan, Advocate
Revenue by	Shri O. P. Meena. Sr. D.R.
Date of hearing	25.01.2018
Date of pronouncement	25-01-2018

ORDER

Per O. P. Meena, AM

1. This appeal by the Assessee is directed against the order of learned Commissioner of Income tax (Appeals) - Valsad (in short CIT (A)) dated 01.06.2015.
2. Ground no. 1 to 3 states that the CIT (A) had erred in law and facts in dismissing the appeal by holding that provisions of section 249(4)(a) specifically debars the Appellate Authority to admit appeal on the event of failure of the assessee to pay tax on returned income. The Id. CIT (A) has not appreciated the facts of non-payment of tax before filing of appeal is a curable defect at a later date and therefore, the

Id. CIT (A) ought to not have dismissed the appeal, since the appellant removed the defects by paying the due taxes before conclusion of the appellate hearing.

3. Succinct facts are that the assessee firm has filed its return of income on 14.10.2010 declaring total income of Rs. 4,90,440. The assessment was made under section 143 (3) by making disallowance u/s. 80IB (10) of Rs. 60.39 lakhs. Being aggrieved, the assessee filed appeal before CIT (A) wherein it was noticed that the assessee has failed to pay self-assessment tax on returned income before filing of appeal, hence, the CIT (A) asked the assessee show cause as to why the appeal should not be admitted as no self-assessment tax was paid before filing of appeal. It was submitted that provisions of section 249 (4) are directory requirement and does not make the action invalid, once such requirement has been fulfilled. The appeal filed by the assessee is defective and once if defects are removed, it assumes the validity on removal of such defects. Since the assessee has paid the self-assessment tax on 29.01.2015, therefore, the appeal should be admitted in the light of ratio of the decision of Mumbai tribunal in the case of Anant R. Thakore v. ACIT [2006] 5 SOT 298 (Mum) in which it was held that the CIT (A) was not justified in dismissing the appeal under section 249(4) (a). In the case of D. S. Karunakar Reddy

v. DCIT, in I.T.A. No. 402/Hyd/2011 for A.Y. 2008-09, it was held that non-payment of self-assessment tax on returned income is a curable defect, and till such time admitted tax is paid appeal remains defective and not valid, and when such defect is cured by the payment of tax on the returned income by the assessee, the appeal becomes valid and such appeal deemed to have been filed.

4. In CIT v. Ram Body Builders [2001] 250 ITR 825 (Del) the appeal was heard by the first appellate authority on several dates and on none of these dates deficiency in the assessee's appeal was pointed out. Before the issuance of show-cause notice, the assessee made the deposit of tax due, it was held that the Tribunal has held correct in law in holding that after payment of the tax due, the requirement of section 249 (4) should be taken as having been fulfilled. The assessee has also placed reliance in the case of Bhumiraj Construction v. Addl. CIT Range-15; Mumbai [2011] 11 taxmann.com 333 /131 ITD 406 (Mum) in support of its proposition that when the defects of payment of due taxes on returned income has been cured and therefore, the appeal so filed has become maintainable.

5. However, the CIT (A) was of the view that payment of tax has been made on 29.01.2015 i.e. after 21 months of after filing of appeal on 11.04.2013. Therefore,

after relying on the decision in the case of Khushmanlal Hiralal [1996] 57 ITD 531 (AHD) held that the appeal is not maintainable as per provisions of section 249(4)(a) of the Act.

6. Being, aggrieved the assessee filed this appeal before the Tribunal. The learned counsel for the assessee relying on the decision of Mumbai Tribunal in the case of Bhumiraj Construction v. Addl. CIT Range 15 Mumbai [2011] 11 taxmann.com 333 /131 ITD 406 (Mum) contended that provision of section 249(4)(a) are directive in nature, hence, once such defects of directive nature are removed; then it will make compliance of the provisions of section 249(4)(a) of the Act. Since the assessee in the present case has paid the self-assessment tax during the appellate proceedings and before disposal of the appeal, it makes good of the provisions, hence, the CIT (A) ought to have admitted the appeal. The learned counsel for the assessee further placed reliance on the judgement of the Hon`ble Karnataka High Court in the case of D. Kamalakshi v. DCIT [2007] 162 Taxman 16 (Kar) is support of her proportion.

7. *Per contra*, the Id. DR strongly supported the order of the CIT (A) and also placed heavy reliance in the case of Khushmanlal Hiralal [1996] 57 ITD 531 (AHD) to contend that the assessee has not paid self-assessment tax on returned income

before filing of appeal and also payment of self-assessment tax was made after 21 months of filing of appeal, hence, CIT (A) has rightly held that the appeal is not maintainable in law.

8. We have heard the rival submissions and perused the relevant material on record. There is no dispute on the fact that the assessee filed its return declaring total income of Rs. 4.90 Lakh on which the tax payable, by way of self-assessment tax, was not paid. The assessment was made under section 143 (3) by making disallowance of Rs. 60.39 Lakh u/s. 80IB of the Act. The assessee-preferred appeal before the learned CIT (A) again without the payment of tax due on the income returned. Such appeal was not admitted and dismissed as not maintainable. However, before the dismissal of the appeal by the learned CIT(A), the assessee made good the deficiency and deposited the tax due on the returned income on 29.01.2015 as mentioned by the CIT (A) in his appellate order, therefore, such defects have been cured by the assessee before disposal of appeal. The provisions of section 249(4) reads as us under:-

"249(4) No appeal under this Chapter shall be admitted unless at the time of filing

of the appeal,

- (a) *where a return has been filed by the assessee, the assessee has paid the tax due on the income returned by him; or*
- (b) *where no return has been filed by the assessee, the assessee has paid an amount equal to the amount of advance tax which was payable by him :*

Provided that, in a case falling under clause (b) and on an application made by the appellant in this behalf, the Commissioner (Appeals) may, for any good and sufficient reason to be recorded in writing, exempt him from the operation of the provisions of that clause."

9. The perusal of above provisions shows that the CIT(A) has been empowered to grant exemption from the payment of tax equal to the amount of advance tax which was payable by the assessee in a situation where no return of income is filed by the assessee. It implies that where the assessee did not file any return for the relevant year and still the assessment was made, the assessee can file first appeal even without the payment of tax provided he satisfies the CIT (A) for the reasons of non-payment of tax. The power of the first appellate authority are directive as per the proviso to above section which says that CIT (A) is not to accept the delayed payment of such tax, but to exempt the payment of tax altogether. The operation of proviso is restricted only to clause (b) and is not applicable to clause (a) which deals with a situation in which return was filed by the assessee. Thus in such a situation where the return was originally filed by the assessee, the CIT(A) has no power to grant exemption from the making of payment of tax due on the income returned. The requirement of payment of tax in a case covered under clause (a) is to be examined at the time of admission of first appeal.

10. Now, it will be apposite to note the distinction between a mandatory and directory provision. If the non-compliance with the requirement of law exposes the assessee to the penal provision, then it is mandatory, but if no penal consequences follow on non-fulfilment of the requirement, then usually it is a directory provision. The Hon'ble Karnataka High Court in *M.L. Srinivasa Shetty & Sons v. State of Karnataka* [1992] 193 ITR 548 had the occasion to consider the distinction between a mandatory and directory provision. It held: *'In other words, one of the crucial tests to determine whether a particular statutory requirement is mandatory or directory is that the court has to see whether any penal consequences will follow by the non-compliance with a particular statutory requirement. If no penal consequences are indicated, then it would be safe to infer that the statutory requirement was directory and not obligatory or compulsory.'* In reaching this conclusion the Hon'ble High Court relied on the judgment of the Hon'ble Apex Court in *State of Uttar Pradesh v. Babu Ram Upadhyaya* AIR 1961 AC 751.

11. It is trite law that omission to comply with a mandatory requirement renders the action void, whereas omission to do the directory requirement makes it only defective or irregular. On the removal of such defect, the irregularity stands removed and the status of validity is attached. There is no dearth of judgments holding the requirement of filing the report of the auditors in connection with the grant of deductions under Chapter VI-A as only directory and not mandatory. In such cases, it has been held that even if the audit report was not filed along with the return of

income as per the necessity of the relevant section, still the deduction could not be denied if such report was subsequently filed during the course of assessment proceedings. In a case where the assessee failed to submit audit report in support of claim for deduction under sections 80HH and 80J during the course of assessment proceedings, the Hon'ble High Court in *CIT v. Trehan Enterprises* [2001] 248 ITR 333 / [2000] 108 Taxman 189 (J&K) held that when such report was filed before the Id. CIT(A), it was necessary for him either to allow deduction or send the matter to the file of Assessing Officer for a fresh decision in the light of such report. It, therefore, transpires that non-compliance of directory requirement does not make the action as invalid. As soon as such requirement is fulfilled, the deficiency stands removed and the action is validated. It can also be seen from the mandate of section 139(9), dealing with the defective return, which provides that on the removal of defect, the return becomes valid. In the like manner if the appeal filed by the assessee is only defective, it assumes validity on the removal of such defect or irregularity.

12. In the present case, the assessee has paid self-assessment tax on 29.01.2015 whereas the appeal order was passed on 01.06.2015. Since the assessee has paid the during tax before appeal decision, it will be sufficient compliance of the provisions of section 249(4)(a). The objective behind the section 249 (4) is to make ensure the payment of taxes on income returned before the admission of appeal. Since in this case the assessee ha has paid self-assessment tax after filing of appeal

but before the decision on appeal by the CIT (A), the CIT (A) should have admitted the same. This view is also supported by the decision of Hon`ble Delhi High Court in the case of CIT v. Ram Body Builders [2001] 250 ITR 825 (Del) wherein it was held that when the appeal was heard by the first appellate authority on several dates and on none of these dates deficiency in the assessee`s appeal was pointed out. Before the issuance of show-cause notice, the assessee made the deposit of tax due, it was held that the Tribunal has held correct in law in holding that after payment of the tax due, the requirement of section 249 (4) should be taken as having been fulfilled.

13. Further reliance is placed in the case of D. S. Karunakar Reddy v. DCIT, in I.T.A. No. 402/Hyd/2011 for A.Y. 2008-09, wherein it was held that non-payment of self-assessment tax on returned income is a curable defect, and till such time admitted tax is paid appeal remains defective and not valid, and when such defect is cured by the payment of tax on the returned income by the assessee, the appeal becomes valid and such appeal deemed to have been filed.

14. Further reliance is placed in the case of Bhumiraj Construction v. Addl. CIT Range15 Mumbai [2011] 11 taxmann.com 333 /131 ITD 406 (Mum) wherein relevant extract of decision is reproduced as under:

8. *In the present case, the Id. CIT (A) granted a time of ten days to the assessee for depositing the tax due. It was only on the failure of the assessee to do so that the appeal was dismissed as unadmitted. If the assessee had made good the deficiency within the period of ten days, then the appeal would have been admitted and taken for disposal on merits. It shows that the appeal filed without paying tax due on returned income is only defective but not void. Thus if tax is*

paid on the income returned, either before or at the time of or after the filing of return, it will be sufficient compliance with the provisions of sub-section (4) of section 249. The pre-requisite is that the payment of such tax, in the category of cases in which tax is paid after the filing of return, should be before the admission of first appeal. In case such tax is not paid up to the filing of appeal before the CIT(A), the same shall not be admitted. In other words if the appeal is to be admitted by the first appellate authority, it is sine qua non that the assessee must have made the payment of tax on the income returned. If no payment of tax on the income returned is made at all and the appeal is filed, that cannot be admitted. If however the appeal is filed without the payment of such tax but subsequently the required amount of tax is paid, the appeal shall be admitted on payment of tax and taken up for hearing. Now the moot point for determination is that if the due tax is paid by the assessee after the filing of first appeal but before it is taken up for consideration, it is admitted and taken up for disposal, then can the payment of due tax after the non-admission of appeal by the authority can come to the rescue of the assessee and save the appeal from non-consideration? In our considered opinion the answer to this question needs to be given in affirmative.

9. The objective behind section 249(4) is to ensure the payment of tax on income returned before the admission of appeal. If such payment after the filing of appeal but before it is taken up for disposal validates the defective appeal, then there is no reason as to why the doors of justice be closed on a poor assessee who, could manage to make the payment of tax at a later date, The stipulation as to the payment of such tax ante the filing of first appeal is only directory and not mandatory. Whereas the payment of such tax is mandatory but the requirement of paying such-tax before filing appeal is only directory. When the defect in the appeal, being the non-payment of such tax, is removed, the earlier defective appeal becomes valid. Once we call an appeal as valid, it is implicit that it is not time-barred. It implies that all the consequences which follow on the removal of defect are that the validity is attached to the appeal from the date when it was originally filed and not when the defect is removed.
10. The Id. AR submitted that the assessee was facing the financial crunch which led to the non-payment of tax on the returned income at the time required by the Id. CIT(A). It was claimed that on making the payment of tax, the appeal ought to have been admitted by the Id. CIT(A). He relied on the order passed by the Mumbai Bench of the Tribunal in the case of Anant R. Thakore v. Asstt. CIT [2006] 5 SOT 298 in which it has been held that the CIT(A) was not justified in dismissing the appeal under section 249(4)(a) where the assessee's application for downward rectification of self-assessment tax was still pending. Per contra the learned Departmental Representative relied on another order passed by the Mumbai Bench of the Tribunal in the case of Bharatkumar Sekhsaria v. Dy. CIT [2002] 82 ITD 512 in which the action of the CIT(A) in not admitting the appeal was held to be justified. He further relied on the judgment of the Karnataka High Court in the case of D. Komalakshi v. Dy. CIT [2007] 162 Taxman 16.
11. In the case of D. Komalakshi (supra), the assessee AOP had three members who had filed returns individually. The assessments were finalized after making some adjustments. After the assessment in the individual capacity, the AOP was also assessed to tax on the same income. However tax paid in individual capacity was not adjusted. Aggrieved thereby, the assessee preferred appeal against the order of the Assessing Officer. For non-compliance of provisions of section 249(4)(a), the learned CIT(A) did not entertain the appeal. The assessee filed one more appeal before the learned CIT(A) after making the payment of tax which was dismissed on the ground of delay and the order so passed was upheld by the Tribunal. When the matter came up before the Hon'ble High Court, it was held that the defect of compliance under section

249(4) was made up by the subsequent action of adjusting the tax and the case for the revival of appeal was made out. Although the fresh appeal filed was not held to be maintainable, the Hon'ble High Court held that the same could be treated as an application for revival of appeal earlier filed. From this judgment, relied on by the learned Departmental Representative, it can be seen that the contention of the assessee was accepted and the CIT(A) was directed to decide the appeal on merits in accordance with law. Here it is relevant to mention that this judgment has been rendered in relation to block period comprising of 1995-96 to 28-9-2001 i.e., after 1-4-1989, being the date of amendment carried out in the proviso to section 249(4). So this judgment advances the case of the assessee instead of the Revenue. Insofar as the reliance of the rival parties on the divergent orders passed by the Mumbai Benches are concerned, we do not propose to deal with such decisions in view of our discussion in the earlier paras and the availability of a clear judgment of the Hon'ble Karnataka High Court available on the point, relied on by the learned Departmental Representative on this issue.

12. Adverting to the facts of the instant case we find that the assessee paid the tax due on income returned albeit after the disposal of appeal by the Id. CIT(A). On such payment, the defect in the appeal due to non-compliance of a directory requirement of paying such tax before the filing of the appeal, stood removed. Ex consequenti this appeal should have been revived by the Id. first appellate authority. Under such circumstances we set aside the impugned order and restore the matter to the file of the learned CIT(A) for disposal of the appeal on merits.

13. In the result, the appeal is allowed in the above terms"

15. In the light of above discussion, we are of the considered opinion that the assessee has make good the deficiency by paying due tax before disposal of appeal hence, the Id. CIT (A) should have admitted the said appeal. The decision in the case of Khushmanlal Hiralal v. ACIT [1996] 57 ITD 5319(Ahd) is not applicable as in said case the claim of the assessee was that assessment proceedings were claimed to have started with search conducted on 24.09.1987 i.e. much before the amended provisions of section 249(4)(a) came in to effect on 01.04.1989, hence, this argument was not found acceptable by the Tribunal, because such interpretation would produce a manifestly absurd and unjust result which could have never have been intended by the Legislature. Thus, the issue that if the assessee has paid self-assessment tax before appeal hearing/decision was not deliberated in said decision. Hence, said decision is distinguishable on facts and in law. Considering the above facts and circumstances,

we revive the admission of appeal before Id. CIT (A). Ex-consequenti, we set-aside the impugned order of CIT (A) and restore the matter to the file of Id. CIT (A) for disposal of appeal on merit after admission of the same.

16. The Ground No. 4 and 5 relating to charging of interest u/s. 234A/B/C and initiation of penalty under section 271(1)(c) are premature at this stage hence, treated as dismissed.

17. In the result, the appeal of the assessee is allowed on the above terms.

18. Order pronounced in the open court on 25-01-2018

Sd/-

(C.M. GARG)
JUDICIAL MEMBER

Sd/-

(O.P. MEENA)
ACCOUNTANT MEMBER

Surat: Dated: January 2018/opm

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT. ✓

By order

Assistant Registrar, Surat