

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.120/Ind/2024
(Assessment Year: 2013-14)

Deepak Khandelwal J.P. Market, Narsullaganj Sehore (Appellant / Assessee)	Vs.	ITO Sehore (Respondent/ Revenue)
PAN: AGXPK7517R		
Assessee by	Shri N.D. Patwa, AR	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	04.07.2024	
Date of Pronouncement	05.07.2024	

ORDER

Per Vijay Pal Rao, JM :

This appeal by assessee is directed against the order dated 27.12.2023 of the Commissioner of Income Tax (Appeal), National Faceless Appeal Centre, Delhi for A.Y.2013-14. The assessee has raised following grounds of appeal:

- “1. The Ld. AO was not justified in passing the order, which is bad-in-law, void ab initio, barred by limitation, illegal, contrary to the facts and circumstances of the case, liable to be annulled.*
- 2. The Ld. CIT(A) was not justified in confirming the order, which is bad-in-law, void ab initio, barred by limitation, illegal,*

contrary to the facts and circumstances of the case, liable to be annulled.

3. The Id CIT(A) was not justified in ex-parte dismissing the appeal of the appellant, without deciding the appeal on merits, and that a fair and meaningful opportunity was not available to the appellant to present his case.

4. The Id CIT(A) was not justified in not deciding the grounds of appeal before him.

5. Without prejudice, the Id CIT(A) ought to have decided the various grounds of appeal.

6. The Id. CIT(A) was not justified in confirming the addition of Rs. 6,00,000/- towards the unexplained investment in MCX trading.

7 The Id. CIT(A) was not justified in confirming the addition of Rs. 3,00,000/- as estimated income which was adhoc.”

2. Ld. AR of the assessee has submitted that the CIT(A) has dismissed the appeal of the assessee in limine as not admissible for want of payment of advance tax as per provisions of section 249(4)(b) of the Act. The assessee did not file any return of income u/s 139 of the Act as the income of the assessee was below the taxable limit. The AO has re-opened the assessment on the basis of CIB information of transaction made in Multi Commodity Exchange (MCX). The AO has estimated the minimum unexplained investment at Rs.6 lac and further estimated the income at Rs.3 lac resulting total income assessed at Rs.9 lac. Thus, the Ld. AR has submitted that when the assessee has not filed any return of income due to non-taxable income during the year under

consideration then the question of payment of advance tax does not arise.

3. On the other hand, Ld. DR has relied upon the orders of the authorities below.

4. We have considered the rival submissions as well as relevant material on record. The AO has stated the reasons for reopening of the assessment as CIB information received regarding the transactions of Multi Commodity Exchange (MCX). Further the AO noted that the assessee has not filed any return of income for the year under consideration. Even in response to notice u/s 148 the assessee did not file any return of income. The AO accordingly proceeded to frame the assessment as best judgment assessment u/s 144 of the Act. The AO has estimated the income of the assessee as under:

“Under the facts and in circumstances of the case discussed above, the minimum unexplained investment in the MCX is estimated at Rs.6 lac. Further, the income for the A.Y.2013-14 is also estimated at Rs.3 lac.”

5. On the appeal the CIT(A) has dismissed the appeal of the assessee in para 3 as under:

“3. Decision:

As per the provisions of the section 249(4)(b) of the Act, the appeal shall not be admitted, unless the appellant has paid an amount equal to the amount of advance tax which was payable by him if no return of income has been filed.

In the present case, the appellant did not file return of income. On or before filing the present appeal, the appellant has failed to make the mandatory payment of the amount equal to the amount of advance tax which was payable by him. Further, the appellant neither provided any clarification/explanation in response to the deficiency letter issued by this office nor did he offer any good and sufficient reasons seeking exemption from the operation of the sec. 294(4)(b) even though sufficient opportunities were provided to him.

On careful consideration of the above facts and circumstances, as the appellant has failed to fulfill the mandatory and essential conditions for admission of appeal before CIT(A) as per sec. 249(4)(b), the present appeal is liable to be held as not eligible for admission.

In the result, the appeal is treated as dismissed for statistical purposes.”

6. Thus, the appeal was dismissed as not admissible for want of payment of advance tax as per section 249(4)(b) of the Act. Undisputedly, the assessee has not filed any return of income and therefore, there is no question of any self-assessment tax or advance tax payable by the assessee. Further the AO has estimated the income of the assessee at Rs.3 lac and addition of Rs.6 lac has been made as unexplained investment. Therefore, it is only a case of estimation of income and not a case of undisclosed income or income assessable to tax as escaped assessment revealed by some material. Carrying out the transactions in Multi Commodity Exchange (MCX) does not ipso facto lead to the conclusion that the assessee has earned income as it may be a case of loss or no income. This tribunal has taken a consistent view on this point that the income assessed by the AO in the reassessment proceedings does

not attract provisions of section 249(4)(b) of the Act. In the latest decision this Tribunal in case of Ramdas Yadav vs. ITO in ITANo.163/Ind/2024 vide order dated 27.06.2024 held in para 4.1 as under:

“4.1 Thus, the appeal was dismissed in limine as not admissible for want of payment of advance tax u/s 249(4) of the Act. At the outset, we note that an identical issue has been considered by this Tribunal in case of Shri Pushpendra Singh Chouhan vs. ITO in ITANo.122/Ind/2024 vide order dated 24.06.2024 in para 7 & 8 as under:

*“7. We have considered the rival submissions as well as relevant material on record. The Assessing Officer initiated proceedings u/s 147 on the basis of the AR information regarding the cash deposit of Rs.36,03,600/- in the savings bank account of the assessee. Since there was no response on behalf of the assessee to the notices issued by the Assessing Officer, therefore, the assessment was framed ex-parte as best judgment assessment thereby the Assessing Officer has assessed total income of the assessee at Rs.36,03,600/-. The assessee has explained the reasons for non appearance before the Assessing Officer as the assessee belongs to a rural area and having no computer or internet facility in the village and therefore, the assessee was not having access to the notice issued by the Assessing Officer and consequently could not furnish any reply or submissions as well as evidence during the assessment proceedings. Further the CIT(A) has dismissed the appeal of the assessee in limine for want of payment of tax as per the provisions of Section 249(4)(b) of the Act. This is a case of reassessment framed by Assessing Officer u/s 147 r.w.s. 144 of the ACT and therefore, there is no obligation of payment of advance tax as per Clause(b) of Section 249(4) as held by the **Mumbai Benches of the Tribunal in case of M/s. Nine***

Globe Industries Pvt. Ltd Vs. ACIT (supra) in para 4 to 6 as under:

“4. In that view of the matter, the appeal came to be dismissed on the ground that the appellant has not filed Rol as well as not paid an amount equal to the amount of advance tax, which was payable by it. It can thus be seen that the CIT(A) had no occasion to examine the merits of the impugned additions.

5. We have heard parties. Perused record. It can be seen that the case was Initially selected for scrutiny, which was completed on 29.03.2015, and there was no change in the returned income of Rs.51.80.800/- in the absence of any additions being made. It is a matter of record that originally the return was filed for the relevant year under consideration on 29.09.2012. It was not disputed during the course of hearing that the advance tax has per the assessed income of Rs. 51,80,800/- has been paid. Here is the case of reassessment which is done for the benefit of Revenue. Hence, in our view, clause (b) of Section 249(4) of the Act will not apply as there is no question of paying advance tax in reassessment proceedings, even though assessee did not file Rol.

6. In the said circumstances, we find that the impugned order dismissing the appeal on the ground of non-compliance of Section 249(4) of the Act cannot be sustained and deserves to be set-aside”.

In the case in hand the assessee has filed return of income and thereafter, the Assessing Officer has initiated reassessment proceedings and passed reassessment order. Therefore, for filing the appeal before CIT(A) the question of payment of advance tax by the assessee as per clause(b) of Sub Section 4 of Section 249 does not arise. Similarly the Raipur Bench of the Tribunal in case of **Vishnusharan Chandravanshi Vs. ITO in ITA No.73/RPR/2024 order dated 10.04.2024** has also considered the identical issue in para No.10 to 15 as under:

10. Admittedly, it is a matter of fact borne from record that the assessee had neither filed his return of income u/s 139 of the Act nor in compliance to notice issued to him u/s. 142(1) of the Act, dated 10.03.2018. As the assessee had failed to file his return of income, the CIT(Appeals) had brought his case within the meaning of Clause (b) of sub-section (4) of Section 249 of the Act. For the sake of clarity, Section 249(4) of the Act is culled out as under:

"(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 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."

The CIT(Appeals) observed that as the assessee who had not filed his return of income had neither paid an amount equal to the amount of advance tax which was payable by him; nor filed any application seeking exemption from operation of the aforesaid statutory provision for any good and sufficient reason, therefore, he had failed to comply with the statutory requirements contemplated u/s 249(4)(b) of the Act. Accordingly, the CIT(Appeals) dismissed the appeal on the said count itself.

11. Controversy involved in the present appeal lies in a narrow compass, i.e. sustainability of the view taken by the CIT(Appeals) that the appeal of the assessee who had not filed his return of income for the subject year was not maintainable for the reason that he had failed to satisfy the conditions contemplated in Section 249(4) of the Act.

12. Admittedly, as per section 249(4)(b) of the Act, in a case where no return of income has been filed by the assessee, then his appeal shall be maintainable before the CIT(Appeals) only if he had paid an amount equal to the amount of advance tax which was payable by him. At the same time, the legislature had carved out an exception to the applicability of the aforesaid statutory requirement by way of a "proviso" to Section 249(4) of the Act, as per which, on an application made by the appellant, the CIT(Appeals) may, for any good and sufficient reason to be recorded in writing exempt him from the operation of the aforesaid statutory provision.

13. At this stage, I may herein observe that the statutory requirement contemplated in Clause (b) of sub-section (4) of Section 249 of the Act would stand triggered only where any obligation was cast upon the assessee to pay "advance tax". As stated by the Ld. AR, and rightly so, in absence of any taxable income for the year under consideration [as was stated by him in the "SOF" filed before the CIT(Appeals)] no obligation was cast upon him to compute and pay any advance tax u/ss. 208 & 209 of the Act. Considering the fact that as no obligation was cast upon the

assessee to compute/deposit any amount towards "advance tax" for the subject year, I am unable to concur with the view taken by the CIT(Appeals) who dismissed the appeal as not maintainable for the reason of non-compliance off mandatory condition contemplated in Clause (b) of sub-section (4) of Section 240 the Act. Although, at the first blush, I was of the view that the amount assessee the A.O vide his order u/s. 144 of the Act dated 23.11.2019 of Rs. 10 lacs would saddle the assessee with an obligation to pay "advance tax", but stood corrected a careful perusal of Section 208 and Section 209(1)(a) of the Act, which contemplates determination of the said tax liability at the behest of the assessee.

14. As in the present case, the assessee had not only before me but had in the "Statement of facts" stated before the CIT(Appeals) that he had no tax income, therefore, in my view in absence of any obligation cast upon the ass to compute/pay "advance tax" u/ss. 208 and 209 of the Act for the subject year first appellate authority could not have held that he had failed to comply with statutory conditions contemplated in Sec. 249(4)(b) of the Act. My aforesaid we fortified by the orders of the ITAT, Bengaluru in the case of Shamama Reddy Vs. ITO, ITA No.1120/Bang/2023 dated 20.02.2024 and that of ITAT, Deih in the of Vikram Singh Vs. ITO, ITA No.6559/Del/2019, dated 21.02.2023

15. I, thus, in terms of my aforesaid observations, set aside the order of the CIT(Appeals) and restore the same to his file with a direction to dispose appeal after considering the merits of the case. Needless to say, the CIT(Appeals) shall in the course of the set-aside proceedings afford a reasonable opportunity of being heard to the assessee."

8. Accordingly, to maintain the rule of consistency we follow the earlier decisions of the Tribunal cited above and consequently the impugned order of CIT(A) is set aside being contrary to the provisions of law.

7. Thus, this Tribunal has taken a consistent view and held that for filing the appeal before the CIT(A) against the reassessment order passed by the AO the question for payment of advance tax by the assessee as per clause (b) of sub-section (4) of section 249 of the Act does not arise. Accordingly this issue is now covered by the earlier decisions of this tribunal and consequently the impugned order of the CIT(A) is set aside being contrary to the provisions of law. Since the assessment order was also passed ex-parte due to

non-appearance of the assessee therefore, in the facts and circumstances of the case when the CIT(A) has not adjudicated appeal of the assessee on merits the matter is remanded to the record of the jurisdictional AO for fresh adjudication after considering relevant details/evidences as well as explanation to be filed by the assessee. Needless to say the assessee be given an appropriate opportunity of hearing before passing fresh order

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

Order pronounced in the open court on 05.07.2024.

Sd/-
(B.M. BIYANI)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

Indore, 05.07.2024

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