

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "B" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA. Nos. 264 & 263/JP/2020
निर्धारण वर्ष/Assessment Year : 2014-15 & 2013-14

M/s Jhunjhunu Balaji Motors Pvt. Ltd. Mandawa Road, Sitar, Jhunjhunu	बनाम Vs.	ACIT, Circle, Jhunjhunu
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCJ9791P		
अपीलार्थी/ Appellant		प्रत्यर्थी/ Respondent

निर्धारिती की ओर से/ Assessee by : None
राजस्व की ओर से/ Revenue by : Smt. Runi Pal (Addl.CIT)

सुनवाई की तारीख/ Date of Hearing : 29/07/2021
उद्घोषणा की तारीख/Date of Pronouncement : 30/07/2021

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

These are two appeals filed by the assessee against the orders passed by the Id. CIT(A)-3, Jaipur dated 28.03.2019 for A.Y 2013-14 and A.Y 2014-15 respectively.

2. None appeared on behalf of the assessee. The Id. AR, Sh. Anil Kumar Sharma has moved an adjournment application requesting for adjourning the matter for 2-3 weeks. It is noted that these two appeals have been filed way back in June, 2020 and thereafter, the matter has been adjourned on as many as 18 occasions. Therefore, given that the matter has been pending for a long time and in absence of any

reasonable explanation for seeking adjournment, it was decided not to adjourn the matter any further and to dispose off these two appeals based on material available on record.

3. Since common issues are involved, both these appeals are being disposed off by this consolidated order. It is noted that there is a delay in filing both the appeals before the Tribunal. In this regard, the assessee has moved an application for seeking condonation of delay along with an affidavit and the contents thereof reads as under:-

"In connection with the subject cited above it is humbly submitted:

- 1. The appellant being a Pvt Ltd. Company got it's Books of Accounts Audited as per relevant provisions of Companies Act, 1956 and IT Act, 1961 and disclosed Net Profit of Rs. 37,10,130/- as appearing in Audited Profit & Loss Account.*
- 2. The assessee due to Serious Financial hardships could not deposited the self assessment Tax and filed return of Income for the relevant A.Y.2013-14.*
- 3. The AO completed the assessment Ex-party u/s 147/144 of IT Act vide assessment order dated 28.12.2017 at huge assessed Income of Rs. 2,93,38,850/-.*
- 4. The assessee preferred appeal before Id. CIT(A)-III Jaipur against the relevant assessment order dated 28.12.2017 along with application for condoning delay of 34 days in filing of the appeal.*
- 5. The Id. CIT(A)-III Jaipur observed that the assessee has not deposited the Advance Tax as provided u/s 249(4)(b) of IT Act,*

1961, therefore vide order dated 28.03.2019 dismissed the appeal of the assessee as un admitted.

6. The order of the Id. CIT(A) was communicated vide E-Mail on 28.03.2019 which came in the knowledge of the assessee either on the same day or later day.

7. The A/R of the assessee advised that remedy of the revival of the appeal before Id. CIT(A) or preferring appeal before Hon. ITAT against the order of Id. CIT(A) may be taken only after deposit of Tax equal to Advance Tax as provided u/s 249(4)(b) of IT Act 1961.

8. The assessee was subject to continuous down fall in business and wife of the Director of the assessee company was suffering from serious disease cancer, therefore under such adverse business and personal circumstances could not deposited any amount of Tax till 25.02.2020.

9. The assessee after it's best efforts could deposited Rs. 5,00,000/-on 25.02.2020 and discussed the case with his A/R.

10. The A/R of the assessee advised that taking in to account the Tax already deposited in different installments before disposal of the appeal by Id. CIT(A) along with Tax deposited on 25.02.2020 is sufficient for compliance of section 249(4)(b) of IT Act, 1961. The assessee directed his A/R to file the appeal before Hon. ITAT.

11. The A/R of the assessee taken some time for preparation of the appeal, however under surrounding circumstances of COVID-19 and national lock down could not filed the appeal in due course.

12. In view of the facts narrated herein above, the appellant could not field the relevant appeal against the impugned order

of Id. CIT (A) dated 28.03.2019 within the period of limitation as provided u/s 253(3) of the IT Act 1961.

