

IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH KOLKATA

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI RAKESH MISHRA, ACCOUNTANT MEMBER**

**ITA No. 1134/KOL/2024
Assessment Year: 2017-18**

Giasuddin Shaikh, Beniagram, Dist. Murshidabad - 742212 (PAN: AWMPS8476R)	Vs	Asst. Commissioner of Income Tax, Circle 42, Murshidabad, Aayakar Bhawan, 57, R.N. Tagore Road, Baharampore, Murshidabad - 742101
(Appellant)		(Respondent)

Present for:

Appellant by : None

Respondent by : Shri Pradip Biswas, Addl. CIT

Date of Hearing : 23.07.2024

Date of Pronouncement : 10.09.2024

ORDER

PER RAKESH MISHRA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of the Ld. Commissioner of Income Tax (Appeal), National Faceless Appeal Centre (NFAC), Delhi (hereinafter referred to as “the Ld. CIT(A)”) passed u/s. 250 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) for AY 2017-18, dated 31.01.2024, passed against the assessment order u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) dated 09.12.2019.

2. The grounds of appeal raised by the assessee are reproduced as under:

- “1. That on the facts and in the circumstances of the case, the Ld. Addl/JT. CIT(A) erred in passing the order without considering the facts of the case and thereby, sustained the addition amounted to Rs. 13,74,957/-, which was contrary to the facts and law.

2. *That on the facts and in the circumstances of the case, the Ld. Addl./Jt.CIT(A) erred in sustaining the addition made by the Ld. A.O. on account of Provident Fund, E.S.I. and Labour Insurance Exp. aggregating of Rs. 13,74,857/- without providing reasonable opportunity of being heard which was arbitrary and unlawful.*
3. *That on the facts and in the circumstances of the case, the Ld. CIT(A) failed to adjudicate upon the order passed u/s.143(3) erroneously, wherein the addition to the tune of Rs. 13,74,857/- was made denying the claim of the expenses on account of Provident Fund, E.S.I. and Labour Insurance Exp. debited under the head cost of contract as per the Profit and Loss account which was bad in law.*
4. *That the appellant craves leave to urge such other ground or grounds before or at the time of hearing of appeal.”*

3. When the appeal was taken up for hearing, none appeared on behalf of the assessee. The appeal of the assessee is time barred by 47 days and a condonation petition along with an affidavit has been filed which is available on record. In the said affidavit, assessee has stated as under:

“I, Giasuddin Sk. son of late Fakir Sk. by faith Muslim, by occupation Business, resident of Bindugram, Beniagram, Murshidabad-742212, do hereby solemnly declare and affirm as under:

1. That I am an Income Tax assessee and I was assessed u/s 143(3) under PAN: ACJPH9060J for the asstt. year 2017-18 by the Asstt. Commission of Income Tax Circle-42, Murshidabad determining the total income of Rs.25,60,700/-

2. That I carried on the business of Labour Contractor of NTPC, Farakka Barrage, U.P.L and other departments and I filed my return of income on 22.09.2017 declaring total income of Rs. 11,85,724.00.

3. That an appeal was preferred against the order u/s 143(3) before the Id. CIT(A), NFAC for asstt. year 2017-18 and an ex-parte order dismissing the appeal was passed by the Id. CIT(A), NFAC on 31.01.2024 which was received by my tax consultant at his e-mail ID and information of that was communicated to me on 17th April, 2024 after the expiry of the due date (29.03.2024) for filing the appeal before the Hon'ble Bench, Income Tax Appellate Tribunal, Kolkata Benches, Later on, on receipt of the information of the order passed by the Id. Id. CIT(A), from my erstwhile Chartered Accountant, I changed my email ID and registered that in the Income Tax portal.

4. That due to my nature of business I did not stay at my home place at a stretch for a long time and communication of the appeal order passed by the Id. CIT(A), NFAC was received on 17.04.2024 and due to my stay outside my place of residence, it was handed over to me on my return on 20th April, 2024 by my erstwhile Chartered Account. That after coming back to my home I got seriously ill due to severe heat wave in the District of Murshidabad.

5. That only on last week of April I sought advice from a Senior Chartered Accountant Sri L. Ray of Sen & Ray, Chartered Accountants, Berhampore, Murshidabad and as per his advice and after taking advice from him upon learning about my duty in filing an appeal before the Income Tax Appellate

Tribunal against the order of the Id. CIT(A), NFA, I requested Sri L. Ray, CA to take necessary action.

6. *That subsequently I handed over the relevant papers in relation to the above matter of Sri L. Ray, CA and the appeal has thus been filed with a delay of about 45 days beyond the prescribed due date before the Hon'ble Income Tax Appellate Tribunal.*

7. *That the delay in filing the appeal before the Hon'ble Income Tax Appellate Tribunal, is required to be condoned for the end of justice.*

That the statements made herein above are true and correct to the best of my knowledge and belief."

4. In this regard, the assessee has also filed a condonation petition which is as under:

"That I am an Income Tax assessee and I was assessed u/s 143(3) under PAN: ACJPH 9060) for the Asst. Year 2010-11 by the Asstt. Commissioner of Income Tax, Circle-42, Murshidabad determining the total income of Rs 25,60,700/-

That I carried on the business of Labour Contractor of NTPS, Farakka and I filed my return of income on 22/09/2017 declaring total income of Rs.11,85,724/-.

That an appeal was preferred against the order u/s 143(3) before the Ld. CIT(A), NFAC for the Asst. Year 2017-18 and an ex-parte order dismissing the appeal was passed by the Ld. CIT(A), NFAC on 31/01/2024 which was received by my tax consultant at his e-mail ID and information of that was communicated to me on 17th April, 2024, after the expiry of the due date (29-03-2024) for filing the appeal before the Hon'ble Bench, Income Tax Appellate Tribunal, Kolkata Benches. Later on, on receipt of the information of the order passed by the Ld. CIT(A) from my erstwhile Chartered Accountant, I changed my email ID and registered that in the income Tax portal.

That due to my nature of business I did not stay at my home place at a stretch for a long time and the communication of the appeal order passed by the CIT(A), NFAC was received on 17/04/2024 and due to my stay outside my place of residence, it was handed over to me on my return on 20 April, 2024 by my erstwhile Chartered Accountant. That after coming back to my home I got seriously ill due to severe heat wave in the District of Murshidabad.

That only on last week of April I sought advice from a Senior Chartered Accountant Sri L. Ray of Sen & Ray, Chartered Accountant, Berhampore, Murshidabad and as per his advice and after taking advice from him upon learning about my duty in filing an appeal before the Income Tax Appellate Tribunal against the order of the Ld. CIT(A), NFAC, I requested Sri L. Ray, CA, to take necessary action.

That subsequently I handed over the relevant papers in relation to the above matter to Sri L. Ray, CA and the appeal has thus been filed with a delay of about 55 days beyond the prescribed due date before the Hon'ble Income Tax Appellate Tribunal.

That there was no malafide intention behind not filing the appeal within the prescribed time, because in that case the your appellant would be the sufferer by paying additional tax on such an income which was not taxable at all under the Income Tax Act, 1961.

That an affidavit to this effect sworn on 06/05/2024 before the Notary Public at Berhampore, Murshidabad is also enclosed.

That the impugned delay in filing of the appeal before the Hon'ble ITAT, therefore, is for the good and sufficient reason and hence it is prayed that the delay may kindly be condoned and the appeal be kindly be admitted for adjudication on merits to meet the ends of justice.”

5. Although there is variation in the number of days of delay in the condonation application and the affidavit, however, in view of the facts mentioned, the delay is hereby condoned and the appeal is admitted for adjudication on merits.

6. Brief facts of the case are that the assessee has been carrying on the business of Labour Contract Job under N.T.P.C. Ltd. Nabarun, Murshidabad and he submitted his return of income disclosing income of Rs. 11,85,740.00 for the AY 2017-18. The assessee claimed deduction for P.F Rs. 9,58,356.00, E.SI, Rs.3,85,367.00 and Labour Insurance of Rs.27,324.00 in the profit & loss account. The assessee claims to maintain proper books of accounts and accounts were duly audited by a Chartered Accountant. The Ld. AO, completed the assessment u/s 143(3) on the total income of Rs 25,60,697.00 and disallowed the claim for P.F. Rs.9,58,356.00, ESI, Rs 3,85,367.00 and Labour Insurance of Rs. 27,324.00 as neither any salary nor wages was debited to the P & L Account. Aggrieved, with the assessment order, the assessee filed appeal before the Ld. CIT(A). The Ld. CIT(A) has not adjudicated upon the grounds of appeal raised and has dismissed the appeal on account of non-prosecution. In this respect, it is relevant to examine the provisions of section 250(6) of the Act, which are reproduced as under:

“250(6) – The order of the Commissioner (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reason for the decision.”

6.1 Thus, section 250(6) casts a duty on the Ld. CIT(A) to pass an order in appeal which should state the points for determination and a decision as well as the reason for arriving at such decision. In the present case before us, these expenses were mentioned in the Audit Report but

compliance has not been made by the Ld. CIT(A) by not mentioning the reasons after examining the assessment records while disposing of the appeal. We also note that while the Ld. CIT(A) has discussed non-compliance on the part of the assessee as the six notices sent by e-mail were not complied with, however, the Ld. CIT(A) dismissed the appeal and has not passed a reasoned order for arriving at the decision, as is required u/s 250(6) of the Act. We further note that in **Aji Basha Vs. CIT (2019) 111 taxmann.com 348 (Madras)**, it has been held that a speaking order on merits with reasons and findings is to be passed by Commissioner (Appeals) on the basis of ground raised in assessee's appeal; he cannot dispose assessee's appeal merely by holding that Assessing Officer's order is a self-speaking order which requires no interference. The relevant extract from the order is as under:

6. ... The first respondent is the appellate authority. Needless to state that the Appellate Authority is also a fact finding authority and therefore, he has to consider the order of assessment on the grounds raised in the appeal and thereafter, pass a speaking order on merits and in accordance with law by giving his own reasons and findings as to whether the order of assessment can be sustained or not. In other words, the order passed by the Appellate Authority should explicitly exhibit his application of mind to the facts and circumstances and the objections raised in the grounds of appeal, also by expressing his reasons and findings in support of his conclusion.

7. In this case, the Appellate Authority, after extracting the order of the Assessing Officer in full, has not given any other reason or finding to dismiss the appeal except by stating that he is of the considered view that the Assessing Officer's order is a self speaking order and does not call for any interference. In my considered view, such single line finding of the Appellate Authority, cannot be sustained as a proper exercise of the Appellate Authority, while disposing the appeal. Therefore, it is apparent that the order impugned in this writ petition is an outcome of total non-application of mind. Consequently, the impugned order cannot be sustained. It is further contended that before passing the order, the petitioner was not heard.

6.2 It has also been held in the case of **Commissioner of Income-tax (Central) Nagpur Vs. Premkumar Arjundas Luthra (HUF) [2016] 69 taxmann.com 407 (Bombay)** that the law does not empower the CIT(A) to dismiss the appeal for non-prosecution as is evident from the provisions of the Act. The relevant extract is as under:

7. An appeal is filed with the CIT(A) from appealable orders listed in Section 246A of the Act. We find that the procedure in appeal before the CIT(A) and the powers of the CIT(A) are governed by Sections 250 and 251 of the Act respectively. The relevant provisions for consideration are as under:—

'Procedure in appeal

250 (1)

(2)

(3)

(4) *The Commissioner (Appeals) may, before disposing of any appeal, make such further inquiry as he thinks fit, or may direct the Assessing Officer to make further inquiry and report the result of the same to the Commissioner (Appeals).*

(5)

(6) *The order of the Commissioner (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reason for the decision.*

(6A)

(7)

Powers of the Commissioner (Appeals)

"Section 251(1) In disposing of an appeal, the Commissioner (Appeals) shall have the following powers —

(a) *in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment.*

(aa)

(b) *in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty."*

(c)

(2) *The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.*

Explanation. - In disposing of an appeal, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the appellant.'

8. From the aforesaid provisions, it is very clear once an appeal is preferred before the CIT(A), then in disposing of the appeal, he is obliged to make such further inquiry that he thinks fit or direct the Assessing Officer to make further inquiry and report the result of the same to him as found in Section 250(4) of the Act. Further Section 250(6) of the Act obliges the CIT(A) to dispose of an appeal in writing after stating the points for determination and then render a decision on each of the points which arise for consideration with reasons in support. Section 251(1)(a) and (b) of the Act provide that while disposing of appeal the CIT(A) would have the power to confirm, reduce, enhance or annul an assessment and/or penalty. Besides Explanation to sub-section (2) of Section 251 of the Act also makes it clear that while considering the appeal, the CIT(A) would be entitled to consider and decide any issue arising in the proceedings before him in appeal filed for its consideration, even if the issue is not raised by the appellant in its appeal before the CIT(A). Thus once an assessee

files an appeal under Section 246A of the Act, it is not open to him as of right to withdraw or not press the appeal. In fact the CIT(A) is obliged to dispose of the appeal on merits. In fact with effect from 1st June, 2001 the power of the CIT(A) to set aside the order of the Assessing Officer and restore it to the Assessing Officer for passing a fresh order stands withdrawn. Therefore, it would be noticed that the powers of the CIT(A) is co-terminus with that of the Assessing Officer i.e. he can do all that Assessing Officer could do. Therefore just as it is not open to the Assessing Officer to not complete the assessment by allowing the assessee to withdraw its return of income, it is not open to the assessee in appeal to withdraw and/or the CIT(A) to dismiss the appeal on account of non-prosecution of the appeal by the assessee. This is amply clear from the Section 251(1)(a) and (b) and Explanation to Section 251(2) of the Act which requires the CIT(A) to apply his mind to all the issues which arise from the impugned order before him whether or not the same has been raised by the appellant before him. Accordingly, the law does not empower the CIT(A) to dismiss the appeal for non-prosecution as is evident from the provisions of the Act.

7. Accordingly, we deem it proper to remit the matter back to the file of Ld. CIT(A) for disposal of the grounds taken by the assessee on merits by passing a speaking order. Needless to say, that the assessee shall be given a reasonable opportunity of being heard to make any further submission it wants to make in support of its grounds of appeal. The assessee shall file necessary evidence in support of the deductions claimed in the grounds of appeal and shall also not seek unnecessary adjournment, unless required by unavoidable exigencies. Accordingly, the grounds taken by the assessee in his appeal are allowed for statistical purposes.

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

Order pronounced in the open court on 10th September, 2024.

Sd/-
(Rajpal Yadav)
Vice President

Sd/-
(Rakesh Mishra)
Accountant Member

Dated: 10th September, 2024

AK, P.S.

Copy to:

1. The Appellant:
2. The Respondent.
3. CIT(A)
4. The CIT,
5. DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata