

IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT

**Before: Shri Waseem Ahmed, Accountant Member
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA No. 451/Rjt/2018
Assessment Year 1997-98**

Hasmukh keshavlal Kesaria-HUF, 107-Kapad Market, Para Bazar, Rajkot PAN: AABHK6682H (Appellant)	Vs	The ITO, Ward-2(1), Rajkot (Respondent)
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**Assessee by: Written Submission
Revenue by: Shri B.D. Gupta, Sr. D.R.**

Date of hearing : 07-07-2022
Date of pronouncement : 21-09-2022

आदेश/ORDER

PER BENCH:-

This assessee's appeal for A.Y. 1997-98, arises from order of the CIT(A)-2, Rajkot dated 10-10-2018, in proceedings under section 154 of the Income Tax Act, 1961; in short "the Act".

2. The assessee has taken the following grounds of appeal:-

“1. The Ld. CIT(A) has erred in not following guidelines issued by the Hon. Bombay High Court which specifically provides that Law does not empower the CIT(A) to dismiss the appeal on account of non prosecution of appeal by the assessee and has thus also erred in not showing utmost regards towards the Hon. Bombay High Court. The order needs cancellation.

2. The Ld. CIT(A) has erred in not following the statutory provisions of section 250(6) of the IT Act, 1961 and passing a vague and non specify order against the mandatory provisions of the statute and has thus totally shown disregards towards the same. The order needs cancellation.

3. The grounds of appeal mentioned hereunder are without prejudice to one another.

4. The Ld. CIT(A) grievously erred on facts as also in law in confirming rejection of the rectification application by the Ld. CIT(A) regarding interest U/s. 234B of the Act charged till 27-12-2011 i.e. the date of order passed U/s. 143(3) r.w.s 254 of the Act as against chargeable upto 13-3-2003 i.e. date of order passed U/s. 143(3) r.w.s 147 of the Act holding that order passed U/s. 143(3) r.w.s 254 of the Act is regular assessment. The CIT(A) be directed to recalculate interest U/s. 234B of the Act till 13-3-2003.

5. Without prejudice, no adequate, sufficient and reasonable opportunity has been provided while passing rectification order. The order needs annulment.

6. Without prejudice, no adequate, sufficient and reasonable opportunity has been provided at the time of assessment stage. The order needs annulment.

7. Without prejudice, no adequate, sufficient and reasonable opportunity has been provided at the time of appellate stage. The order needs annulment.

8. The last hearing fixed by the Ld. CIT(A) on 11-9-2014 and thereafter he passed order on 10-11-2014, i.e. after about 2 months without giving any hearing. The Ld. CIT(A) thus erred in not following principals of natural justice of giving suitable time since as per C.B.D.T's instruction an appeal order is to be passed within 15 days from last date of hearing. Thus after passing the order after about 10 months time without giving further hearing is contrary to the guidelines issued by the C.B.D.T. as also in violation of principals of natural justice. The appeal order thus pass is erroneous needs cancellation.

9. The appellant craves leave to add/alter/amend and/or substitute any or all ground of appeal before the actual hearing takes place.”

3. The brief facts of the case are that the assessee filed appeal before Ld. CIT(Appeals) Rajkot against the order by the AO passed under section 154 of the act dated 12-03-2012 charging interest under section 234B of the Act. The Ld. CIT(Appeals) vide order dated 10-11-2014 dismissed the appeal of the assessee on the ground that in spite of granting several adjournments, there is no compliance whatsoever from the assessee. This only shows that the assessee has no interest in pursuing the appeal filed, and accordingly the appeal was dismissed for non-prosecution. While dismissing the appeal of the assessee, Ld. CIT(Appeals) made the following observations:

“4. During the appeal proceedings, various notices were issued to the assessee as under.

Sr. No.	Date of notice	Date fixed for hearing	Remarks
1.	26/04/2018	11/05/2018	No one attended adjournment not filed
2.	16/05/2018	05/06/2018	No one attended adjournment not filed
3.	06/06/2018	22/06/2018	No one attended adjournment not filed
4.	25/06/2018	10/07/2018	No one attended adjournment not filed
5.	23/07/2018	10/08/2018	No one attended adjournment not filed
6.	10/09/2018	08/10/2018 (Final Opportunity)	No one attended adjournment not filed

5. In view of above, the appeal is liable to be dismissed for non-prosecution. I find support from the following decisions:-

(i) In the case of CIT Vs. B.N. Bhattachargee & Another 118 ITR 461 (relevant pages 477 & 478) wherein their Lordships have held that "the appeal does not mean merely filing of appeal but effectively pursuing it."

(ii) In the case of Estate of Late Tukoji Rao Holker Vs. CWT 223 IR 480 (MP) while dismissing the reference made at the instance of assessee in default made following observations in their order.

"if the party at whose instance the reference is made fails to appear at the hearing, or fails in taking steps for preparation of the paper books so as to enable hearing of the reference, this court is not bound to answer the reference.

(iii) In the case of CIT Vs. Multiplan India Pvt. Ltd. 38 ITD 320 (Del). The appeal filed by the revenue before the Tribunal which was fixed hearing but on the date of hearing nobody represented the revenue applicant, nor any communication for adjournment received. There was no communication or information as to why revenue choose to remain absent on that date. The Tribunal on the basis of inherent power treated the appeal filed by the revenue as un-admitted in view of Rule 19 of the Appellate Tribunal Rules, 1963.

Coming to the merits of the case I find that the only grievance of assessee is that interest u/s 234B has been incorrectly charged. The AO in the impugned order u/s 154 has justified the charging of interest u/s 234B. The assessee on other hand has failed to show how the charging of interest is incorrect. The ground of appeal is therefore rejected on merits as well.

*4. For statistical purpose, the appeal of the assessee is to be treated as **dismissed.**"*

4. The assessee is in appeal before us against the order of Ld. CIT(Appeals). The counsel for the assessee submitted that Ld. CIT(Appeals) has passed ex parte order, without discussing the merits of the case, which is contrary to various judicial precedents which have held that Ld. CIT(Appeals) is required to pass order on merits of the case, on the basis of available material and cannot dismiss assessee's appeal summarily for non-prosecution. The counsel for the assessee submitted that appellate order is silent on the merits of the case and is vaguely worded, without discussing the merits of the case. He submitted that the ITAT, Rajkot bench in the case of **Shri Vipul V. Dhakan in ITA number 180/Rjt/2018 dated 31-05-2022** has held that without passing a specific detailed and well-reasoned order, to

dismiss an appeal amounts of miscarriage of justice. Accordingly, request was made to restore the matter to the Ld. CIT(Appeals) in the interest of justice. In response, DR submitted that as many as 6 opportunities of hearing were provided by the Ld. CIT(Appeals), which remained uncompiled with.

5. We have heard the rival contentions and perused the material on record. In the case of **Premkumar Arjundas Luthra (HUF) [2016] 69 taxmann.com 407 (Bombay)**, the Mumbai High Court has held that Commissioner(Appeals) is required to apply his mind to all issues which arise from impugned order before him whether or not same had been raised by appellant before him. Further, law does not empower Commissioner (Appeals) to dismiss appeal for non-prosecution (non-appearance). The Delhi the case of **Ms. Swati Pawa [2019] 103 taxmann.com 300 (Delhi - Trib.)** has held that in terms of section 250, Commissioner (Appeals) is not empowered to dismiss appeal for non-prosecution and is obliged to dispose of appeal on merits by passing a speaking order. The Delhi Tribunal in the case of **Pawan Kumar Singhal [2019] 108 taxmann.com 548 (Delhi - Trib.)** has held that Commissioner (Appeals) cannot dismiss assessee's appeal in limine for non-prosecution without deciding same on merits through an order in writing, stating points of determination in appeal, decision thereon and reason for decision. It would be also useful to reproduce the decision of Rajkot bench in the case of **Shri Vipul V. Dhakan in ITA number 180/Rjt/2018 dated 31-05-2022**, on which reliance has been placed by the counsel for the assessee:

“5. We have heard the learned Sr. D.R. at length. Since, the matter had been passed ex parte. Despite of the fact that assessee had sought adjournment for hearing of the above matter, but the learned CIT(A) did not consider the adjournment application. Since the order of the CIT(A) is an ex parte order and has lack of reasoning, did not pass order on merit and to our opinion, same is amount to miscarriage of justice. Therefore, in the interest of justice, we set aside this matter back to the file of the learned CIT(A) subject to the condition that assessee shall deposit a cost of Rs.1000/- with the department within 60 days from the receipt of this order. Thereafter, learned CIT(A) shall decide the matter as per law. 6. In the result, the appeal filed by the Assessee is allowed for statistical purposes.”

6. In the present case, we note that the Ld. CIT(Appeals) passed a non-speaking order and dismissed the appeal of the assessee summarily without discussing the merits of the case and the issues for consideration and the grounds of appeal raised by the assessee. However, we also note that adequate opportunity was not given to the assessee to present his case on merits (as many as 6 opportunities were provided by Ld. CIT(Appeals)). Therefore, in the interests of justice, we are restoring the file to Ld. CIT(Appeals) to decide the appeal afresh, after giving due opportunity of hearing to the assessee to present his case on merits. However, in the instant case we have also noted that despite several opportunities, the assessee neither caused appearance before Ld. CIT(Appeals) and for which assessee has not been able to produce any convincing reason. Therefore, respectfully following the decision of **Shri Vipul V. Dhakan in ITA number 180/Rjt/2018 dated 31-05-2022** cited by the assessee before us, and in the interests of justice we are setting this matter back to the file of the Ld. CIT(Appeals) subject to the condition that the assessee shall deposit cost of ₹ 1,000/- with the Department within 60 days from receipt of this order.

Accordingly, the case is being set aside to the file of the Ld. CIT(Appeals) with the above directions.

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

Order pronounced in the open court on 21-09-2022

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER
Ahmedabad : Dated 21/09/2022

Sd/-
(SIDHHARTHA NAUTIYAL)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order,

Assistant Registrar,
Income Tax Appellate Tribunal,
Rajkot