13. Thus the delay in filing of relevant appeal is not deliberate and not attributable to any misconduct or recklessness of appellant and the appellant has a reasonable cause for not filing the relevant appeal within the period of limitation of 60 days from the date of communication of the impugned order of Id. CIT(A).

Therefore, it is humbly prayed to admit the appeal as provided u/s 253(5) of I.T Act, 1961, by condoning the delay in filing of the same and decide the appeal on merits."

4. Per contra, the Id. DR is heard who has opposed the condonation of delay stating that substantial delay has happened in filing these two appeals and no reasonable explanation has been submitted by the assessee.

5. After carefully pursuing the application, the affidavit filed by the assessee and hearing the Id DR, we find that the assessee has reasonably explained the reasons for the delay in filing the present appeals on account of extreme financial hardship and on account of ongoing Covid pandemic, and in view of overarching principle of substantial justice to prevail over the technical glitches, the delay in filing the two appeals is hereby condoned and the appeals are admitted for adjudication.

6. In ITA No. 263/JP/2020, the assessee has taken the following grounds of appeal:-

"1. Under the facts and circumstances of the case the Id. CIT(A) is not justified in dismissing the Appeal as un admitted due to non deposit of Admitted Tax/Advance Tax as provided u/s 249(4) of I.T. Act, 1961.

2. Under the facts and circumstances of the case the Id. CIT(A) is not justified in not disposing the following Grounds of appeal on merits.

2.1 Under the facts and circumstances of the case the AO is not justified in Estimating the Net Profit of Rs. 2,88,00,000/- by applying NP Rate of 8% of Gross Receipts of Rs. 36,00,00,000/-.

2.2 Under the facts and circumstances of the case the AO is not justified in Estimating the Net Income from Interest and commission of Rs. 3,17,048/-.

2.3 Under the facts and circumstances of the case the AO is not justified in Estimating the Net Income from Rent of Rs. 2,21,800/-."

7. In Ground No. 1, the assessee has challenged the action of the Id. CIT(A) in dismissing the appeal due to non deposit of admitted tax/advance tax as provided u/s 249(4) of the Act, 1961.

8. In this regard, the Id DR drawn our reference to the findings of the Id. CIT(A) which read as under:-

"I have carefully considered the material before me. I find that the appellant is not paid the tax on admitted income till date, which is mandatory as per section 249(4) of the IT Act. The

section say that "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."

In the appellant case the appellant not file any return of income. The A/R of the appellant submitted profit and loss account, balance sheet where in profit before tax was shown Rs. 37,10,130/- and income tax at Rs. 14,00,000/- but the appellant not paid any amount of advance tax which is violation of section 249(4) of the I.T. Act. Therefore, the appeal is dismissed as un-admitted."

9. It was submitted by the Id DR that since the assessee has not filed any return of income originally, therefore, it was incumbent on part of the assessee to deposit an amount equal to advance tax which was due had it filed its return of income. It was submitted that since the assessee failed to deposit taxes equivalent to the amount of advance tax, the Id CIT(A) was right in rejecting the appeal at the threshold in view of the clear and mandatory provisions of section 249(4) of the Act.

10. We have heard the Id. DR and considered the material available on record. The provisions of Section 249(4) of the Act read as follows:-

"Section 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 filling under Clause (b) and on an application made by the appellant in this behalf, the CIT(A) may, for any good and sufficient reason to be recorded in writing, exempt him from the operation of the provisions of that clause."

11. On reading of the aforesaid provisions, it is noted that where the assessee has not filed its return of income, the assessee is required to pay an amount equal to the amount of advance tax which was payable by him which needs to be taken into consideration before the appeal is admitted for adjudication by the Id CIT(A). At the same time, the CIT(A) has been empowered to exempt the assessee from the payment of amount equal to advance tax on an application filed by the assessee. In other words, where the assessee did not file any return for the relevant assessment year, the assessee can file the appeal before the Id CIT(A) against the assessment order passed by the AO even without the payment of tax provided he satisfies the CIT(A) with the reasonable explanation for non-payment of taxes. Therefore, before the appeal is admitted for adjudication, the Id CIT(A) has to examine whether the assessee has either complied with the requirement of payment of taxes, or has moved an application seeking an exemption from such

requirement and on disposal of such application seeking exemption from payment of taxes, the appeal may be admitted for adjudication.

12. In the instant case, on perusal of the order of the Id CIT(A), we find that the Id CIT(A) has not admitted the appeal for want of payment of taxes equal to advance tax by the assessee. Apparently, there is nothing on record which suggests that the assessee has moved any application before the Id CIT(A) seeking exemption from payment of taxes. However, before us, the assessee has moved an application seeking admission of additional evidence by way of tax challans disclosing payment of Rs 13 lacs equal to advance tax as per section 249(4)(b) for the impugned assessment year.

13. It is noted that taxes amounting to Rs 6 lacs have been deposited by the assessee before filing of appeal before the Id CIT(A), the taxes amounting to Rs 2 lacs have been deposited after filing of appeal before the Id CIT(A) and Rs 5 lacs have been deposited after passing of the impugned order by the Id CIT(A) which reasonably explains the financial hardship faced by the assessee and also its earnestness in taking the necessary steps to be in compliance with the provisions of section 249(4)(b) and to be heard on merits.

14. Given that the assessee has deposited an amount of Rs 13 lacs equal to advance tax as per section 249(4)(b) for the impugned assessment year, the additional evidence by way of tax challans towards payment of taxes are hereby admitted and consequent thereto, the appeal by the assessee against the order of assessment need to be

admitted and adjudicated by the CIT(Appeals) on merits. In this regard, useful reference can be drawn to the decision of the Coordinate Bench in case of **Bhumiraj Constructions vs Additional Commissioner of Income-tax, Range 15(1)** reported in 11 taxmann.com 333 (Mumbai) wherein it has been held as under:-

"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.

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."

15. Though the aforesaid decision has been rendered by the Coordinate Bench in the context of clause (a) of sub-section (4) of section 249 of the Act, the legal proposition laid down therein, that the payment of tax is mandatory but the requirement of paying such tax before filing appeal is only directory and where the defect in the appeal, being the non-payment of such tax, is removed, the earlier defective appeal becomes valid, applies equally to clause (b) sub-section (4) of section 249 of the Act. Therefore, where the admitted taxes are paid at a later point of time, then the appeal of the assessee should be considered as properly instituted and should be heard and decided by the CIT(Appeals) on merits. Considering the same, the matter is set-aside to the file of the Id. CIT(A) with the directions to verify and consider the payment of taxes towards due discharge of the assessee's liability as per provisions of section 249(4)(b) of the Act and decide the

matter on merits after providing reasonable opportunity to the assessee.

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16. We find that similar fact pattern exists in case of appeal filed by the assessee for A.Y 2014-15 wherein the appeal of the assessee was not admitted by the Id CIT(A) on account of non- payment of taxes equal to advance tax as provided u/s 249(4)(b) of the Act.

17. In this regard, the assessee has moved an application seeking admission of additional evidence by way of tax challans disclosing payment of Rs 14.78 lacs out of which Rs 978,987 has been deposited on 28.03.2019, the date of passing of the impugned order and Rs. 5 lacs has been deposited on 25.02.2020 after passing of the impugned order. The additional evidence so filed by way of tax challans towards payment of taxes is hereby admitted and consequent thereto, the appeal by the assessee against the order of assessment need to be admitted and adjudicated by the CIT(Appeals) on merits and the matter is set-aside to the file of the Id. CIT(A) with the directions to verify and consider the payment of taxes towards due discharge of the assessee's liability as per provisions of section 249(4)(b) of the Act and decide the matter on merits after providing reasonable opportunity to the assessee.

In the result, both the appeals filed by the assessee are disposed off in light of aforesaid directions and are allowed for statistical purposes.

Order pronounced in the open Court on 30/07/2021.

Sd/-

(संदीप गोसाई)
(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member
जयपुर / Jaipur

दिनांक / Dated:- 30/07/2021.

*Ganesh Kumar

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- M/s Jhunjhunu Balaji Motors Pvt. Ltd., Jhunjhunu
2. प्रत्यर्थी / The Respondent- ACIT, Circle- Jhunjhunu
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA Nos. 264 & 263/JP/2020 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar