

THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "SMC" BENCH

Before: Shri Ramit Kochar, Accountant Member

**ITA Nos. 85 & 87 /Ahd/2024
Assessment Year 2013-14**

Niraj Pratapbhai Shah, E/304, Arjun Grace, Nr. Shastrinagar, Naranpura, Ahmedabad-380013 Gujarat PAN: BCGPS2730G (Appellant)	v.	The Income Tax Officer, Ward-3(3)(2), Pratyakashar Bhawan, Behind Stock Exchange Near Panjara Pole X Road, Ambawadi Ahmedabad- 380014, Gujarat (Respondent)
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Assessee by: Shri Kushal Fofaria, A.R.
Revenue by: Smt. Trupti Patel, Sr. D.R.

Date of hearing : 01-07-2024
Date of pronouncement : 01-07-2024(Order
signed on 9.7.2024)

आदेश/ORDER

These two appeals bearing ITA No. 85 & 87/Ahd/2024 both for assessment year 2013-14 are filed by the assessee before Income Tax Appellate Tribunal, Ahmedabad Bench,

Ahmedabad, firstly appeal in ITA No. 85/Ahd/2024 has arisen from the appellate order dated 16th October, 2023 in DIN & Order No. ITBA/NFAC/S/250/2023-24/1057102346(1) passed by Id. Commissioner of Income Tax (Appeals), NFAC, Delhi u/s 250 of the Income-tax Act, 1961, which appeal before Id. CIT(A) has in turn arisen from the assessment order passed by the Assessing Officer u/s. 147 r.w.s. 144B r.w.s. 144 of the Income Tax Act, 1961 vide ITBA/AST/S/147/2021-22/1035873474(1), dated 24-09-2021, and the second appeal filed by the assessee in ITA No. 87/Ahd/2024 has arisen from the appellate order dated 27.10.2023 passed by Id. CIT(A), NFAC in DIN & Order No. ITBA/NFAC/S/250/2023-24/1057462179(1), which appeal before Id. CIT(A) in turn has arisen from the penalty levied by the Assessing Officer u/s. 271(1)(c) of the Act, to the tune of Rs. 10,043/-, vide penalty order dated 07.01.2022 in DIN ITBA/PNL/F/271(1)(c)/2021-22/1038512707(1).

2. First, I will take the appeal of the assessee in ITA No. 85/Ahd/2024 for assessment year 2013-14. The grounds of appeal raised by the assessee in Memo of Appeal filed with Income Tax Appellate Tribunal, Ahmedabad Bench, Ahmedabad in ITA No. 85/Ahd/2024, reads as under:-

- “1. The learned CIT(A) has erred in law and on facts of the case in deciding the appeal ex-parte which is gross violation of principles of natural justice.
2. The learned CIT(A) has erred in law and on facts of the case in confirming action of learned AO of reopening the assessment u/s. 147 of the Act. Under the facts and circumstances of the case, the action of reopening is without jurisdiction and is not permissible either in law or on facts.
3. The learned CIT(A) has erred in law and on facts of the case in confirming the action of the learned AO in treating long term capital gain of Rs. 2,77,500/- on sale of shares as unexplained cash credit u/s. 68 of the Act.
4. The learned AO has erred in law and on facts of the case in making addition without providing the appellant with the material relied upon and opportunity of cross-examination resulting in gross violation of principles of natural justice.
5. The learned AO has erred in law and on facts of the case in not allowing TDS credit of Rs. 42,830/- while calculating demand of Rs. 2,32,474/-.
6. The learned CIT(A) has erred in law and on facts of the case in confirming action of the learned AO in levying interest u/s. 234A/B/C/D of the Act.
7. The Ld. CIT(A) has erred in law and on facts of the case in confirming action of the learned AO in levying penalty u/s. 271(1)(c) of the Act.
8. Both the lower authorities have passed the orders without properly appreciating the facts and law on the issue. The action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.

9. *The Appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.*”

3. The brief facts of the case are that the assessee is an individual , and has filed return of income declaring total income of Rs. 3,59,188/- u/s 139. The return of income was processed by Revenue u/s. 143(1) of the Act. Subsequently, information was received by AO from DDIT (Investigation) Unit-1(3), Ahmedabad that search u/s. 132 has taken place on 11-09-2018 in the case of Sanjay Shah and Jignesh Shah of Ahmedabad. There was seizure of unaccounted cash of Rs. 19.37 crores(alleged by Revenue to be related to accommodation entries and commission earned thereon) along with incriminating digital as well documentary evidences. The evidences gathered during search revealed that there are clandestine record of unaccounted cash, synchronized trading, providing bogus LTCG in various BSE listed scrips and transport of such cash through angadiyas was found to have been maintained . Thus, as per Revenue, there was a record of accommodation entries of long term capital gain against receipt of cash. Thus, as per Revenue , there were synchronized clandestine activities carried out by Shri Sanjay Shah and Jignesh Shah by way of manipulations in stock market, accommodation entries in shares etc. which are elaborately discussed by the AO in the assessment order. The said Shri Jignesh Shah and Shri Umang Shah (accountant of

Shri Sanjay Shah) admitted that the scrips has been used for providing accommodation entries by way of bogus long term capital gain against cash from beneficiaries. Various incriminating materials were found during the search and seized by the Department , and one of the scrip wherein the manipulations were allegedly made is the scrip of Safal Herbs Ltd. , which has been used by Shri Sanjay Shah and Shri Jignesh Shah for generating bogus long term capital gain and contrives losses. On analysis of the information, it was found that the assessee is also one of the beneficiaries who carried out the transaction in the share scrip of Safal Herbs Ltd and which was a penny stock. The department invoked provisions of Section 147 of the Act, and notice u/s. 148 of the Act was issued to the assessee, which as per the AO was duly served on the assessee. The assessee did not file return of income in response to the notice u/s. 148 nor complied with the said notice. Statutory notices were issued by the AO to the assessee u/s. 142(1) of the Act on 23-02-2021, 12-08-2021 and 19-08-2021 which were claimed by the AO to have been duly served on the assessee, but the same also remained un-complied with by the assessee. SCN along with draft assessment order was also sent by the AO to the assessee on 06.09.2021. Since the assessee remained non compliant, the case was referred to verification unit for verification of assessee details , physical service of notice on 19.08.2021,

07.09.2021 and 15.09.2021. The verification unit vide speed post issued notice at registered address of the assessee, which also remained non compliant with by the assessee. Since the matter was getting time barred, and the assessee has not complied with the notices issued by the Assessing Officer, the Assessing Officer issued notice u/s 144B(1)(xi) dated 24.08.2021 to the assessee proposing to finalize the assessment proceedings u/s 147 r.w.s. 144 and 144B of the 1961 Act. The assessee again did not comply with the said notice. The AO proceeded to frame best judgment under the provisions of section 147 r.w.s 144 r.w.s 144B of the Act , and a detailed assessment order was passed elaborating as to how the penny stock of Safal Herbs Limited was used and manipulated to generate bogus long term capital gain , and the assessee being beneficiary of such tax evasion wherein the assessee has carried out transaction of Rs. 2,77,500/- in the scrip of Safal Herbs Limited . The additions of Rs. 2,77,500/- was made by the AO to the income of the assessee as unexplained cash credit u/s. 68 of the Act. Alternatively , the AO observed that since the assessee has not furnished any details during assessment proceedings, therefore it cannot be ascertained whether or not the assessee has recorded this transaction in his books of accounts or not. In case the assessee does not maintain books of account, then as per AO, the said amount shall be taxed u/s 69A of the 1961 Act.

4. Aggrieved , the assessee filed first appeal before the ld. CIT(A) , and the ld. CIT(A) issued as many as three notices to the assessee for compliance by assessee on 06-09-2023, 19-09-2023 and 29-09-2023 but there was no compliance on the part of the assessee. The ld. CIT(A) has stated that these notices were duly served to the assessee on all the available email id's of the assessee, but despite that the assessee did not comply with the notices of hearing issued by the CIT(A), and the assessee has not even sought adjournment. The CIT(A) dismissed the appeal of the assessee on the ground that assessee has not filed any response to the notices issued by ld. CIT(A) , and further no material produced by the assessee before the ld. CIT(A) to controvert the findings of the Assessing Officer on merit. The ld. CIT(A), thus, affirmed the assessment order passed by the AO, and dismissed the appeal filed by the assessee for non prosecution.

5. Still Aggrieved , the assessee filed this appeal before the Tribunal. It is observed that this appeal is filed belatedly by 34 days beyond the time prescribed u/s 253(3) , and the assessee has filed affidavit dated 28.05.2024 explaining that the appellate order of the CIT(A) was served on 16th October, 2023 but the part time accountant employed by the assessee inadvertently forgot to pass on the appellate order of the CIT(A)

to the assessee, and when the tax consultant enquired about the status of the same, it came to be known that the order has already been passed and immediately, thereafter, the assessee proceeded to file the appeal with the Tribunal. The assessee has prayed in the affidavit to condone the delay of 34 days in filing this appeal belatedly with the ITAT beyond the time prescribed u/s 253(3) of the 1961 Act. The ld. Departmental Representative objected to delay in filing this appeal belatedly but left the matter to the Bench to be decided. I have gone through the affidavit and I observed that the assessee filed this appeal belatedly by 34 days beyond the time prescribed u/s 253(3), and the assessee has prayed for condonation of delay by filing an affidavit dated 28.05.2024. The said affidavit is placed on record in file. The assessee has claimed that the order of the CIT(A) was received by the part time accountant who failed to inform the assessee which led to delay in filing the appeal in time and it is only when the income tax consultant inquired about the status of the CIT(A) order, it came to be known that the order has already been received, and then the assessee immediately proceeded to file the appeal with Tribunal. I do not find any malafide on the part of the assessee in filing this appeal belatedly with the Tribunal, as the assessee is not likely to gain anything by filing this appeal belatedly. In my considered view, the assessee has shown reasonable and sufficient cause for filing

this appeal belatedly. When technicalities are pitted against the substantial justice, the Courts will lean towards advancement of substantial justice rather than technicalities, unless the malafide on the part of the assessee is at writ large. Under the facts and circumstances, I do not find any malafide on the part of the assessee in filing this appeal belatedly, and in the interest of justice, I condone the delay of 34 days and proceed to adjudicate this appeal on merits in accordance with law. Reference is drawn to the decision of Hon'ble Supreme Court in the case of **Collector of Land Acquisition, Anantnag v. Mst. Katiji (1987 AIR 1353(SC))**.

5.2 The Ld. counsel for the assessee submitted that an ex-parte order was passed by Assessing Officer u/s. 147 of the Act r.w.s. 144 and 144B. The ld. counsel for the assessee submitted that the notices issued during assessment proceedings were not received by the assessee. It was submitted that ld. CIT(A) has dismissed the appeal of the assessee for non-prosecution by simply upholding the assessment order passed by the Assessing Officer. It is submitted that ld. CIT(A) has not decided the issues arising in the appeal on merit , and rather dismissed the appeal of the assessee ex-parte in-limine without deciding the issues on merit as is required u/s. 250(6). The ld. counsel for the assessee submitted that the matter can be set aside and

restored back to the file of Id. CIT(A) for fresh adjudication. The Id. Departmental Representative relied upon orders of the authorities below, but fairly submitted that the matter can go back to the file of Id. CIT(A) for fresh adjudication.

