

IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "SMC", PUNE

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER  
AND  
SHRI VINAY BHAMORE, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.642/PUN/2024  
निर्धारण वर्ष / Assessment Year : 2017-18

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| Dilip Hiralal Chaudhari,<br>5, Near Korit Naka,<br>Jaychand Nagar,<br>Nandurbar- 425412.<br>PAN : AFHPC7974F | Vs. | ITO, Ward-Nandurbar. |
| Appellant  |     | Respondent           |

Assessee by : Shri Sanket Joshi  
Revenue by : Shri Manoj Tripathi

Date of hearing : 02.05.2024  
Date of pronouncement : 05.06.2024

**आदेश / ORDER**

**PER VINAY BHAMORE, JM:**

This appeal filed by the assessee is directed against the order dated 30.01.2024 passed by Ld CIT(A)/NFAC for the assessment year 2017-18.

2. The appellant raised the following grounds of appeal :-

- “1] *The learned CIT(A) erred in not admitting the appeal on the ground that the assessee had not satisfied the condition of payment of advance tax as specified u/s 249(4)(b) without appreciating that the said condition was not applicable to the facts of the present case and therefore, the appeal ought to have been adjudicated on merits.*
- 2] *The learned CIT(A) failed to appreciate that the assessee had already paid taxes on the total income of Rs.5,32,310 declared by the appellant in belated ITR dated 28.03.2019 filed in*

*response to notice u/s 142(1) and the (advance) tax liability on the balance income of Rs.1127698 assessed by the A.O. was disputed by the assessee in appeal and hence, the provisions of section of section 249(4)(b) cannot be interpreted in a manner to compel the appellant to pay advance tax on the entire disputed income before filing appeal merely because the appellant had not filed a valid ITR for A.Y.2017 - 18.*

- 3] *The learned CIT(A) erred in not appreciating that the provisions of section 249(4)(b) mandate that the (advance) tax liability on the undisputed income must be deposited prior to filing appeal and the interpretation as sought to be placed by CIT(A) would result into absurd results of making the appellant liable to deposit tax on entire disputed income in a case of a high pitched asst. and hence, the said provisions ought to be interpreted liberally to ensure that the right of appeal guaranteed by Legislature is not deprived to the citizens.*
- 4] *The learned CIT(A) ought to have appreciated that interpretation to section 249(4)(b) adopted by the CIT(A) was also contrary to the mandate of CBDT Instruction No. 1914 as modified by CBDT Office Memorandums dated 29.02.2016 and 31.07.2017 which stipulate recovery of 20% of disputed demand without providing any exception to cases of disputed demand where no valid ITR is filed by the assessee and hence, the interpretation sought to be placed by the ld. CIT(A) to section 249(4)(b) was not justified.*
- 5] *The assessee submits that on identical facts, the appeal filed in case of cousin of the appellant individual, Mr. Motilal D. Chaudhari was admitted and allowed on merits by the CIT(A), NFAC, Delhi vide order dated 29.11.2023 and hence, the action of the CIT(A), NFAC, Delhi in taking a different view on identical facts in case of the appellant was opposed to the settled principles of consistency and therefore, the CIT(A), NFAC, Delhi may please be directed to follow the same decision in case of the appellant individual after admitting the appeal on merits.*
- 6] *The appellant craves leave to add/ alter/ amend any of the grounds of appeal.”*

3. Briefly, the facts of the case are that the assessee is an individual doing business of permit room & beer bar but have not filed Income Tax Return for A.Y. 2017-18. On the basis of statement of financial transactions, the department came to know that the assessee had deposited a cash of Rs.16,77,900/- in his Bank

A/c No.SB/1143 maintained with Nasik Merchant Co-Operative Bank Ltd., Nandurbar branch during demonetization period. During the financial year relevant to the assessment year under consideration, the assessee had deposited total cash of Rs.92,33,100/-. The case was selected under 'Operation Clean Money' for verification of source of such cash deposits. Since, the assessee has not filed any return of income, a notice u/s 142(1) of the IT Act was issued on 08-03-2018 calling for the assessee to file the return of income. In response to the said notice u/s 142(1), assessee belatedly filed his return of income on 28-03-2019 declaring net income of Rs.6,82,013/- @ 8% on total sales of Rs.85,25,152/- u/s 44AD of the Act. Since, the return was filed beyond the prescribed time limit u/s 142(1), same was treated as invalid return. The AO estimated net profit @ 10% of total turnover of Rs.76,28,652/- (i.e. Rs.85,25,152/- minus Rs.8,96,500/- treated as unexplained money), which comes to Rs.7,62,865/-. Thus the assessment was made on a total income of Rs.16,60,008/-.

4. Being aggrieved with the above action of the AO, an appeal was preferred before LD CIT(A)/NFAC, who vide impugned order dated 30-01-2024 dismissed the appeal of the assessee *in limine* by observing as under :-

“3.1 I have examined facts of the case as also gone through relevant provisions of Income Tax Act (the Act). In the present case, the appellant failed to file return of income. The impugned order was passed u/s 144 of the Act, creating demand of Rs.12,36,079/- and the appellant was asked by notice u/s 156 of the Act to deposit the demand but it is noticed that the appellant has not deposited the demand before filing of this appeal. The appellant has at sl. No.16 of Form-35, stated to have made payment of appeal fee of Rs.1,000/- only. At sl. No. 9 of Form-35, the appellant has offered ‘No’ comments. This sl. No. 9 is reproduced below-

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| 9 | <i>Where no return has been filed by the appellant for the assessment year, whether an amount equal to the amount of advance tax as per section 249(4)(b) of the Income-tax Act, 1961 has been paid</i> | No |
|---|---|----|

3.2. As per provisions of section 249(4)(b) of the Act, where no return has been filed by the assessee, the assessee has to pay an amount equal to the amount of advance tax which was payable by him otherwise appeal shall not be admitted. The provisions of section 249 (4) of the Act are reproduced as under-

*Section 249(4)*

“No appeal under this Chapter shall be admitted unless at the time of filing of the appeal.-

(a) where a return has been filed by the assessee, the assessee has paid the tax due on the income returned by him; or

“(b) where no return has been filed by the assessee, the assessee has paid an amount equal to the amount of advance tax which was payable by him: Provided that, in a case falling under clause (b) and] on an application made by the appellant in this behalf, the Deputy Commissioner (Appeals)] or, as the case may be, the Commissioner (Appeals)] may, for any good and sufficient reason to be recorded in writing, exempt him from the operation of the provisions of that clause].

3.3 As per provisions of section 234B(1), read with provisions of section 208 of the Act, the liability to pay advance tax, in a case where returned income is less than the assessed income, is calculated on the basis of assessed income. The provisions of section 234B(1) and provisions of section 208 of the Act are reproduced below -

*Section 234B(1)*

“(1) Subject to the other provisions of this section, where, in any financial year, an assessee who is liable to pay advance tax under section 208 has failed to pay such tax or, where the advance tax paid by such assessee under the provisions of section 210 is less than ninety per cent of the assessed tax, the assessee shall be liable to pay simple interest at the rate of two per cent for every month or part of a month comprised in the period from the 1st day of April next following such

*financial year to the date of determination of total income under sub-section (1) of section 143 and where a regular assessment is made, to the date of such regular assessment, on an amount]] equal to the assessed tax or, as the case may be, on the amount by which the advance tax paid as aforesaid falls short of the assessed tax. Explanation 1-In this section, "assessed tax" means,-*

*(a) for the purposes of computing the interest payable under section 140A, the tax or total income as declared in the return referred to in that section;*

*(b) in any other case, the tax on the total income determined under sub-section (1) of section 143 or on regular assessment, as reduced by the amount of tax deducted or collected at source in accordance with the provisions of Chapter XVII on any income which is subject to such deduction or collection and which is taken into account in computing such total income.] Explanation 2.- Where in relation to an assessment year, an assessment is made for the first time under section 147, the assessment so made shall be regarded as a regular assessment for the purposes of this section. Explanation 3.- In Explanation 1 and in sub-section (3)" tax on the total income determined under sub-section (1) of section 143" shall not include the additional income-tax, if any, payable under section 143.]”*

#### *3.4 Section 208*

*“208. Conditions of liability to pay advance tax Advance tax shall be payable during a financial year in every case where the amount of such tax payable by the assessee during that year, as computed in accordance with the provisions of this Chapter, is one thousand five hundred rupees or more.*

*3.5 Though the appellant has not offered ‘YES’ comments at sl. No.9 of Form-35, it was asked vide DIN & letter no. ITBA/NFAC/F/APL\_1/2023-24/1059665415(1) dated 12.01.2024 to intimate whether it has made payment of tax -which includes element of advance tax also- in compliance to notice of demand u/s 156 of the Act and date compliance was fixed for 19.01.2024 but the appellant failed to contradict the information given at sl. no. 9 of Form-35 and to prove that it has made payment of amount equal to the advance tax which was due on its income.*

*4. Since the appellant has not filed return of income as well as not paid an amount equal to the amount of advance tax which was payable by it, present appeal is not liable be admitted. The appeal is infructuous and is, therefore, dismissed.*

*5. The appeal is dismissed.”*

5. Being aggrieved with the above order passed by LD CIT(A)/NFAC, the assessee is in appeal before this Tribunal.

6. LD AR of the assessee submitted before us that LD CIT(A)/NFAC without even going into merits of the case & without looking into grounds of appeal has dismissed the appeal of the assessee *in limine*, by wrongly interpreting section 249(4)(b) of the IT Act. It was further submitted that the assessee has not furnished return of income within time allowed as per section 139(1) of the IT Act but in response to notice u/s 142(1) of the IT Act, return of income was filed disclosing income of Rs.6,82,013/- & claiming refund of Rs.28,740/- after adjusting income tax of Rs.32,406/- from the total TCS of Rs.61,149/-. TCS was collected on liquor purchased by the assessee during the course of business of running permit room & beer Bar. It was further clarified by the counsel of the assessee that instead of advance tax whole of the admitted tax was paid in the shape of TCS. Therefore it was prayed that the condition mentioned in the section 249(4)(b) of the IT Act was fulfilled, which suggests that – where no return is filed the assessee has paid advance tax, *which was payable by him*. It was also submitted by counsel of the assessee that as per section 209(1)(d) the computation of advance tax payment was required to be made after considering TDS / TCS if any. In the instant case an amount of Rs.61,149/- was collected at source during the course of business while purchasing liquor for permit room & it was more than the

total income tax calculated by the assessee on his admitted income. The counsel of the assessee, along with other citations relied on decision of coordinate bench of this Tribunal passed in the case of Vishnusharan Chandravanshi vs. ITO in ITA No.73/RPR/2024 wherein it was held that as per section 208 & section 209(1) of the IT Act the Advance tax liability is to be calculated at the behest of the assessee. It was therefore prayed before the bench to set-a-side the order passed by LD CIT(A)/NFAC & direct LD CIT(A)/NFAC to admit the appeal for adjudication on merits.

7. Learned DR on the other hand emphasised that for the purposes of calculation of interest u/s 234B(1), liability to pay advance tax is calculated on the basis of assessed tax & therefore the assessee was also liable to pay advance tax on the basis of income tax assessed by the AO, but the assessee failed to pay such advance tax & therefore LD CIT(A)/NFAC was right in dismissing the appeal of the assessee.

8. We have heard learned counsels from both the sides & perused the material available on record. The solitary question which arises for our consideration is whether LD CIT(A)/NFAC was justified in dismissing the appeal of the assessee *in limine*, by treating that the assessee has not deposited the amount of advance tax in the light of section 249(4)(b) of the IT Act. We find that the

appellant assessee did not respond to the notice issued by LD CIT(A)/NFAC, wherein the assessee was asked to clarify that whether he has made payment of tax which includes the element of advance tax. But the appellant assessee failed to reply to the above notice & also did not file any application seeking exemption from payment of advance tax, which compelled LD CIT(A)/NFAC to dismiss the appeal *in limine*. But at the same time LD CIT(A)/NFAC also referred section 234B(1) for the purposes of calculation of interest on advance tax & hold that advance tax is to be calculated on the basis of assessed tax & the assessee has not paid advance tax on the basis of assessed tax. We find that, as per section 234B(1) of the IT Act for the purposes of calculation of interest on advance tax, advance tax is calculated on the basis of assessed tax, whereas in section 249(4)(b) the words- advance tax which was payable by him are used. If the intention of the legislature would have been same than in both the sections same wording could have been used. But we do not find so. It is the contention of the counsel of the assessee that clause (b) of section 249(4) contemplates that advance tax payable by him, means according to the assessee & not according to the assessed income. We are in agreement with the contention of the counsel of the assessee & hold that in the instant case the assessee was not

required to pay advance tax on the basis of assessed tax but was required to pay advance tax, if any, which was payable by him i.e. on the basis of his undisputed admitted income.

9. Now we find that the assessee has admitted the taxable income of Rs.5,32,310/- in belated income tax return, & due income tax of Rs.32,406/- was sought to be adjusted from TCS of Rs.61,149/-. Therefore instead of advance tax whole of the tax payable on undisputed admitted income of the assessee was already deposited in the shape of TCS of Rs.61,149/- & therefore there was no further advance tax liability remained to be paid. Therefore in our considered opinion LD CIT(A)/NFAC erred in dismissing the appeal of the assessee on the limited ground of non payment of advance tax, because whole of the income tax on the undisputed income declared in the belated income tax return of the assessee was already paid in the shape of TCS, hence there was no requirement as per section 249(4)(b) of the IT Act to pay any further tax in the shape of advance tax by the assessee. Hence without going into merits of the case we set-a-side the order passed by LD CIT(A)/NFAC & remand the matter back to the file of LD CIT(A)/NFAC with direction to admit the appeal for adjudication on merits of the case after providing the assessee a reasonable opportunity of hearing. LD CIT(A)/NFAC shall pass the order as

per facts & law & on grounds of appeal after providing reasonable opportunity of being heard to the assessee. The assessee is also hereby directed to respond to the notice issued by the ld. CIT(A)/NFAC and submit the requisite details on the appointed date without seeking any adjournment under any pretext, failing which ld. CIT(A)/NFAC is at liberty to pass appropriate order as per law. We hold & direct accordingly.

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

Order pronounced in the open Court on 05<sup>th</sup> day of June, 2024.

**Sd/-**  
**(INTURI RAMA RAO)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(VINAY BHAMORE)**  
**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 05<sup>th</sup> June, 2024.

*Sujeet*

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Pr. CIT concerned.
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "SMC" बेंच, पुणे / DR, ITAT, "SMC" Bench, Pune.
5. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.