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. 151/Ind/2024
Assessment Year:2013-14

Manoj Kumar Motwani, Prop. Neelam Store, Lally Chowk, Kothi Bazar, Betul	बनाम/ Vs.	ACIT, NFAC, Delhi
(Assessee/Appellant)		(Revenue/Respondent)
PAN: AAUPM8830E		

Assessee by	Shri Rakesh Khandelwal, AR
Revenue by	Shri Ashish Porwal, Sr. DR
Date of Hearing	16.07.2024
Date of Pronouncement	25.07.2024

आदेश / O R D E R

Per B.M. Biyani, A.M.:

Feeling aggrieved by appeal-order dated 08.12.2023 passed by learned Commissioner of Income-Tax (Appeals)-NFAC, Delhi ["CIT(A)"] which in turn arises out of assessment-order dated 24.09.2021 passed by learned NFAC, Delhi ["AO"] u/s 147 r.w.s. 144/144B of Income-tax Act, 1961 ["the Act"] for Assessment-Year ["AY"] 2013-14, the assessee has filed this appeal on the grounds mentioned in Form No. 36.

2. The registry has informed that the present appeal is delayed by 9 days and therefore time-barred. Ld. AR for assessee submitted that the assessee has filed an application for condonation of delay supported by an affidavit on stamp. On perusal of the application/affidavit, we observe that the assessee has stated that he is a cardiac patient and had undergone cardiac surgery. It is further stated that he had been suffering from illness regularly and advised by Dr. Jaiswal to take rest; hence there occurred a small delay of 9 days in filing appeal. Ld. AR very humbly submitted that there is no deliberate lethargy, negligence, mala fide intention or ulterior motive of assessee in making delay and the assessee does not stand to derive any benefit because of delay. Ld. DR for Revenue left the matter to the wisdom of Bench. We have considered the explanation advanced by assessee and in absence of any contrary fact or material on record, the assessee is found to have a sufficient cause for delay in filing present appeal. We find that section 253(5) of the Act empowers the ITAT to admit an appeal after expiry of prescribed time, if there is a sufficient cause for not presenting appeal within prescribed time. It is also a settled position by Hon'ble Supreme Court in **Collector, Land Acquisition Vs Mst. Katiji and others 1987 AIR 1353, 1987 2 SCC 387** that whenever substantial justice and technical considerations are opposed to each other, the cause of substantial justice must be preferred by adopting a justice-oriented approach. Thus, taking into account the provision of section 253(5) and the decision of Hon'ble Supreme

Court, we take a judicious view, condone small delay of 9 days, admit appeal and proceed with hearing.

3. The background facts leading to this appeal are such that the AO, on receipt of information that the assessee had deposited cash of Rs. 24,65,550/- in Bank A/c during the financial year 2012-13 relevant to AY 2013-14 under consideration, issued notice dated 13.03.2020 u/s 148 to undertake proceeding of section 147 against assessee. In response to such notice, the assessee did not file any return. The AO also issued notices u/s 142(1) which again remained uncompiled with. Ultimately, the AO passed assessment-order u/s 147 r.w.s. 144 of the Act to the best of his judgement assessing the entire deposit of Rs. 24,65,550/- as income from unexplained sources u/s 69A r.w.s. 115BBE. Aggrieved, the assessee carried matter in first-appeal. The CIT(A) treated assessee's first-appeal as deficient on the footing of non-payment of tax as required by section 249(4)(b) and accordingly dismissed assessee's appeal as non-admitted. Now, the assessee has come before us challenging the orders of lower-authorities.

4. So far as the deficiency noted by CIT(A) for dismissal of assessee's first-appeal is concerned, we find that the assessee has not filed any return to department u/s 139 or even in response to notice u/s 148. Further, the Ld. AR also apprised that the assessee is engaged in small business of kirana/general items and the total income of assessee did not exceed the maximum amount not chargeable to tax, therefore there was neither any obligation to file return nor to pay advance-tax or self-assessment tax. The

assessment-order also shows that the AO has taken returned income at Rs. Nil and assessed total income at Rs. 24,65,550/- after making an addition of equal amount. In such a situation, the CIT(A) was not correct in observing that there was a non-compliance of section 249(4)(b) as held by ***ITAT, Indore in Shri Pushpendra Singh Chouhan Vs. ITO, ITA No. 122/Ind/2024, order dated 24.06.2024*** 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 RoI 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 RoI.*
>
> *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:*
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> *"(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."*
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> *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.*
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> *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 assesse 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 taxa 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, Delhi 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. Needles 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."

5. Thus, applying the view taken by ITAT, Indore cited above, the impugned order of CIT(A) is hereby set aside.

6. Now, we take up the merits of the case. During hearing of appeal, it emerged that the AO has passed assessment-order to the best of his judgement u/s 144 and treated entire cash deposit made by assessee in bank a/c as income of assessee citing that the assessee has not made compliance of notice issued u/s 142(1) by him and not filed details/documents. But the Ld. AR, by referring to documents filed at Page 193-195 of Paper-Book, successfully showed that the assessee made

attempts to e-file required documents on the designated portal of Income-tax Department but could not file due to technical glitch and ultimately the assessee also raised an on-line grievance on 19.08.2021 which was resolved by department on 30.09.2021 and immediately thereafter the assessee e-filed documents. But the AO passed ex-parte assessment-order on 24.09.2021 itself u/s 144. Ld. AR also drew us to Para 5 of assessment-order wherein the AO has himself acknowledged that prior to re-opening case of assessee, the assessee filed response dated 30.01.2020 to department in response to enquiry wherein the bank statement was filed and it was also submitted that the impugned deposits were made from trading receipts of business. Thus, there was a submission by assessee to show the source of deposits in bank a/c which is trading receipts of business. At the same time, the assessee has also filed certain additional evidences/details of sales and purchase of business as well as cash extract at Page 146 onwards in Paper-Book to prove the source of deposit. Ld. DR for revenue immediately made a proposal that the case must be remanded to the Jurisdictional AO for factual examination of assessee's submission, details and documents and adjudication afresh. Ld. AR for assessee could not show any objection against Ld. DR's proposal. Faced with this situation, we remand this matter to the file of AO for a proper adjudication on merit after giving opportunity of hearing to the assessee, uninfluenced by his earlier order in any manner. The assessee is also directed to ensure participation in the hearings as may be fixed by AO and do not seek

unnecessary adjournments failing which the AO shall be at liberty to pass appropriate order in accordance with law.

7. Resultantly, this appeal is allowed for statistical purpose.

Order pronounced in open court on 25.07.2024

Sd/-	sd/-
(VIJAY PAL RAO)	(B.M. BIYANI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Indore
दिनांक /Dated : 25.07.2024
CPU/Sr. PS

Copies to:
(1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order
Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore