

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, KOLKATA

डॉ. मनीष बोरड, लेखा सदस्य

एवं

श्री प्रदीप कुमार चौबे, न्यायिक सदस्य

के समक्ष

Before

Dr. Manish Borad, Accountant Member

&

Shri Pradip Kumar Choubey, Judicial Member

I.T.A. No.277/KOL/2024

Assessment Year: 2017-18

Sunil Kumar Mishra
(PAN: AHPPM0825R)

.....

Appellant

Vs.

Income Tax Officer,
Ward-40(1), Kolkata.

.....

Respondent

Appearances by:

Shri Gopal Ram Sharma, AR appeared for Appellant.

Shri P. P. Barman, Addl. CIT, Sr. DR appeared for Respondent.

Date of concluding the hearing : 04.06.2024

Date of pronouncing the order : 09.07.2024

ORDER

Per Manish Borad, Accountant Member:

This appeal filed by the assessee pertaining to the Assessment Year (in short “AY”) 2017-18 is directed against the order passed u/s 250 of the Income Tax Act, 1961 in short the “Act”) by Ld. Commissioner of Income-tax (Appeal), National Faceless Appeal Centre (NFAC), Delhi [in short Ld. “CIT(A)”] dated 21.07.2023 arising out of the assessment order u/s 144 of the Act by ITO, Ward-40(1), Kolkata dated 24.12.2019.

2. Registry has informed that this appeal of assessee is time barred by 96 days. Application for condonation of delay has been filed by assessee. Perusal of the same and also considering the ratio of

judgment of Hon'ble Apex court in the case of Collector of Land Acquisition, Anantanag Vs. Mst. Katiji & Ors. dated 19.02.1987 and the Hon'ble Madras High Court in the case of CIT vs Himatasingike Seide Ltd. in (2006) **286 ITR 555**, we note that the main reason for the delay was on account of the *bona fide* impression of the assessee that the appeal has been filed before the Ld. CIT(A) by the professional. But at a later stage, he came to know that no such appeal has been filed. The assessee is stated to be a layman and dependent upon the Ld. AR and considering the same, and also in the interest of justice, we condone the delay and admit the appeal for adjudication.

3. Grounds of appeal raised by the assessee read as under:

"1. For that the Assessment order U/s.144 of the Act is illegal & void.

2. For that the Appeal Order dated 21/07/2023 was passed by the Ld. CIT (Appeals), Income Tax Department, NFAC without considering the Grounds of Appeal and facts and circumstances of the assessee. No speaking order was passed by the appellate authority.

3. The Ld. CIT (A) erred in not considering facts and circumstances of the assessee's case and upheld the order of the Ld. AO passed u/s.144 of the Act.

4. For that the Ld. Assessing Officer had passed the order without giving reasonable opportunity & time.

5. For that the Ld. CIT (A) misconceived in dismissing appeal on the ground that the assessee availed the remedy u/s.264 prior to invoking section 246A which could not be a bar in filing an appeal in view of the ratio decided in CIT v. D. Lakshminarayanapathi [2001] 250 ITR 187 (Madras) which was followed in case of M. Jayabalan v. CIT, Chennai-VI [2013] 40 taxmann.com 218 (Madras).

6. For that the addition of Rs.1,25,90,000/- u/s. 69A of the Act treating the total deposit during the year as unexplained money is illegal & void.

7. For that the Ld. CIT (A) erred in not considering submission of the assessee who prayed for deleting additions made by the AO.

8. For that the levy of tax u/s.115BBE on a bonafide assessee on the arbitrary addition and initiating penalty proceeding u/s.271AAC on that score is bad in law and should be declared void ab initio.

9. For that the Ld. Assessing Officer admitted that during demonetization period there was cash deposit into ICICI bank Rs.3550000/- but choose to make addition of Rs.1,25,90,000/-. So the addition u/s.69A is itself erroneous and unjustified.

10. For that your petitioner prays to place any additional ground or grounds on or before completion of appeal hearing.”

4. At the outset, Ld. Counsel for the assessee submitted that Ld. CIT(A) has summarily dismissed the appeal of the assessee on the ground that the assessee had already taken a rigors u/s. 264 of the Act and since the authority passing the order u/s. 264 is higher to the Ld. CIT(A), the appeal of the assessee is not maintainable. Only prayer of the assessee is that he may be given one more opportunity to go back to Ld. CIT(A) and get the issues decided on merit of the case.

5. On the other hand, Ld. DR opposed this request stating that an order has already been passed u/s. 264 on the application of assessee itself and, therefore, no remedy is available to the assessee at this stage.

