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.122/Ind/2023
(Assessment Years:2017-18)

Shital Jain 171, Venktesh Nagar Indore	Vs.	ITO 4(4) Indore
(Appellant / Assessee)		(Revenue)
PAN: ABBPJ7412 M		

Assessee by	Ms. Shreya Jain AR
Revenue by	Ms. Simran Bhullar, CIT- DR
Date of Hearing	16.10.2023
Date of Pronouncement	26 .10.2023

O R D E R

Per Vijay Pal Rao, JM:

This appeal by the assessee is directed against the order dated 20.02.2023 of Commissioner of Income Tax(Appeal), National Faceless Appeal Centre, Delhi for A.Y.2017-18. The assessee has raised following grounds of appeal:

> *"1.That impugned order passed by the Ld. CIT(A) sustaining the order passed by the Ld. AO u/s 144 is bad in law, without Jurisdiction, it is based on Incorrect interpretation of law and without allowing proper and reasonable opportunity of being heard, moreover the facts have also been incorrectly construed.*

1.2 That on the facts and in the circumstances of case and in law, the Ld. CIT(A) erred in sustaining the order passed by the Ld. AO u/s 144 without appreciating the fact that the appellant could not make compliance before the Ld. A.O. due to the reason that creditor was not co-operating and providing confirmations alongwith bank statement and ITR for the reason that I am not able to repay the amount and interest within the time limit.

1.3 That on the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in confirming the order of Ld. AO without allowing a proper and reasonable opportunity being heard on each and every date of hearing I was requesting to the Ld. CIT(A) kindly allow me time to make compliance.

2.That on the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in sustaining the addition of Rs. 4,47,88,500/- made by the Ld. AO u/s 68 and charging the tax on the same at the rate prescribed u/s 115 BBE.

3. That on the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in not deciding on merits the following grounds of appeal raised before him:

2] That on the facts and in the circumstances of the case and in law the Ld A.O erred in passing order u/s 144 without issuing any show cause notice to the assessee.

3.1] That on the facts and in the circumstances of the case and in law the Ld A.O erred in making addition of Rs. 4,47,88,500/- u/s 68 by stating that same is total credit entries reflected in the bank account of the appellant without appreciating the fact that the total of credit entries as per the bank account is Rs. 1,66,75,003.83 including opening balance of Rs.1334.74.

3.2] That on the facts and in the circumstances of the case and in law the Ld A.O erred in stating the fact that show cause notice dated 24.12.2019 was issued to the appellant directing him to reply by 26.12.2019. In fact no such show cause notice was received by the assessee even otherwise the time allowed is very short and prior to this notice the Ld. A.O never asked to file explanation on credit entries. Moreover the assessee duly filed on line reply of notice u/s 142(1) dated 17.10.2019 on 21.10.2019 vide document reference ID No.100000032355441.

3.3] That on the facts and in the circumstances of the case and in law the Ld A.O erred in assessing entire receipt u/s 68 and thereby charging the tax at the rate prescribed u/s 115BBE of the I.T. Act.

4] That on the facts and in the circumstances of the case and in law the Ld A.O erred in charging interest u/s 234B at Rs.1,14,18,528/-."

2. The assesse is an individual and filed his return of income for the year under consideration on 03.08.2017 declaring total income of Rs.2,71,650/-. The case was selected for limited scrutiny through CASS for verification of cash withdrawals. Since the assessee did not appear in the assessment proceeding therefore, the AO passed order u/s 144 of the Act on 27.12.2019 determined the total income of the assessee at Rs.4,50,60,150/-. The AO made addition u/s 68 of Rs.4,47,88,500/- on account of unexplained cash credit. The assesse challenged the action of the AO before the CIT(A) but the appeal of the assesse was dismissed by the Ld. CIT(A) *ex-parte* as there was no response to the notice issued.

3. Before the Tribunal the Ld. AR of the assesse has submitted that the appeal of the assesse was dismissed by the Ld. CIT(A) for non-prosecution without giving any finding on merit. The AO has made the addition of the entire amount without giving show cause notice to the assesse. The CIT(A) has even not verified the assessment record before passing the impugned order. Thus, Ld. AR has submitted that the impugned order of the Ld. CIT(A) may be set aside and matter may be

remanded to the record of the CIT(A) for fresh adjudication on merits after giving opportunity of hearing to the assesse.

4. On the other hand, Ld. DR has submitted that the Ld. CIT(A) has given details of the notices issued to the assessee but there was no response on behalf of the assessee to any of the notices issued by the CIT(A). She has relied upon the order of the CIT(A).

5. We have considered the rival submissions as well as relevant material on record. The AO has made the addition while passing the ex-party assessment order u/s 144 therefore, the explanation of the assesse along with supporting documentary evidence was not before the AO. On appeal the Ld. CIT(A) though issued four notices to the assesse and stated in the impugned order that the assesse did not respond to any of the notices. Consequently the CIT(A) has dismissed the appeal of the assesse in apra 5.1 to 5.9 as under:

> *"5.1 During the course of appellate proceedings, as is discussed above, neither the appellant nor his AR has made any submission to support his claim. Keeping in view the facts of the case, it is apparent that, the appellant has nothing to offer any explanation in support of his grounds of appeal. The conduct of the appellant shows that, the appellant is approaching the appeal in a very casual manner and not showing any interest in pursuing the appeal. In this regard, reliance is placed on Gujarat High Court Judgment in case of Fairdeal Filaments Ltd vs. C.I.T. 302 ITR 173. Therefore, It is not required to give further opportunity to such recalcitrant assessee.*
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> *5.2 The 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 non-compliance because compliance can lead to more investigation or more points to be explained whereas non-compliance lead to mere penalty u/s*

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, 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 below:

"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."

5.3 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."

5.4 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 in 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."

5.5 The Hon'ble High Court of M.P. In the case of Estate of Tukojirao Holkar V. CWT 23 ITR 480) had held that-

"if the party, at whose instance the reference is made at, fails to appear at hearing the court is not bound to answer the reference."

5.6 Similarly their lordship, in case of CIT Vs. B. N. Bhattacharya (118 ITR 461) (Relevant pages 477 & 478) had held that –

"appeal does not mean merely filling of appeal but effectively pursuing it."

5.7 The Hon'ble ITAT Delhi (ITR No.2006/Del/2011 dt.19.12.2001) In the case of Whirlpool of India Ltd. v. DCIT had dismissed appeal for not attending hearing inferring that assessee is not interested in prosecuting of appeal. Thereafter in another decision in the case of Chadha Finlease Ltd. V. ACIT (ITA No.3013/Del/2011 date of order 20.12.2011) the Hon'ble ITAT had dismissed the appeal for non attending hearing inferring that the assessee is not interested in pursuing the appeal.

5.8 In view of the aforesaid discussion and relevant judicial pronouncements, the appeal filed by the appellant may be dismissed without going into merits of the case. Even otherwise, if the appeal was to be decided on the basis of merits, not much can be done without the co-operation of the prosecuting party and submission of relevant documents in support of the grounds of appeal.

5.9 In view of the aforesaid discussion and relevant judicial pronouncements, after carefully considering the facts of the case, it is clear that the appellant has not filed any written submission in support of grounds of appeal, despite getting Four (04) opportunities. Therefore, no interference is required in the order of the Ld. A.O. Hence, the appeal of the appellant is dismissed."

6. It is apparent from the impugned order that the Ld. CIT(A) has not decided the appeal of the assessee on merits but the same was dismissed for non-prosecution. Accordingly the impugned order of the Ld. CIT(A) is not in accordance with the provisions of section 250(6) of the Act. Hence, in the facts and circumstances of the case and in the interest of justice, we set aside the impugned order and the matter is remanded to the record of the CIT(A) for fresh adjudication on merits after giving one more opportunity of hearing to the assessee.

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

Order pronounced in the open court on 26.10.2023

Sd/- **Sd/-**

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

Indore, 26.10.2023

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