6. I have considered the contention of both the parties and perused the material on record. I have observed that the CIT(A) has issued three notices to the assessee but the assessee did not comply with the said notices. I further find that the CIT(A) has passed order ex-parte in-limine without deciding the issues arising in the appeal on merits. The order passed by the CIT(A) is non-speaking and non-reasoned cryptic order in which Id. CIT(A) has simply upheld the order of the Assessing Officer on the ground that the assessee has not submitted the documents/evidences to support its case, and further that the assessee is not interested in prosecuting the appeal. I have observed that there is a clear violation of provisions of section 250(6) of the Act on the part of the Id. CIT(A) as the CIT(A) is obligated to pass appellate order by stating points for determination, his decision and reasoning thereof which has not been done by Id. CIT(A). I have observed that Id. CIT(A) issued first notice to the assessee requiring compliance on 06.09.2023 (there were two more notices also issued requiring compliance on 19.09.2023 and 29.09.2023), and the appellate order was passed by Id. CIT(A) on

16.10.2023 i.e. within the short span of one and half month(approx.) after issuing first notice, and that too without adjudicating the issues arising in the appeal before Id. CIT(A) on merits as is required u/s 250(6). Thus, there is clearly breach of principles of natural justice by Id. CIT(A) as proper and adequate opportunity of heard was not granted by Id. CIT(A) to the assessee. I have observed that in the statement of facts filed before the CIT(A) , the assessee has contended that the notices issued by the Assessing Officer u/s. 148 and 142(1) were not received by the assessee. The assessee has also challenged and disputed the service of notice by speed post by the verification unit of the Department. The assessee has also challenged the invocation of provision of section 147 on legal grounds before the CIT(A), which has also not been adjudicated by the CIT(A). The power of Id. CIT(A) are co-terminus with the power of Assessing Officer which even includes power of enhancement(Section 251(1)(a)). The Id. CIT(A) is required to adjudicate the issues on merit in accordance with law , as is provided u/s. 250(6). The Id. CIT(A) has to state point for determination, his reasons for decision and the decision thereof as provided u/s 250(6). The assessee has challenged the assessment order before Id. CIT(A) on legal grounds of invocation of provisions of Section 147. Further, the assessee has claimed before Id. CIT(A) that copy of relied upon material/statements were not provided by the

department on the basis of which the case was reopened. It is even claimed by the assessee that reasons recorded by the AO for reopening of assessment u/s 147 has not been provided by the AO to the assessee. The assessee has claimed before Id. CIT(A) that notices issued by the AO and verification unit of department were never served on the assessee. The Id.CIT(A) have not adjudicated appeal of the assessee on these legal grounds as well additions made by the AO on merits , and the appeal was dismissed within short period of one and half month after issuance of first notice, for non prosecution by the assessee. The CIT(A) has power to make such inquiries as he thinks fit and may also direct AO to make such enquiries and report to Id CIT(A), as is provided u/s 250(4), and to adjudicate issues arising in the appeal before him on merits in accordance with law. The CIT(A) could have issued summons u/s. 131 to the assessee or could have called for information from third parties u/s. 133(6). The Id. CIT(A) could have called for assessment records to verify the contentions of the assessee raised in ground of appeal/statement of facts filed before Id. CIT(A). The assessee has raised the contentions that neither reasons for reopening were provided by the AO nor relied upon statements were provided. The Id. CIT(A) ought to have called for assessment record. There are other powers vested with Id. CIT(A) as is provided under the 1961 Act. The Id. CIT(A) has not rebutted the claim of the assessee, but

dismissed the appeal of the assessee on ground of non filing of documents/details by the assessee and for non prosecution and simply upholding the additions. The ld. CIT(A) is required and obligated to pass order in compliance with the provisions of section 250(6), as ld CIT(A) is required to pass reasoned and speaking order on merits in accordance with law, but the appellate order passed by ld. CIT(A) is a non speaking and non reasoned appellate order which is not in compliance with provisions of Section 250(6) and is liable to be set aside. The appellate order passed by ld. CIT(A) is subject to further appeal with ITAT u/s 253. The appellate order passed by ITAT is subject to further appeal before Hon'ble High Court u/s 260A. The judgment and order passed by Hon'ble High Court is also subject to challenge before Hon'ble Supreme Court. Thus, the appellate order passed by ld. CIT(A) is not a final order, as it is subject to challenge before higher appellate authority. Thus, Reasons which weighed in the minds of the adjudicating authority while adjudicating appeal on merits of the issue are cardinal as the higher appellate authority can then adjudicate appeal on the issues arising in appeal before them, based on decision and reasoning of ld. CIT(A) in deciding the issues. If the ld. CIT(A) simply dismiss the appeal merely because the assessee did not appear before ld. CIT(A) or did not comply with the notices, in limine without adjudicating issues arising in the appeal on merits , such

order is not sustainable in the eyes of law keeping in view provisions of Section 250(6) , and also higher appellate authorities will be deprived to see what weighed in the mind of the ld. CIT(A) while adjudicating appeal as it will be an order passed without reasoning on the issues on merits . The ld. CIT(A) is not toothless as his powers are co-terminus with the powers of the AO. He could have made enquiries himself or have caused enquiries to be made by the AO and submit remand report to him to enable ld. CIT(A) to adjudicate the appeal(Section 250(4)). There are other vast powers vested under the 1961 Act with ld. CIT(A). It is equally true that the assessee also did not complied with the notices issued by ld. CIT(A) and did not file the requisite details/documents to support his contentions. The assessee is also equally responsible for its woes. Under these facts and circumstances and fairness of both the parties, in the interest of justice, the appellate order of CIT(A) is set aside and the matter can go back to the file of ld. CIT(A) for fresh adjudication of the appeal of the assessee on merit in accordance with law after giving opportunities to both the parties. The ld. CIT(A) shall pass the appellate order in compliance with the provision of section 250(6) of the Act on merit in accordance with law, in set aside proceedings ,after giving opportunity to both the parties in compliance with principles of natural justice. The assessee on his part is also directed to comply with the direction/notices of

CIT(A) , and in case of failure of the assessee, the ld. CIT(A) shall be free to pass such appellate order as deemed fit ex-parte in accordance with law on merits and after complying with the provisions of section 250(6) of the Act. Thus, the appeal of the assessee is allowed for statistical purposes and the matter is restored back to the file of ld. CIT(A) for fresh adjudication of the appeal of the assessee on merit in accordance with law. I clarify that I have not commented on the merits of the issues in the appeal. Thus, the appeal of the assessee is allowed for statistical purposes. I order accordingly.

7. In the result, the appeal of the assessee in ITA No. 85/Ahd/2024 for assessment year 2013-14 is allowed for statistical purposes.

ITA No. 87/Ahd/2024-Assessment Year 2013-14

8. The brief facts are discussed in preceding para's of this common order and are not repeated. The AO made additions to the income of the assessee to the tune of Rs. 2,77,500/- on account of being beneficiary to the accommodation entries in the scrip of Safal Herbs Limited, vide assessment order dated 24.09.2021 passed by the AO u/s 147 read with Section 144 read with Section 144B. This led to invocation of penalty proceedings u/s 271(1)(c) by the AO against the assessee. The notices were issued to the assessee by the AO as well

verification unit of the department, but the assessee did not responded, which led to levy of Penalty of Rs. 10,043/- u/s 271(1)(c) by the AO vide order dated 07.01.2022.

9. Aggrieved , the assessee filed first appeal before the ld. CIT(A) who confirmed the penalty and dismissed the appeal of the assessee, vide appellate order dated 27th October, 2023.

10. Still Aggrieved , the assessee filed this appeal before the Tribunal. It is observed that this appeal is filed belatedly by 23 days beyond the time prescribed u/s 253(3), and the assessee has filed affidavit explaining that the appellate order of ld. CIT(A) was served on 27th October, 2023 but the part time accountant employed by the assessee inadvertently forgot to pass on the appellate order of the CIT(A) to the assessee, and when the tax consultant enquired about the status of the same , it came to be known that the order has already been passed and immediately, thereafter, the assessee proceeded to file the appeal with the Tribunal. The assessee has prayed in the affidavit to condone the delay of 23 days in filing this appeal belatedly with the ITAT beyond the time prescribed u/s 253(3) of the 1961 Act. The ld. Departmental Representative objected to delay in filing this appeal belatedly but left the matter to the Bench to be decided. I have gone through the affidavit and I observed that the assessee filed this appeal

belatedly by 23 days beyond the time prescribed u/s 253(3), and the assessee has prayed for condonation of delay by filing an affidavit dated 28.05.2024. The said affidavit is placed on record in file. The assessee has claimed that the order of the CIT(A) was received by the part time accountant who failed to inform the assessee which led to delay in filing the appeal in time and it is only when the income tax consultant inquired about the status of the CIT(A) order, it came to be known that the order has already been received, and then the assessee immediately proceeded to file the appeal with Tribunal. I do not find any malafide on the part of the assessee in filing this appeal belatedly with the Tribunal, as the assessee is not likely to gain anything by filing this appeal belatedly. In my considered view, the assessee has shown reasonable and sufficient cause for filing this appeal belatedly. When technicalities are pitted against the substantial justice, the Courts will lean towards advancement of substantial justice rather than technicalities, unless the malafide on the part of the assessee is at writ large. Under the facts and circumstances, I do not find any malafide on the part of the assessee in filing this appeal belatedly, and in the interest of justice, I condone the delay of 23 days and proceed to adjudicate this appeal on merits in accordance with law. Reference is drawn to the decision of Hon'ble Supreme Court

in the case of **Collector of Land Acquisition, Anantnag v. Mst. Katiji (1987 AIR 1353(SC))**.

11. Since I have already set aside the quantum appeal in ITA No. 85/Ahd/2024 vide preceding para's of this common order. Both the ld. counsel for the assessee and ld. Departmental Representative submitted before me that in all fairness this appeal arising from penalty order u/s 271(1)(c) which has arisen because of quantum additions made by the AO(which is now set aside by me to ld. CIT(A) for denovo adjudication vide this common order) , the appellate order dated 27.10.2023 passed by ld. CIT(A) w.r.t. penalty u/s 271(1)(c) can also be set aside and the matter can go back to the ld. CIT(A) for fresh adjudication of the appeal of the assessee. Under the facts and circumstances of the case and in the interest of justice , I am setting aside the impugned appellate order dated 27.10.2023 passed by ld. CIT(A) arising out of the penalty proceedings u/s 271(1)(c) , and restore the matter back to the file of CIT(A) for fresh adjudication of the appeal of the assessee on merits in accordance with law after providing proper and adequate opportunities to both the parties and in compliance of provision of section 250(6) of the Act. The assessee is directed to comply with the directions/ notice of hearing issued by ld. CIT(A), and in case of failure thereof, the ld. CIT(A) shall be free to pass appellate order on merits of the issue in

accordance with provisions of Section 250(6). I clarify that I have not commented on the merits of the issues arising in this appeal. I order accordingly.

12. In the result, the appeal of the assessee in ITA No. 87/Ahd/2024 is allowed for statistical purposes.

13. In the result, both the appeals filed by the assessee before ITAT, Ahmedabad Bench, Ahmedabad in ITA no. 85 & 87/Ahd/2024 for assessment year 2013-14 are allowed for statistical purposes.

Both the orders pronounced in the open court on 01-07-2024 at the Conclusion of the hearing in the presence of both the parties, and reduced to writing and signed on 09th July, 2024

Sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Ahmedabad : Dated 09/07/2024

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad

6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद