

**IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH MUMBAI**

**BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER &
MS. PADMAVATHY S, ACCOUNTANT MEMBER**

**ITA No.852/Mum/2023
(Assessment Year: 2010-11)**

Arif Noor Mohammed Basathia, Gala No.198, Ghaswala Compound, Oshiwara, Jogeshwari, Mumbai-400102.	बनाम/ Vs.	ITO-31(1)(2), Pratyakhakar Bhavan, BKC, Bandra East, Mumbai-400051.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AEVPB4123N		
(अपीलार्थी /Appellant)		(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / Appellant by :	Ms.Neelam Jadhav.AR
प्रत्यर्थी की ओर से/Respondent by :	Mr.Anil Gupta.DR

सुनवाई की तारीख / Date of Hearing	24/05/2023
घोषणा की तारीख /Date of Pronouncement	2505/2023

आदेश / ORDER

PER PAVAN KUMAR GADALE - JM:

The assessee has filed the appeal against the order of Commissioner of Income-tax (Appeals)-National Faceless Appeal Centre, Delhi ["Ld. CIT(A)"] passed under section 250 of the Income Tax Act, 1961 ("the Act") for the Assessment Year ("AY") 2010-11. The assessee has raised following grounds of appeal:-

1. *"On the facts and circumstance of the case, the National Faceless Appeal Centre erred in by passing an order as dismissed in limine, without appreciating that the appellant had physically/manually filed an appeal*

- before CIT(A)-42, Mumbai on 15/03/2016, within the prescribed period of limitation, i.e., 30 days from the date of receipt of Assessment Order. Hence, there is no question to dismiss the appeal on the ground of non-filing of condonation application for 1168 days delay along with appeal. Hence, the Order passed by the National Faceless Appeal Centre may be set aside, appeal be admitted as filed in time and directions may be given to decide on merits.*
2. *On the facts and circumstance of the case and in law, the CBDT instructions, vide Notification No. SO 637(E) [No. 11/2016 (F. No. 149/150/2015-TPL)], dated 1-3-2016, mandating e-filing of appeal to CIT(A) is not applicable to Orders passed prior to 1-3-2016 and Commissioner (Appeals) could not reject an appeal filed by appellant on a technical ground that same was not 'e-filed' within period of limitation prescribed under Circular no. 20/2016 based on judicial precedents. Hence, the Order passed as dismissed in limine by the National Faceless Appeal Centre may be set aside, appeal be admitted as filed in time and directions may be given to decide on merits.*
3. *On the facts and circumstances of the case, the learned CIT(A)-42, Mumbai vide Notices dt.09/4/2019 & 01/05/2019 asked appellant details to be submitted and attend hearing in person. However, due to the*

- faceless appeal scheme as well as directions by the CIT(A), the appellant e-filed Form 35 again on 28/05/2019 with same grounds. Hence, there is no delay in filing an appeal and the Order passed as dismissed in limine by the National Faceless Appeal Centre is erroneous and bad-in-law and thereby Order may be set aside, appeal be admitted as filed in time and directions may be given to decide on merits.*
4. *On the facts and circumstances of the case, the National Faceless Appeal Centre erred in dismissing the Order in limine, failing to appreciate that it had sought submissions and evidences in support of grounds of appeal e-filed vide its Notice dated 18 January 2021 and the appellant had duly e-filed submissions in December 2021, whereby the appellant presumed that the appeal was duly admitted and no further action was necessary. Hence, the Order passed by the National Faceless Appeal Centre may be set aside, appeal be admitted as filed in time and directions may be given to decide on merits.*
5. *Without prejudice to the above, the National Faceless Appeal Centre erred in not adjudicating the grounds of appeal raised by the appellant on merits in the interest of justice. Hence, the Order passed by the National Faceless Appeal Centre may be set aside and one more opportunity may be given to appellant.*

II. Additions surrounding purchases alleged to be unproven / bogus purchases: Rs.6.36,037 (GP Addition and Unexplained Cash Expenditure)

6. *On the facts and circumstances of the case and in law, the Assessing Officer has erred in making additions by adopting higher gross margin at 12.5% alleged to be embedded in the impugned purchases, failing to appreciate that the appellant had declared gross margin on sales at 19.92% (after considering the impugned purchases) in line with the gross margin maintained in past year(s).*
7. *On the facts and circumstances of the case and in law, the Assessing Officer has failed to apply the ratio laid down by Hon'ble Mumbai ITAT in M/s. Max Realities LLP v. DCIT, ITA No.7544/Mum/2019 (Mumbai) and Ahmedabad ITAT (upheld by Gujarat High Court) in Shri Simit P. Sheth v. ITO, ITA No. 3238 and 3293/Ahd/2009, which have held that the margin is to be computed with reference to sales-tax savings on such impugned purchases and incidental margin involved in such transactions.*

The appellant prays that the addition at gross margin of 12.5% is simply exorbitant, arbitrary, unreasonable, excessive and be considered at a reasonably lower percentage around 5% (sales-tax savings 4% and incidental margin 1%).

8. The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal.”

2. The brief facts of the case are that the assessee is engaged in the business and filed the return of income for A.Y.2010-11 on 05.102.2010, disclosing a total income of Rs.3,15,600/- and the return of income was processed u/s 143(1) of the Act. Subsequently, the Assessing Officer (“AO”) received information from Sales Tax Department, Mumbai and office of DCIT(Inv.), Mumbai that the assessee was engaged in obtaining the accommodation entries/ bogus purchase bills of Rs.26,38,295/- from the dealers and is a beneficiary. The AO has reason to believe that the income has escaped the assessment and issued notice u/s 148 of the Act. Subsequently, notice u/s 142(1) of the Act was issued calling for various information. In compliance, the Ld.AR of the assessee appeared from time to time and submitted the details. The AO on perusal of the financial statements observed that the assessee has debited purchases of Rs.52,07,489/- and sales of Rs.65,03,515/- in the Profit & Loss Account. The AO found that the assessee has obtained bogus purchases bills from Ghatalia Steels/Divine Enterprises of Rs.26,38,295/-.

3. The AO has called for detailed information on the purchase transactions and in order to test check the genuineness of the transaction, the AO has called for the production of the parties. The assessee has submitted the details of cash

payment, vouchers, cheque payments etc and subsequently the AO has issued a show cause notice. The assessee has filed a letter in reply to the show cause notice referred at Para 4.6 of the assessment order. Finally, the AO was not satisfied with the explanations and information provided by the assessee and has estimated income @ 12.5% on alleged bogus purchases of Rs.22,89,295/- which worked out to Rs.2,86,037/- and similarly the A.O made addition of Rs.3,50,000/- as unexplained expenditure and assessed the total income of Rs.9,51,640/- and passed the order u/s 143(3)r.w.s147 of the Act dated 13.01.2016.

4. Aggrieved by the order, the assessee has filed an appeal before the CIT(A). Whereas, the CIT(A) has considered the grounds of appeal, statement of facts and submissions and find that there is a delay of 1167 days in filing the appeal against the order U/sec143r.w.s147 of the Act dated 13.01.2016 and served on assessee on 15.02.2016. Whereas the assessee has filed the Form-35 electronically on 28.05.2019. The CIT(A) without going into the merits of the appeal has observed that the assessee has not explained the delay and dismissed the assessee appeal in *limine*. Aggrieved by the order of the CIT(A), the assessee has filed an appeal before the Hon'ble Tribunal.

5. At the time of hearing, the ld. AR of the assessee submitted that the CIT(A) has dismissed the assessee's appeal, because the assessee has not filed appeal as per the

procedure laid down under Rule 45 & 46 of Income Tax Rules, 1962. Whereas, the assessee has filed the appeal manually on 15.03.2016 and again during appellate proceedings the assessee has filed Form .no 35 electronically on 28-05-2019 as per CBDT circular no.20/2016. The amendment in filling the appeal is w.e.f 1-3-2016 and due to technical glitches and proceedings the appeal was filed electronically subsequently. The ld.AR prayed that the assessee be provided an opportunity to substantiate the delay and relied on the CBDT Circular and factual Paper Book and prayed for allowing the appeal. Contra, the Ld.DR supported the order of the CIT(A).

6. We have heard the rival submissions and perused the material available on record. The sole crux of the disputed issue that the assessee has filed the appeal in paper form on 15.03.2016. Further, we find that as per the amendment and procedure laid down under Rule 45 & 46 of the Income Tax Rules, 1962 w.e.f. 01.03.2016. The appeal in Form No. 35 has to be filed electronically, whereas the assessee has filed the appeal in electronic form on 28-05-2019 due to technical issues. We have considered the facts of technicalities in filing the appeal electronically and the amendment effective from 01.03.2016. We find the Honble Tribunal in the case of *Ashraf Aziz Kasmani vs ITO [2018] 92 taxmann.com 293 (Mumbai-Trib.)* on the identical issue has dealt on the facts and provisions of law and

granted the relief and observed at Para 4 to 12 of the order read as under:

4. *“Thereafter, the Id. Commissioner of Income Tax (Appeals) considered the admissibility of appeal filed in manual form on 30.6.2016. In this regard, he referred to be CBDT Notification No. SO 637(E) [No. 11/2016 dated 01.03.2016] and has referred as under:*

“In exercise of the powers conferred by sub-section (1) of section 249, read with section 295 of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby makes the following rules further to amend the Income-tax Rules, 1962, namely

1. (1) These rules may be called the Income-tax (3rd Amendment) Rules, 2016.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Income-tax Rules, 1962 (herein after referred to as the said rules), for rule 45, the following rule shall be substituted, namely:-

45. Form of appeal to Commissioner (Appeals).-

(1) An appeal to the Commissioner (Appeals) shall be made in Form No. 35.

(2) Form No. 35 shall be furnished in the following manner, namely:-

(a) in the case of a person who is required to furnish return of income electronically under sub-rule(3) of rule 12,-

(i) by furnishing the form electronically under digital signature, if the return of income is furnished under digital signature;

(ii) by furnishing the form electronically through electronic verification code in a case not covered under sub-clause (1); (b) in a case where the assessee has the option to furnish the return of income in paper form, by furnishing the form electronically in accordance with clause (a) of sub rule(2) or in paper form.

(3) The form of appeal referred to in sub-rule (1), shall be verified by the person who is authorized to verify the return of income under section 140 of the Act, as applicable to the assesses, (4) Any document accompanying Form No. 35 shall be furnished in the manner in which the said form is furnished. (5) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems), as the case may be, shall-

(1) specify the procedure for electronic filing of Form No. 35 and documents;

(i) specify the data structure, standards and manner of generation of electronic verification code, referred to in sub-

rule(2), for the purpose of verification of the person furnishing the said form, and

(iii) be responsible for formulating and implementing appropriate security, archival and retrieval of policies in relation to the said form so furnished."

5. Thereafter, be referred to the amendment to Rule 2(3) of the Income Tax Act, 1962 where the mode of filing of the return income in electronically form is specified. Thereafter, the ld. Commissioner of Income Tax (Appeals) referred to another CBDT Circular whereby the CBDT has subsequently extended the period of filing of appeal electronically till 15.06.2016, the said CBDT Circular No. 20 dated 26.5.2016 reads as under:

"Rule 45 of the Income Tax Rules, 1962 mandates compulsory e-filing of appeals before ld. Commissioner of Income Tax (Appeals) with effect from 01.03.2016 in respect of persons who are required to furnish return of income electronically. It has come to the notice of the Central Board of Direct Taxes (hereinafter referred 1 as the Board) that in some cases the taxpayers who were required to e-file Form 35, were unable to do so due to lack of knowledge about e-filing procedure and/or technical issues in e-filing. Also, the EVC functionality for verification of e-appeals was made operational from 12.05.2016 for individuals and from 19.05.2016 for other persons. Word limit for filing grounds of appeal and

mapping of jurisdiction of Commissioners of Income Tax (Appeals) were also a cause of grievance in some cases.

2. The matter has been examined by the Board. While the underlying issues relating to e-filing of appeals have since been addressed and resolved, in order to mitigate any inconvenience caused to the taxpayers on account of the new requirement of mandatory e-filing appeals, it has been decided to extend the time limit for filing of such e-appeals. E-appeals which were due to be filed by 15.05.2016 can be filed upto 15.06.2016. All e-appeal's filed within this extended period would be treated as appeals filed in time.

3. In view of the extended window for filing e-appeals, taxpayers who could not successfully e-file their appeal and had filed paper appeals and required to file an e-appeal in accordance with Rule 45 before the extended period i.e. 15.06.2016. Such e-appeals would also be treated as appeals filed within time."

6. From the above, the Id. Commissioner of Income Tax (Appeals) noted that the assessee was required to file this appeal only in electronic form latest by 15.06.2016. However, since the appeal was filed manually as a paper appeal, the Id. Commissioner of Income Tax (Appeals) held that since the same was not electronically filed, he treated the appeal is not maintainable.

7. *Against the above order, the assessee is in appeal before the ITAT.*

8. *I have heard the Id. Departmental Representative. None appeared on behalf of the assessee. The notice for hearing has also returned unserved. Hence, I proceeded to adjudicate the case by hearing the Id. Departmental Representative and perusing the records. From the grounds of appeal in this case, it transpires that the assessee has raised a ground that the CDBT Circular which mandated appeals before the Id. Commissioner of Income Tax (Appeals) to be filed electronically was dated 01.3.2016 and, hence, it is the plea of the assessee that the appeals against the assessment order passed on or before 01.03.2016 can be filed manually and all the appeals in respect of assessment order passed on or after 01.3.2016 to be filed electronically.*

9. *First of all I note that the Id. Commissioner of Income Tax (Appeals) has himself noted in the first paragraph of his order that the appeal is "well within time". Thereafter, the Id. Commissioner of Income Tax (Appeals) has opined that the assessee should have filed the appeal electronically by referring the CDBT Circular.*

10. *I find that there is no clarification in the said CDBT Circular, regarding the applicability of the same with regard to the date of assessment order passed. In the present case, admittedly the assessment order has been*

passed before 01.03.2016, so the claim of the assessee that the said Circular is applicable to assessment orders passed after 01.03.2016, cannot be brushed aside summarily. When this question was put to the ld. Departmental Representative, she replied that since the assessment order has been served to the assessee after 01.03.2016, the assessee's ground taken cannot be sustained.

11. Upon careful consideration, I find that in the above CBDT Circular, admittedly there is no discussion about the date of assessment order, with respect to which the said Circular is applicable. A construction that the said Circular is not applicable to assessment orders passed prior to 01.3.2016, cannot be said to be totally unsustainable. The Hon'ble Apex Court in the case of CIT v. Vegetable Products Ltd. [1973] 88 ITR 192 has expounded that if two constructions are possible, one in favour of the assessee should be applied. On the facts of the present case, and on the touch stone of the above said Hon'ble Apex Court decision, I am of the considered opinion that the assessee's plea that the appeal filed manually for assessment order passed prior to 01.03.2016, should be admitted by the ld. Commissioner of Income Tax (Appeals), is cogent. More so, when the ld. Commissioner of Income Tax (Appeals) in his earlier paragraph has accepted that the appeal is well within time. Accordingly I direct the ld.

Commissioner of Income Tax (Appeals) to admit the aforesaid appeal of the assessee and pass an order on the merits of the case. Needless to add, the assessee should be granted adequate opportunity of being heard.

12. In the result, the appeal by the assessee stands allowed for statistical purpose.”

7. We find the facts in the present case, are similar and identical as discussed in the above judicial decision and to meet the ends of justice, we set aside the order of the CIT(A) and restore the disputed issue to the file of the CIT(A) to adjudicate afresh on merits and the assessee should be provided adequate opportunity of hearing and shall cooperate in submitting the information and comply with appeal filling rules. Accordingly, we allow the grounds of appeal of the assessee for statistical purposes.

8. In the result, the appeal filed by the assessee is treated as allowed for statistical purposes.

Order pronounced in the open court on 25.05.2023.

Sd/-
(PADMAVATHY S)
ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 25/05/2023
Amit Kumar, Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त (अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुम्बई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

1.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Asst. Registrar)
आयकर अपीलीय अधिकरण, मुम्बई/ ITAT, Mumbai