6. We have heard the rival contentions and perused the material available on record. We observe that the assessee is an individual. There was an information about large cash deposit in his bank account held with ICICI Bank amounting to Rs.35,50,000/-. The total credits in the bank account amounting to Rs.1,25,90,000/-. The assessee did not file any income tax return and not availed any of the opportunities granted by the AO. There was no explanation given by the assessee about the alleged credits in the bank account. The assessment for AY 2017-18 framed on 24.12.2019. Though the remedy available with the assessee was to file an appeal within 30 days of receiving the order to the Ld. CIT(A) but as knowingly or unknowingly he failed to file any appeal. But later on before the expiry of one year from the date of receiving the assessment order he filed a petition to Ld. PCIT u/s. 264 of the Act for revision of the assessment order. However, by order u/s. 264 of the Act dated 31.03.2021 assessee's petition u/s. 264 of the Act was dismissed and

the addition made by the AO was confirmed. After the dismissal of the petition vide order dated 31.03.2021 assessee filed an appeal on 20.03.2023 to ld. CIT(A). Ld. CIT(A) dismissed the appeal observing as follows:

“3.0 I have considered the submissions of the assessee. The assessee preferred to take recourse u/s 264 of the Act and filed an application to the PCIT who admittedly dismissed the petition. The assessee was therefore legally barred from agitating the same issue u/s 246A. The assessee however submitted that he was not educated and qualified enough to understand law and legal provisions and for that reason, an application u/s 264 was moved before CIT on a basis of wrong advice. He also relied on various rulings of High Court/ Tribunals to support his view that revisional jurisdiction under section 264 did not bar him from filing an appeal before the Commissioner of Income Tax (Appeals).

The basic issue here is the revision order of the PCIT dismissing the petition u/s 264 merged with the order of the subordinate authority and such an order u/s 264 is not an appealable order u/s 246A. In effect, there is no jurisdiction vested with CIT(A) to sit on appeal against the order u/s 264. In the case M/s Orissa Rural Housing Development Corpn. Ltd(2012) 204 Taxman 673, it was held that remedy available to an assessee u/s 264 was an alternative remedy ,who does not want to avail remedy by way of an appeal and assessee was not permitted to pursue both remedies either simultaneously or one after another. Since the assessee already availed the remedy u/s 264, the present appeal is not maintainable. The appeal is therefore dismissed.”

7. We observe that section 246A(1) of the Act provides list of the orders against which appeals can be filed before Ld. CIT(A) and in the said sub-section, the orders of the AO u/s. 144 of the Act is an appealable order. Further, on perusal of Sec. 246A of the Act, we find tht there is no mention about section 264 of the Act. Certainly since the revisionary power u/s. 264 are vested with the higher authority to that of Ld. CIT the same is not provided in this section. Similarly, on perusal of section 253(1) of the Act provides a list of orders against which appeals can be filed before this Tribunal and the order u/s. 264 of the Act is not appealable before this Tribunal.

8. In the instant case, the assessee had two options either to file appeal before the Ld. CIT(A) or to file a revision petition u/s. 264. The assessee first chose to opt for section 264 but failed. It is quite

obvious that the assessee may have missed to file the appeal before the Ld. CIT(A) within the statutory time and, therefore, as advised went for petition u/s. 264 but failed to succeed.

9. Ld. DR could not refer to any provision under the Act that if assessee has availed section 264 window then it is debarred from opting the other window of filing appeal to Ld. CIT(A). Thus, Ld. CIT(A) erred in dismissing the appeal solely on the ground that assessee has already lost in sec. 264 proceeding, therefore, it cannot file any appeal to Ld. CIT(A). Proceedings u/s. 264 of the Act are completely different and not similar to that of appellate proceeding. Therefore, the option for filing the appeal before the Ld. CIT(A) is still open subject to the condition that the assessee is able to convince Ld. CIT(A) about the reason for delay in filing the appeal. Once the assessee is able to cross this hurdle of delay in filing the appeal then Ld. CIT(A) may adjudicate the appeal on merits of the case after giving reasonable opportunity of hearing to the assessee and also consider the additional evidence filed by the assessee to explain the source of alleged credits in the bank account held with ICICI Bank. Assessee is also directed to remain compliant without taking adjournment for unnecessary reason. Thus, appeal of the assessee is allowed for statistical purposes.

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

Order is pronounced in the open court on 9th July, 2024.

Sd/-
[Pradip Kumar Choubey]
Judicial Member

Sd/-[Dr. Manish Borad]
Accountant Member

Dated: 9th July,2024

J.D. Sr. PS.

Copy of the order forwarded to:

1. Appellant – Shri Sunil Kumar Mishra, 31/3, B. K. Paul Temple road, Belur, Howrah-711202.
2. Respondent – ITO, Ward-40(1), Kolkata
3. CIT(A), NFAC, Delhi
4. CIT-
5. Departmental Representative
6. Guard File.

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata