

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

डॉ. एस.सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA. No. 245/JP/2021
निर्धारण वर्ष / Assessment Years : 2017-18

Shri Mahavir Soni S/o Shri Bhanwar Lal Soni Arpit Marbles, Industrial Area, Madanganj, Kishangarh, Ajmer.	बनाम Vs.	ITO, Ward-2(3), Alwar.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACTPS 0818 D		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Kranti Mehta (C.A.)
राजस्व की ओर से / Revenue by : Smt. Runi Pal (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 23/03/2022
उदघोषणा की तारीख / Date of Pronouncement : 30/03/2022

आदेश / ORDER

PER: DR. S. SEETHALAKSHMI, J.M.

This is an appeal filed by the assessee directed against the order of the National Faceless Appeal Centre, Delhi (hereinafter called as 'NFAC') dated 12.08.2021 penalty of Rs.3,87,000/- levied u/s. 271 (1) (c) of the Income Tax Act, 1961 (in short "the Act") for the Assessment year 2017-18.

2. At the outset of hearing, the Bench observed that there is delay of 30 days in filing the appeal by the assessee for which the Id. AR of the assessee filed an application dated 21.01.2022 for condonation of delay with following prayers.

“In the above connection, I respectfully beg to submit that the jappeal order dated 12.08.2021 from faceless CIT(Appeals) was received on 12.08.2021 and appeal to ITAT, Jaipur was e-filed on 09.10.2021 and accordingly the last date for filing physical copy (hard copy) was 08.11.2021.

Your Honour will kindly appreciate that there were beg crowds in the market due to festival season of Dushehra in mid-October, 2021 and Diwali on 04.11.2021, Goverdhan Pooja on 05.11.2021, Bhai Dooj on 06.11.2021 and Sunday on 07.11.2021. Corona cases in festival season were reported throughout the country, hence the physical copy (hard copy) of the appeal could be sent on 08.11.2021 by Railway Mail Service (RMS)

Under the above circumstances of Corona fear, there occurred little delay of few days in filing the physical copy of appeal. I therefore, request you to kindly condone the delay and oblige.”

3. During the course of hearing, the Id. DR has no objection to assessee application for condonation of delay and prayed that court may decide the issue as deem fit and proper in the case.

4. We have heard the rival contentions and perused the materials available on record. The prayer as mentioned above by the assessee for condonation of delay of 30 days has merit and we concur with the submission of the assessee. Thus the delay of 30 days in filing the appeal by the assessee is condoned.

5. The assessee raised the following grounds of appeal:-

“1.That Ld. CIT (Appeals), NFAC erred in not disposing of ground no.1 as per form no. 35 with regard to jurisdiction of ITO, Ward 2(3), Alwar.

Since the ITO had no jurisdiction over the appellant, as such the impugned assessment order is bad in law and deserves to be quashed.

2. That Ld. CIT (Appeals), NFAC erred in not disposing of ground no. 2 as per form no. 35 with regard to non-service of notices u/s 142(1) and late service of notice u/s 144 as well as no demand notice served for AY 2017-18. Accordingly, the impugned assessment order is bad in law and deserves to be quashed.

3. That without prejudice to the above grounds, Ld. CIT (Appeals), NFAC erred in dismissing the appeal in limine by mentioning that additional evidences cannot be produced without application under Rule 46A even when in the absence of service of notices, the impugned assessment order was completed u/s 144. He further erred in not appreciating the fact that the amount of Rs.900000/- was never deposited in the bank account of the appellant and the remaining amount of Rs. 330000/- deposited in bank was business income of proprietary concern of the appellant. Accordingly, the impugned addition of Rs.1230000/- deserves to be deleted.

4. That the appellant prays to add or alter any ground of appeal at or before the time of hearing.”

6. Brief facts of the case are that the assessee during the demonetization period, i.e. 09.11.2016 to 31.12.2016 has deposited cash in the bank accounts and no return of income was filed even issuance of notice u/s 142(1) on 12.03.2018. Therefore the case was picked for scrutiny. Thereafter a detailed query letter along with notice u/s 142(1) was issued on 14.11.2018 for filing reply by 20.11.2018 but no reply received from the assessee. Again notice u/s 142(1) was issued on 27.11.2018 for 30.11.2018 was also not complied with by the assessee. Looking to the non cooperative attitude of the assessee, a final show cause notice u/s 144(1) on 03.12.2018 for 10.12.2018 was

issued proposing the addition of income on the basis of material available on record which also did not comply with by the assessee.

7. The Assessing Officer also initiated penalty proceedings Penalty proceedings u/s 271(1)(b) are initiated separately for making to compliance to the statutory notice issued u/s 142(1) vide dated 12.03.2018, dated 14.11.2018 and dated 27.11.2018.

8. Being aggrieved by the assessment order, the assessee preferred an appeal before the CIT(A). Before the CIT(A), the assessee has reiterated its arguments in page Nos. 2 to 3 of the order. The CIT(A) for the reason stated in his appellant order has rejected arguments and submissions made by the assessee.

9. The Ld CIT (A) at page 8 of his order observed as under:-

“Respectfully following the ratio of the above judgments and in view of the fact that the appellant has furnished the additional evidence without any accompanying petitioner making out a case under any of the four limbs of the Rules 46A(1) of the Income Tax Rules, 1962, I being constrained by the procedural rules and law laid out, cannot consider the additional evidence. Thus, in the absence of the requisite documentary evidences, the contention of the Appellant remained unverified and unproved solely due to the conduct and latches on the part of the appellant and these cannot be accepted. Accordingly, the addition made by the AO is hereby confirmed and the appeal is dismissed, in limine.”

10. Aggrieved by the CIT(A) order, the assessee is in appeal before us. Before us, the assessee has reiterated that his submissions were not taken on record by the CIT (A). Before us the Ld AR for assessee submitted a detailed Written submissions dated 18.01.2022 which are as under :-

“(A) WRONG AMOUNT OF BANK DEPOSITS MENTIONED IN ASS. ORDER

(1) It is brought to your kind notice that fact mentioned in the assessment order of depositing Rs.12,30,000/- in United Commercial Bank, Makrana Road, Kishangarh is wrong. It is mentioned in Para 3, page 3 of the assessment order that "As per information available on record, the assessee deposited cash of Rs.3,30,000/- in ICICI Bank Ltd. and Rs.9,00,000/- in United Commercial Bank, Makrana Road, thus total cash was deposited to Rs. 12,30,000/- during the period under consideration."

(2) It is submitted that the appellant is proprietor of Arpit Marbles, Jaipur By Pass Road, Madanganj, Kishangarh (Dist. Ajmer) which is carrying on the business of Marble and maintaining its regular books of account. An amount of Rs.3,30,000/- was deposited in ICICI Bank Ltd., the source of which was from the regularly maintained books of account of the proprietary business of the appellant M/s Arpit Marbles. Copy of Capital A/c and Balance Sheet of the appellant for AY 2017-18 as well as Profit and Loss A/c and Balance Sheet of Arpit Marbles, Kishangarh are enclosed herewith for your kind perusal.

(3) So lar as the amount of Rs.9,00,000/- is concerned, it is submitted that the appellant is partner in Mohit Marble Industries, Kishangarh (Dist. Ajmer) and from the regularly kept books of account of this lirm, Rs.9,00,000/- were deposited in United Commercial Bank (UCO Bank), Makrana Road, Kishangarh as detailed below-

Rs.5,00,000/- Cash deposited on 18.11.2016

Rs.4,00,000/- Cash deposited on 01.12.2016

(4) Copy of Bank account and certificate dated 09.03.2020 taken from the Manager, UCO Bank, Kishangarh are enclosed. It is clearly mentioned in the certificate that the amount of Rs.9,00,000/- were deposited in the account of Mohit Marbles Industries having PAN Card No. AAEFMO76IC. The PAN of the appellant is ACTPS0818D. Hence, the appellant never deposited the amount of Rs.9,00,000/- in UCO Bank in his account.

(B) NO JURISDICTION OF ITO, WARD 213), ALWAR

(1) The ITO Ward 2(3), Alwar passed ex-parte Assessment Order u/s 142(1)/144 of the Income Tax Act,1961 on 17-12-2018. The appellant lives in

Madanganj, Kishangarh (Dist. Ajmer) and during the year under appeal he was proprietor of M/s Arpit Marbles, Kishangarh (Dist. Ajmer). Accordingly, the Income Tax Officer, Ward 2(3), Alwar had no jurisdiction over the appellant. It was very much in the knowledge of the ITO that the appellant was not living in Alwar which is apparent from the following address mentioned in the assessment order and demand notice -

Shri Mahavir Soni

Sib Shri Bhanwar Lal Soni

*Arpit Marbles, Industrial Area,
Madanganj, Kishangarh*

Ajmer (Raj.)

(2) Accordingly, it was duty of the ITO Ward 2(3), Alwar to transfer the relevant record/file/papers to ITO, Kishangarh (Dist. Ajmer) since he had no jurisdiction over an assessee residing in the Dist. of Ajmer. The assessment order therefore, is bad in law.

(C) NO SERVICE OF NOTICES

(1) It is brought to your kind notice that notice u/s 142(1) issued on 14.11.2018 and 27.11.2018 were not received by the appellant. It is primary requirement of law that notice should have been served upon the appellant before assessment order is made.

Even there is no mention in the assessment order that these notices were served upon the appellant or not It is not the issue of notice which is important but it is the service of notice which is important. In the absence of service of notice, the impugned assessment order is bad in law.

(2) the notice u/s 144 issued on 03.12,2018 was received by the appellant on 19.12.2018 while the date fixed for hearing was 10.12.2018. The assessment order was passed on 17.12.2018. Hence, on this ground also the assessment order is bad in law since it was passed on 17.12.2018 while the notice u/s 144 was received by the appellant on 19.12.2018.

***(U) PRAYER FOR ACCEPTING ADDITIONAL EVIDENCES UNDER
RULE 29***

(1) In view of the above submissions there was no opportunity/occasion available with appellant to produce necessary evidences before the ITO Ward 2(3), Alwar. Firstly, the ITO Ward 2(3), Alwar had no jurisdiction to issue notices to or pass assessment order of a person who is residing in District Ajmer. Secondly, the notices u/s 142(1) by the ITO were never served, notice u/s 144 was served after the assessment order was passed. The Faceless CIT (Appeals) has not decided these grounds.

(2) I therefore, request your honour to kindly admit the additional evidences under Rule 29 of Income Tax Tribunal Rules since the appellant was prevented by sufficient cause from producing the evidences before the ITO Ward 2(3), Alwar and no sufficient opportunity was given to the appellant to adduce the evidences as narrated above. It is very humbly submitted that all these evidences are relevant to the grounds of appeal and go to the root of the case to determine the amount of deposits made in the bank. These evidences were submitted to The Faceless CIT (Appeals), but he did not consider the same on the technical ground of not filing application for accepting additional evidences.

I therefore, request you to kindly admit the additional evidences under Rule 29 since these evidences are of utmost important and go to the root of the case and the appellant was prevented by sufficient reasons from producing the same before the authorities below as detailed above.”

11. The averments made by the Ld AR for assessee that all the evidences were furnished by the assessee before the CIT (A)/NFAC relating to deposit of cash. He further submitted that the assessee has furnished Additional evidences duly explained the source of cash deposit, the Bank statements, Bank certificate, Capital Account.

12. Further the ld. AR submitted that during the appellate proceedings before the ld CIT(A), the assessee had moved an application under Rule 46A for admission of certain additional evidences which are critical and was relevant to purse under consideration, however the ld. CIT(A) has erred in not accepting the additional evidences filed by the assessee on the only ground that it was not

accompanied by an affidavit . It was submitted that the assessee has taken a specific ground of appeal before this Bench regarding non-admission of additional evidences by the Id CIT(A) besides other grounds of appeal and it was accordingly prayed that the additional evidences so filed by the assessee may be admitted and the matter may be remanded back to the file of the Assessing Officer to examine the same.

13. The Ld. DR, on the other hand strongly supporting the order of the CIT(A)/NAFC submitted that there is no merit in arguments taken by the Ld. AR of the assessee and the AO has rightly taken has a fit case for imposition of penalty.

14. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. The Ld AR for assessee submitted additional evidence and Written submission before us.

14.1 In our opinion, considering the facts and circumstances of the case, the Id. CIT(A) has erred in not considering the additional evidence as requested.

14.2 We are constrained to hold that the appellate authority acted in violation of rule 46A and the acceptance of the documents as additional evidence de hors rule 46A of the Rules, because the appellant is not entitled to produce oral or documentary evidence afresh before the appellate authority, as a matter of right. Under special and certain circumstances only, as mentioned, in clauses (a), (b), (c) and (d) of rule 46A(1) additional evidence can be adduced. Rule 46A itself contains the principles of natural justice. That being so, sub-rule (4) of rule 46A does not permit to accept any additional evidence in contravention of the provisions of sub-rules (2) and (3) of rule

46A. The appellate authority is not permitted to act whimsically while exercising the jurisdiction under rule 46A of the Rules.

14.3 In this regard, We have gone through the decisions of various High Courts in the cases :

1. [2006] 153 TAXMAN 31 (GUJ.) High Court Of Gujarat N.B. Surti Family Trust Vs. Commissioner Of Income-Tax.

2. [2007] 162 Taxman 257 (Gau.) High Court Of Gauhati Commissioner Of Income-Tax Vs.Ranjit Kumar Choudhury.

3. [2018] 89 Taxmann.Com 126 (Allahabad) High Court Of Allahabad Dr. Prabhu Dayal Yadav Vs. Commissioner Of Income Tax.

We noted from the following judgments, that considering the fact that these additional evidences which are now sought to be admitted would be in the interest of proper adjudication of the issues at hand, the same are hereby admitted and the matter is set-aside to the file of AO to examine the same and decide the matter as per law after providing reasonable opportunity to the assessee as the earlier order disputed is also passed u/s 144 and therefore we deem it fit to remand it back to the file of AO.

14.4 Accordingly, it is a fit case for remand for proper adjudication of the case by following the established procedure laid down. Under rules 46A(1), (2) and (3) of the Rules which we order accordingly. The impugned order passed by the Lower authority is hereby quashed and set aside. The appeal is remanded to the AO, who shall make an endeavour to dispose of the entire appeal in accordance with law as indicated above as expeditiously as possible, where additional evidence as it requires to justify the claim of assessee which needs to be verified and examined by the Revenue authorities afresh after allowing proper opportunity to the assessee.

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

Order pronounced in the open Court on 30/03/2022.

Sd/-

(राठोड कमलेश जयन्तभाई)
(RATHOD KAMLESH JAYANTBHAI)
लेखा सदस्य / Accountant Member

Sd/-

(एस.सीतालक्ष्मी)
(Dr. S. Seethalashmi)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 30/03/2022.

***Santosh**

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

1. अपीलार्थी / The Appellant- Shri Mahavir Soni, Ajmer.
2. प्रत्यर्थी / The Respondent- ITO, Ward-2(3), Alwar.
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 No. 245/JP/2021 }

सहायक पंजीकार / Asst. Registrar