

IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES “ C ” BENCH: BANGALORE

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

ITA No.2957/Bang/2018
(Assessment Year: 2009-10)

Shri Nagaraj,
No.46, Dayanand Mansion,
2nd Floor, Ring Road,
Chowdeshwari Nagar, Laggere,
Bangalore-560 058
PAN ACGPN 8331H

....Appellant

Vs.

Income Tax Officer,
Ward 1(2), Mysuru.

.....Respondent.

Assessee By:	Shri Ravi Shankar S V, Advocate.
Revenue By:	Smt. R. Premi, JCIT (D.R)

Date of Hearing :	07.09.2020.
Date of Pronouncement :	09.09.2020.

ORDER

PER SHRI CHANDRA POOJARI, AM :

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals), Mysuru dt.23.07.2018 for the Assessment Year 2009-10.

2. The assessee has raised the following grounds of appeal :

1. The order of the learned A O in so far as it is against the appellant is opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.
2. The Hon'ble CIT[A] ought not to have dismissed the appeal without adjudication the issues on merit for want of demand notice u/s 156 and further not providing adequate & reasonable opportunity to cure the defect which lapse was due to introduction of new e-filing appeal procedures. The Order of Hon'ble CIT[A] thus suffers from principles of natural justices thereby liable to be quashed.
3. Without prejudices to above, the impugned order of re-assessment is bad in law and void-ab-initio for want of requisite jurisdiction especially, the mandatory requirements to assume jurisdiction u/s 148 of the Act did not exist and have not been complied with and consequently, the re-assessment requires to be annulled under the facts and in the circumstances of the appellant's case.
4. Without prejudice to above, there cannot be two parallel assessment proceedings against the same income for the same AYr. The learned AO re-opened the assessment by requiring the assessee to file the return of income by issuance of notice u/s 148 dt.30.03.2016 and at the same time issued notice u/s 142(1) dt.17.11.2016 calling the assessee to file the return of income for the same AYr. The impugned assessment thus concluded bad in law, *void-ab-intio* and liable to be annulled.

5. Without prejudice to the above the learned A.O. has not given the reasons recorded for re-opening the assessment and also has not passed any formal order upholding the re-opening prior to passing of the impugned order as required by the ratio of the decision of the Hon'ble Supreme Court in the case of GKN DRIVESHAFT reported in 259 ITR 19.
6. Without prejudice to the above, even in extreme case, provisions of Section 147 are not applicable, as the material giving raise to the alleged escapement of income stemmed out of assessee own reconciliation statement & audit report which were part of original assessment records and duly scrutinized. Thus, the assessment framed on these materials results in 'CHANGE OF OPINION' which is not permissible under re-assessment scheme as laid down by Hon'ble Apex Court in case of Kelvinator of India Ltd 320 ITR 561 and thus the additions made on surmises assumptions and presumptions based on change of opinion liable to be deleted in toto.
7. Without prejudice to the above, the learned A.O. is not justified in assessing a sum of Rs.36.48 lakhs as unexplained contract receipt & Rs.3.30Lakhs disallowance u/s 40(a)(i) of the Act under the facts and in the circumstances of the appellant's case, although the appellant has given true explanations and substantiated the same by the evidence of the parties, who appeared before the A.O. and deposed the relevant facts and consequently, the additions is made by rejection of well substantiated explanations and evidence is liable to be deleted.

8. The addition made is purely on suspicion and surmise, assumptions and presumptions and by expecting the appellant to prove once again on the same issues which were duly explained during the original assessment and further disbelieving the evidence furnished during the course of re-opening assessment, the addition made deserves to be deleted.
9. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies himself liable to be charged to interest u/s 234-A and 234-B of the Act, which under the facts and in the circumstances of the appellant's case deserves to be cancelled.
10. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered.

3. The facts of the case are that the assessee is a labour contractor. The concluded original assessment was reopened under Section 147 of the Act on the last date of limitation i.e. on 30.03.2016 by issuance of Notice under Section 148 of the Act. The Assessing Officer made certain additions on account of undisclosed contract receipt of Rs.36,48,373 & disallowance under Section 40(a)(ia) of Rs.3,30,400 on account of non-deduction of TDS. The assessee filed an appeal with the CIT (Appeals). The CIT (Appeals) without adjudicating the issues summarily dismissed the appeal for not having enclosed the demand notice under Section 156 and thereby upholding the additions made by the Assessing Officer. The Id. AR relied on the decision in the case of Chelamala Setti Adeyya 54 ITR 339 (AP) which decision was again based on O.A.O.K. Rm. Arunachalam 45 ITR 407 (Madras). Further, the Id. AR submitted that the CIT (Appeals) order

is against the principles of natural justice and the order to be quashed. Aggrieved by the order of CIT (Appeals), the assessee is in appeal before us.

4. There was a delay of 30 days in filing the appeal before the Tribunal. The assessee filed condonation petition explaining the reason that after receiving the appellate order, it was handed over to Authorised Representative to file appeal before the Tribunal. The A.R. of the assessee prepared the appeal and gave it to the assessee to file before the Tribunal. However, the assessee sent the appeal to the Tribunal old office situated at Kempe Gowda Road, Bangalore instead of Tilak Nagar, Bangalore address. Later the assessee enquired with the Tribunal of Bangalore Benches for obtaining the acknowledgement of receipt of appeal by the Tribunal and also date of hearing. The Tribunal informed the assessee that appeal papers were not received at the office of the Tribunal. Therefore the assessee filed new set of appeal by hand on 31.10.2018. Thus there was a delay of 30 days in filing the appeal. In our opinion, there exists a reasonable cause that the assessee mistakenly posted this appeal to the old address of the Tribunal. Accordingly, we condone the delay of 30 days in filing the appeal before the Tribunal and admit the appeal for adjudication.

5. The order of the Assessing Officer was passed ex-parte under Section 144 of the Act on which the assessee filed an appeal before the CIT (Appeals). The CIT (Appeals) also dismissed the appeal ex-parte on the reason that the appeal filed by the assessee was not accompanied by the valid demand notice. The CIT (Appeals) would have given defect notice and give a fair opportunity of hearing to the assessee to correct the defect noticed by him. Since the order was passed by the A.O. is ex-parte, in the interest of justice, we remand the entire disputed issue to the file of A.O. Officer for fresh consideration.

6. In the result, the appeal of the assessee is allowed for statistical purposes.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(N.V. VASUDEVAN)
VICE PRESIDENT

Sd/-

(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Dated: 09.09.2020.

*Reddy GP

Copy to

1. The appellant
2. The Respondent
3. CIT (A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore