आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 370 & 371/Ind/2022
(Assessment Years:2013-14 & 2014-15)

MH Brothers Bus-stand Sagar Road Raisen	Vs.	ITO Raisen
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AALFM5627J		
Assessee by	Shri N.D. Patwa & Divyanshu Porwal, ARs	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	17.07.2023	
Date of Pronouncement	18.07.2023	

O R D E R

Per Vijay Pal Rao, JM:

These two appeals by the assessee are directed against two separate orders dated 26.08.2022 & 30.07.2022 of Commissioner of Income Tax(Appeal), National Faceless Appeal Centre, Delhi for Assessment years 2013-14 & 2014-15 respectively.

2. For A.Y.2013-14 the assesse has raised following grounds of appeal:

"Ground1. That the Order u/s 250 dated 26/08/2022 made by CIT(A), NFAC, Delhi holding that the appeal filed by the appellant was delayed by 49 days and therefore dismissing the said appeal be held to be contrary to the facts when the appellant had physically filed the appeal on 15/04/2016 and upon notice from CIT(A)-2, Bhopal dated 31/05/2016 providing opportunity to file the said

appeal electronically before 15/06/2016 had e-filed the same on 06/06/2016. The dismissal of the appeal in limine be therefore held to be bad and unjustified and the order u/s 250 dated 26/08/2022 be quashed.

Ground2. That it be held that the submissions and paper-book submitted by the appellant in e-proceedings before the CIT(A) on 05/08/2022 should have been considered by him and the appeal should have been decided on the merits of the case.

Ground.3. That the addition of Rs.1,50,000/- for unsecured loan received from Qutbi Qardan Hasana Trust be held to be bad and unjustified when the confirmation and PAN from the said Trust had been placed on record. The addition made be therefore quashed and deleted.

Ground4. That the disallowance of Rs.39,155/- out of Depreciation on Car be held to be bad and unjustified and be deleted.

Ground.5. That the disallowance of Rs.31,095/- out of Tanker Repairs & Maintenance be held to be bad and unjustified and be deleted.

Ground.6. That the disallowance of Rs.27,510/- out of Repairs & Maintenance be held to be bad and unjustified and be deleted.

Ground.7 That the disallowance of Rs.45,750/- out of Travelling Expenses be held to be bad and unjustified and be deleted.

8. Ground.8. That the disallowance of Rs.5,808/- out of Insurance Charges be held to be bad and unjustified and be deleted.

9. Ground.9. That the disallowance of Rs.491/- being Interest on VAT 0 be held to be bad and unjustified and be deleted.

10. Ground10. That the disallowance of Rs.4,655/- out of Telephone Expenses be held to be bad and unjustified and be deleted.

Ground11. That the disallowance of Rs.49,108/- out of Conveyance Expenses and the disallowance of Rs.27,597/- out of Staff Welfare expenses be held to be bad and unjustified and be deleted."

3. The Ld. AR of the assesse has submitted that the Ld. CIT(A) has dismissed the appeal of the assessee *in limine* by treating the same as barred by limitation whereas the assesse filed the appeal physically well within the period of limitation and thereafter the notice dated 31st May 2016 was issued by the Ld. CIT(A) for filing the appeal in electronic form

up to 15th June 2016. The assesse duly filed the appeal electronically on 06.06.2016 and therefore, there is no delay in appeal filed by the assesse before the Ld. CIT(A). Thus, the Ld. AR has submitted that the impugned order of Ld. CIT(A) may be set aside and the matter may be remanded to the record of Ld. CIT(A) for deciding the appeal on merits.

4. On the other hand, ld. DR has fairly submitted that the matter may be remanded to the record of the Ld. CIT(A) for adjudication on merits.

5. We have considered rival submissions and carefully perused the relevant material on record. The ld. CIT(A) has noted the date of institution of appeal as 06.06.2016 and then treated the appeal filed by the assessee as barred by limitation and dismissed the same *in limine.* The relevant part of the CIT(A) are as under:

> *"3. On grounds of equity, notices were issued to the Appellant on 01.02.2021. 04.07.2022, 13.07.2022, 24.07.2022 and 04.08.2022 in which hearing was fixed on 16.02.2021, 11.07.2022, 20.07.2022, 03.08.2022 and 11.08.2022 respectively but the appellant has not filed any request or reason for condonation of delay.*
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> *4.According to Section 249(2) an appeal before the CIT(A) shall be presented within 30 days of the receipt of the order sought to be filed against is served on the assessee. The date of service of the order appealed against has been mentioned in Form No. 35 and the date of service is given as 18.03.2016. An appeal filed outside the time without any prayer for any condonation of delay is liable to be dismissed in limini as time barred without going into the merits of the case. Section 249(3) gives a discretion to the CIT(A) to admit a belated appeal if he is satisfied that the appellant had sufficient cause for not presenting the appeal within that period. It has been held in various judicial pronouncements that the mistake of not filing the appeal in time must be a bona fide and not merely a device to cover inaction on the part of the tax payer. [State of Kerala v. Krishna Kurup Mahava Kurup AIR 1971 (Ker.) 211.] Therefore, the delay must not be attributable for want of diligence or inaction. There is no automatic right of the appellant to a decision on merit in the case of an appeal presented out of time. The CIT(A) is not bound to compulsorily allow the appellant the opportunity of being heard before rejecting in limini a time barred appeal. It is incumbent to file a condonation application and explaining each day of delay in support of the evidence of the facts for which the delay is attributable. In a case where a conscious decision has been taken for not filing the appeal within the stipulated time, the delay, if any, in filing an appeal thereafter could not be*

> *condoned ITO VS. Hemraj Onkarji Mali [2007] 106 ITD 513 (Indore) (SMC). Non submission of an explanation for the delay in filing appeal is not a technical defect which cannot be ignored in view of the specific provision of Section 249(2)/249(3). In this case, there is no explanation for the delay nor is there any request for condonation of such delay. In view of the above facts, the appeal is dismissed in limini."*

6. Thus, it is clear that the Ld. CIT(A) has dismissed the appeal as barred by limitation and in absence of any application for condonation of delay. The ld. AR of the assessee has filed notice dated 31st May 2016 of Ld. CIT(A) whereby the assessee was asked to file the appeal electronically latest by 15.06.2016. Para 3 of the said notice reads as under:

> *"3. However, only a paper appeal had het filed by you as mentioned above which is not a valid appeal. You are hereby by an opportunity to file your appeal electronically before 15.6.2016."*

7. It is evident from the above notice that the Ld. CIT(A) has accepted this fact that the assessee initially filed a paper appeal which was not valid and therefore, asked the assessee to file the appeal electronically before 15.06.2016. The assessee consequently filed the appeal electronically on 06.06.2016 i.e. well before the time period allowed by the Ld. CIT(A) in the said notice dated 31st May 2016. Accordingly, in the facts and circumstances of the case we find that the appeal filed by assessee before the ld. CIT(A) was well within the period of limitation as originally the assessee filed the appeal within the period of limitation and thereafter the appeal was filed electronically on 06.06.2016 before the time period allowed by the Ld. CIT(A) up to 15.06.2016. Hence in the facts and circumstances of the case and in the interest of justice we set aside the impugned order of Ld. CIT(A) for A.Y.2013-14 and remand the matter to the record of the Ld. CIT(A) for adjudication of the appeal of the assessee on merits after giving an appropriate opportunity of hearing to the assessee.

8. For A.Y.2014-15 the assessee has raised following grounds of appeal:

"Ground-1. That the disallowance of Rs.3,416/- out of telephone expenses be held to be arbitrary, bad and unjustified and be deleted.

Ground-2. That the disallowance of Rs.34,936/- out of Generator expenses be held to be arbitrary, bad and unjustified and be deleted.

Ground-3. That the disallowance of Rs.22,336/- out of Staff welfare Expenses be held to be arbitrary, bad and unjustified and be deleted.

Ground-4. That the disallowance of Rs.38,097/-out of Repair & Maintenance Expenses be held to be arbitrary, bad and unjustified and be deleted.

Ground-5. That the disallowance of Rs.1,12,251/- out of Travelling. Conveyance and Sales-promotion Expenses be held to be arbitrary. bad and unjustified and be deleted.

Ground-6. That the disallowance of Rs.33,348/- out of Tanker 0 Expenses be held to be arbitrary, bad and unjustified and be deleted.

Ground-7. In the alternative and without prejudice to the grounds stated above the disallowances made by the learned A.O. be held to be high, exorbitant and unreasonable and be suitably reduced.

Ground-8. The appellant craves leave to add, amend or alter any Ground of Appeal before or during the course of appellate proceedings."

9. The ld. AR of the assessee has submitted that the Ld. CIT(A) has dismissed the appeal of the assessee *ex-parte in limine* for non-prosecution when the assessee did not file any reply/submission before the Ld. CIT(A). Ld. AR of the assessee has submitted that the reason for non-appearance before the ld. CIT(A) was due to non-availability of the assessee in the country as the assessee was out of country. Ld. AR has filed a copy of the Passport of the assessee to show that from May 2022 to 18th August 2022 the assessee was visiting to Iraq during the month of Ramjan and thereafter to London and therefore, the nonappearance before CIT(A) was due to reason that the assessee was outside the country. Thus, Ld. AR has submitted that the non-appearance before the ld. CIT(A) was neither deliberate nor wilful but due to the reason of assessee being out of India. Accordingly, he has pleaded that when the Ld. CIT(A) has not decided the appeal of the assessee on merits then the impugned order may be set

aside and the matter may be remanded to the record of the Ld. CIT(A) for adjudication on merits.

10. Ld. DR has raised no objection if matter is remanded to the record of the Ld. CIT(A) for adjudication on merits.

11. We have considered the rival submissions as well as relevant material on record. The Ld. CIT(A) has dismissed the appeal of the assessee *in limine* in para 4.2 to 5 as under:

> *"4.2. FINDINGS and DECISION*
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> *4.2.1 It is well settled that the law assists those who are vigilant, not those who sleep over their rights. This principle is embodied in the dictum 'vigilantibus non dormientibus jura subveniunt. From the above mentioned series of notices issued, it is evident that several notices have been issued to the appellant but there has been absolutely no response. Mere filing of Form 35 is not sufficient advocacy of the appeal. Considering the facts of the case and that assessee has made no representation it is hereby held that the appellant is not interested in prosecuting his appeal. Reliance in this regard is placed on Gujarat High Court Judgement in case of Fairdeal Filaments Ltd vs. C.I.T. 302 ITR 173 also.*
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> *4.2.2 Section 114(g) of Indian Evidence Act. 1872 lays a presumption that evidence which could be and is not produced, would, if produced, be unfavourable to the person who withholds it. In the appellate proceedings, burden of proof lies on the Assessee to prove that facts and findings of the AO are incorrect. If the assessee fails to disprove or rebut with cogent evidence such facts and findings, no interference is required. In this case, the assessee did not choose to avail several opportunities in appellate proceedings which entails conclusion that he had no evidence or say or explanation against the order of the AO, In case of tax evasion, sometimes compliance is more detrimental than con compliance because compliance can lead to more investigation or more points to be explained whereas non-compliance lead to mere penalty us.271(1)(b) and / or ex-parte decision on the basis of available material only. It also brightens chance against levy of concealment penalty. Ex-parte assessment/other order has its own inherent limitations as to its scope and extent. Hence, the assessee should not be allowed to be enriched or benefited unjustly for act of his own wrongs, i.e., non compliance or non attendance of hearing. The Hon'ble High Court of Delhi, delivered a decision in the case of CIT v. Gold Leaf Capital Corporation Ltd. on 02.09.2011 (ITA No.798 of 2009) that a negligent assessee should not be given many opportunities just because that quantum of amount involved is high. Necessary course of action is to draw adverse inference; otherwise it*

would amount to give premium to the assessee for his negligence. When the assessee is non cooperative, it can naturally be safely concluded that the assessee did not want to adduce evidence as it would expose falsity and non genuineness. In this regard, the decision of the Hon'ble High Court of Mumbai in the case of M/s. Chemipol v/s. Union of India [Central Excise Appeal No.62/2009 dated Dec.12th 2009] clearly, states that every court judicial body or authority, which has a duty to decide a list between two parties, inherently possesses the power to dismiss the case in default. For case of reference, relevant extract of the judicial pronouncement rendered by the Hon'ble High Court of Mumbai in the said case, quoting decision of Hon'ble Supreme Court in case of Nandramdas Dwarkadas, AIR 1958 MP 260, is reproduced bellow:

"Now the Act does not give any power of dismissal. But it is axiomatic that no court or tribunal is supposed to continue a proceeding before it when the party who has moved it has not appeared nor cared to remain present. The dismissal, therefore, is an inherent power which every tribunal possesses."

4.2.3 The above proposition has been upheld by the Hon'ble Supreme Court in case of Dr. P. Nalla Thampy Vs. Shankar (1984 (Supp) SCC 63). Further Hon'ble Supreme Court in case of New India Assurance vs. Srinivasan (2000) 3 SCC 242, has stated as under-

"That every court or judicial body or authority, which has a duty to decide a list between two parties, inherently possesses the power to dismiss a case in default. Where a case is called up for hearing and the party is not present, the court or the judicial or quasi-judicial body is under no obligation to keep the matter pending before it or to pursue the matter on behalf of the complainant who had instituted the proceedings. That is not the function of the court or, for that matter of a judicial or quasi judicial body. In the absence of the complainant, therefore, the court will be will within its jurisdiction to dismiss the complaint for non prosecution. So also, it would have the inherent power and jurisdiction to restore the complaint on good cause being shown for the non appearance of the complainant

4.2.4 The Hon'ble Bombay High Court has finally laid down proposition as under:

"An appellant who on account of his place or residence or business being far away from the place of sitting for the Tribunal may not except at a high cost be able to attend the hearing especially when as we know that the matters are adjourned for several times. In such an event, if the appellant files on record his submissions in writing, the Tribunal must decide the appeal on merits on the basis of the said submissions. In that case, the Tribunal would not have a power to dismiss the appeal for but where the appellant inspite of notice is persistently absent and the Tribunal on facts of the case is of the

view that the appellant is not interested in prosecuting the appeal, it can exercise its inherent power to dismiss the appeal for non-prosecution. Of course, the conclusion of the Tribunal that the appellant is not interested in prosecuting the appeal must be reached on the facts of each case and not merely on account of absence of an appellant on a solitary occasion."

4.2.5 The appeal cannot be decided on merits without active co-operation of the Appellant. The grounds raised are such that the relevant documents will have to be examined and analysed before coming to any conclusion on the basis of merit. Since the Appellant has not been complying with the notices sent, it leaves me with no option but to dismiss the appeal in limine. Thus in view of the aforesaid discussion and relevant judicial pronouncements, the appeal of the assessee is dismissed."

12. Thus, the Ld. CIT(A) has not decided the appeal of the assessee on merits but dismissed the same *in limine* for non-prosecution which is contrary to the provision of section 250(6) of the Act. The assessee has explained reason for non-appearance/response to the notice issued by CIT(A) due to out of country during the said period. Accordingly, in the facts and circumstances of the case and in the interest of justice we set aside the impugned order and Ld. CIT(A) and remand the matter to the record of the Ld. CIT(A) for adjudication of the appeal on merits after giving one more opportunity of hearing to the assessee.

13. In the result, appeals filed by the assessee for A.Y.2013-14 & 2014-15 are allowed for statistical purposes.

Order in pronounced in Open Court	**18/ 07/2023**

Sd/- **Sd/-**
(B.M. BIYANI) **(VIJAY PAL RAO)**
Accountant Member Judicial Member

Indore, 18 .07.2023

Patel/Sr. PS

Copies to: *(1)* *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore