

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "SMC" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य के समक्ष
BEFORE: HON'BLE SHRI SANDEEP GOSAIN, JM

आयकर अपील सं./ITA No. 1065/JP/2024
निर्धारण वर्ष / Assessment Year : 2014-15.

Vimla Devi Agrotech Ltd., 45, Basant Vihar Special, Kota-324 009.	बनाम Vs.	Assistant Commissioner of Income-tax, Ward 1(2), Kota.
स्थायी लेखा सं./जीआईआर सं./ PAN/GIR No. AACCV 5971 C		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Devang Gargieya, Advocate

राजस्व की ओर से / Revenue by : Shri Gautam Singh Chaudhary, JCIT D/R

सुनवाई की तारीख / Date of Hearing : 23/09/2024

उदघोषणा की तारीख / Date of Pronouncement : 26/9/2024

आदेश / ORDER

PER: SANDEEP GOSAIN, J.M.

This appeal by the assessee is directed against the order dated 31.07.2024 of Id. CIT (Appeals), Jaipur-4 passed under section 250 of the Income Tax Act, 1961 for the assessment year 2014-15. The grounds raised in the appeal are reproduced as under :-

1. The impugned in the penalty order u/s 271B dated 30.04.2019 are bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence the same kindly be quashed.
2. The Id. CIT (A) erred in law as well as on the facts of the case in passing the order without affording adequate and reasonable opportunity and even

- without complying with the mandatory statutory requirement of law. The impugned order having been framed in gross breach of natural justice, kindly be quashed.
3. The Id. CIT (A) erred in law as well as on the facts of the case in confirming the penalty u/s 271B of the Act of Rs. 1,50,000/- imposed by the AO. The penalty so imposed by the AO and confirmed by the Id. CIT (A) being totally contrary to the provisions of law and facts kindly be deleted in full.
 4. The appellant prays your honour to add, amend or alter any of the grounds of the appeal on or before the date of hearing.
2. The brief facts of the case are that the assessee is a limited company. The assessment in this case was completed under section 144 read with section 147 of the IT Act, 1961 on 31.10.2018 at a total income of Rs. 5,08,87,740/-. The AO has noticed that the appellant has not maintained books of account and got the same audited under section 44AB of the Act. The AO while framing the assessment also initiated penalty proceedings under section 271B for non-maintenance of books of accounts. During the proceedings the AO issued various notices to the assessee which were duly replied by the assessee in timely manner. However, unsatisfied with the response of the assessee, the AO passed penalty order dated 30.04.2019. Aggrieved by the order of AO, the assessee preferred appeal before the Ld. CIT (A), however, the Ld. CIT (A) passed an ex-parte order without affording a reasonable and adequate opportunity to the assessee. Hence, the assessee is in appeal before the Tribunal.
3. Before me, the Id. A/R of the assessee reiterated the submissions as made before the Id.CIT (A) and also filed his written submissions as under :-

“1. No adequate opportunity:

The Id. CIT(A) erred in law as well as on the facts of the case in passing the impugned order in a haste on dated 29.12.2023 without affording adequate and reasonable opportunity of being heard. The impugned order having been framed in gross breach of natural justice, kindly be quashed or alternatively be restored to the file of the Id. CIT(A), as would appear from the following date chart:

Chart Showing Different notices and compliances:

S.No.	Date of issuance of notice	Due date of hearing	Response date	Compliance by assessee	Remark
1.	24.12.2020	08.01.2021	09.02.2021	Requested for adjournment	Issued during COVID 19 period
2.	03.11.2022				Notice for enablement of Window
3.	11.06.2024	18.06.2024	03.07.2024	Requested for adjournment	
4.	28.06.2024	04.07.2024	03.07.2024	Requested for adjournment	
5.	09.07.2024	16.07.2024	31.07.2024	Requested for adjournment	

A bare perusal of the above chart shows that the so-called many opportunities granted by the CIT(A) to the appellant, is illusory and shall reveal an interesting fact that the first notice was given in December 2020 which was duly complied with. However, there was a long silence and after a long gap of almost 22 months the Id. CIT(A) woke up and issued a notice on 03.11.2022 for enablement of window, which did not require any response neither it had such option. Again, thereafter there was complete silence for around 19 months before issuing notices on 11.06.2024, 28.06.2024 & 09.07.2024 providing a short period of 7 days only. Immediately thereafter on 31.07.2024 he passed the ex-parte order.

The question is that when the authority sends the notice after such a long gap it may be difficult for the recipient to check his e-mail/portal every next day throughout the period of 2-3 years. Not only the assessee but also the tax consultant who are also practicing in small towns are not sound with the technical knowledge and infrastructure, it is quite basic for them to have lost sight of such communication if any sent by the department. Another aspect to take note of is that COVID-19 was still prevalent at that time and activities did not resume with full force and it was only in March 2022, the normalcy could have been said to be restored as evident from the order of Apex court passed on dated 23.03.2020 in Suo motu Writ Appeal (Civil) No. 3 of 2020 on the issue of law of limitation holding as under:

“...The period from 15-3-2020 till 28-2-2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.”

In the meanwhile, the Central Government was continuously relaxing the time limits for taking actions/making compliance through TOLA.

In these circumstances there appears no justified reason at all as to why the Id. CIT(A) was issuing notices for such a short period of 7-10 days only. Also there was no urgency to pass the appellate order hastily. Therefore, there is no hesitation to say that the Id. CIT(A) just to show a disposal on his part, passed the impugned order in complete disregard to principles of natural justice i.e., Audi alteram partem.

Hence, to do substantial justice, the appeal kindly be decided in favour of the assessee or alternatively restored to the file of the Id. CIT(A).

2. Reason of Non-Compliance: It is submitted that on the face though appears that there has been non-compliance from the side of the Appellant however the factual background was not properly appreciated rather ignored in as much as, at that point of the assessee company has been nonoperational since 2014, with no ongoing day-to-day activities or employees. Due to this, the director faced challenges in identifying and submitting the necessary documents within the limited time frame provided, requiring an extension to file an appropriate response. Additionally, the company underwent multiple searches during the year under consideration, leading to the scattering of various documents and details, further complicating the process of retrieving information. This difficulty is also evident from the fact that even in the quantum appeals, the assessee is struggling to collect the required documents and information.

2. CIT(A)/NFAC did not act as per Law: The CIT(A) has not decided the appeal on merits which is contradictory to the mandate of Section 250(6). The same is reproduced here under for your ready reference:

“(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.”

A bare perusal of above provision makes it clear that the CIT(A) is bound to dispose of the appeal before him on merits. Merely because the assessee didn't turn up, he cannot dismiss the appeal in Limine. The law contained u/s 250(6) & 251 do not at all contemplates the CIT(A) passing an appellate order in this manner. There are judicial guidelines to support this contention.

2.2. Supporting Case Laws:

2.2.1. Corporate International Financial Services V ITO ITA No. 2147/Del/2017 held as:

“Further, it is well-settled that powers of Ld. CIT(A) are coterminus with powers of the Assessing Officer. Useful reference may be made to order of Apex Court decision in CIT vs. Kanpur Coal Syndicate 53 ITR 225 (SC) in which it was held that the first appellate authority, the Ld. CIT(A) in the case before us, has plenary powers in disposing off an appeal; that the scope of her power is co-terminus with that of the ITO, that she can do what the ITO can do and also direct him to do what he failed to do. In this context, useful reference may also be made to Hon’ble Apex Court’s decisions in the cases of CIT vs. Rai Bahadur Hardutroy Motilal Chamaria 66 ITR 443 (SC) and CIT vs. B.N. Bhattachargee 118 ITR 461 (SC) for the proposition that an assessee having once filed an appeal, cannot withdraw it and even if the assessee refuses to appear at the hearing, the first appellate authority can proceed with the enquiry and if he finds that there has been an underassessment, he can enhance the assessment. Just as, once the assessment proceedings are set in motion, it is not open to the Assessing Officer to not complete the Assessment Proceedings by allowing the Assessee to withdraw Return of Income; it is similarly, not open for Ld. CIT(A) to not pass order on merits by dismissing the appeal in limine, whether on account of non-prosecution of appeal by the Assessee or due to the Assessee seeking to withdraw the appeal or if the assessee does not press the appeal. When the Commissioner (Appeals) dismisses the appeal of assessee in limine for non-prosecution of appeal by the assessee; in effect, indirectly it leads to same results as withdrawal of appeal by assessee. When the assessee is not permitted to withdraw the appeal filed before the first appellate authority, the first appellate authority is duty bound to not allow a situation to arise, through dismissal of appeal in limine for non-prosecution of appeal before the first appellate authority; in which, in effect, indirectly the same results are obtained as arise from withdrawal of appeal by the assessee. What cannot be permitted in law to be done directly, cannot be permitted to be done indirectly either, as is well settled. In view of the foregoing discussion; it is amply clear that Ld. CIT(A) was in error in dismissing the appeal in limine for non-prosecution of appeal by the assessee. We draw support from order of Hon’ble Bombay High Court in the case of CIT vs. Premkumar Arjundas Luthra (HUF) [2016] 240 taxman 133 for the proposition that Ld. CIT(A) is required to apply her mind to all issues which arise from impugned order before her whether or not same had been raised by appellant before her; and further, that CIT(A) is obliged to dispose of the appeal on merits.

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In view of the foregoing, **we hold that the Ld. CIT(A) erred in dismissing the appeal of the Assessee in limine for non-prosecution** of appeal by assessee. We set aside the impugned order of the Ld. CIT(A) and we direct the Ld. CIT(A) to pass denovo order as per law, in accordance with Sections 250 and 251 of I.T. Act.”

2.2.2 CIT vs. Premkumar Arjundas Luthra (HUF) [2016] 240 taxmen 133 it was held that:

“8.....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(l)(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 dear that while considering the appeal, the CTT(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 CTT(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 CTT(A) to dismiss the appeal on account of nonprosecution of the appeal by the assessee. **This is amply clear from the Section 251(l)(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.***

2.2.3 The decision of Shri Onkar Mal in ITA No. 1262/JP/2018 followed in Shri Ram Borewell & Construction company V ACIT ITA No. 180/JP/2019 (DPB 7-10) it was held as:

“As per provisions of Section 250(6) of the Act, the Id. CIT(A) is required to pass a speaking order in writing giving reasons for reaching to the conclusion. However, the order passed by the Id. CIT(A) are not in terms of Section 250(6) of the Act. Therefore, in the substantial interest of justice, we set aside the ex parte order of the Id. CIT(A) and restore the matter back to the file of the Id. CIT(A) for deciding the issue afresh on merits. The assessee is also directed to appear before the Id. CIT(A) within two months from the date of receipt of this order. In case of any failure on the part of the assessee, the Id. CIT(A) is at liberty to pass order after considering the material placed on record.”

3.1 The impugned assessment is not a best judgment assessment as contemplated by law: It is submitted that the AO also did not meet with the requirements of making a “best judgment assessment”. It is submitted that while making an assessment u/s 144 the AO does not have blind and arbitrary powers to make the assessment, the way he wants. On the contrary, the law enjoins upon him a more onerous duty in such a circumstance in as much as he has to act in the capacity of quasi-judicial authority, who

is supposed to take a best judgment, while making a fairest possible assessment of the income of an assessee.

3.2 Fair estimation required- Judicial Guideline: For a better appreciation, a reference may kindly be made to the commentary by the Id. Authors Chaturvedi Pethisaria Vol. 3 Edition V at page 4932, reproduced hereunder verbatim:-

“Best Judgment assessment – how to be made? – In making a best judgment assessment the Assessing Officer must not act dishonestly or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must be able to take into consideration local knowledge and repute in regard to the assessee’s circumstances, and his own knowledge of previous returns by and assessments of the assessee and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it must be honest guess-work [CIT Vs. Laxmi Narain Badridas , (1937) 5 ITR 170, 180 (PC), reversing (1934) 2 ITR 246 (Nag); CIT Vs. S. Sen, (1949) 17 ITR 355 (Orissa); Singh Engineering Works Vs. CIT , (1953) 24 ITR 93 (All); M.A. Rauf Vs. CIT, (1958) 33 ITR 843 (Pat); Mohanlal Mahribal Vs. CIT, (1982) 133 ITR 683 (MP) ; Ganga Prasad Sharma Vs. CIT, (1981) 132 ITR 87 (MP) & (1981) 127 ITR 27 (MO); Balchand Udairam Vs. State of Sikkim, (1989) 180 ITR 530, 553 (Sikkim); K.T. Thomas Vs. Ag ITO, (1990) 184 ITR 561, 565 (Ker.)].

In making a best judgment assessment the Assessing Officer **does not possess absolutely arbitrary authority** to assessee at any figure he likes and that although he is not bound by strict judicial principles he should be guided by rules of justice, equity and good conscience [Abdul Qayum & Co., Vs. CIT, (1933) 1 ITR 375, 378 (Oudh)]. A best judgment assessment is not by way penalty for non-compliance [Jot Ram Sher Singh Vs. CIT, (1934) 2 ITR 129 (All) and it cannot be made capriciously in utter disregard to the material on record [Gunda Subbayya Vs. CIT, (1939) 7 ITR 21, 26-7 (Mad-- FB); CIT Vs. S. Sen, (1949) 17 ITR 355 (Orissa)].”

3.3 A decision is in the case of **CIT v/s Gotan Lime Khaniz Udyog (2002) 256 ITR 243 (Raj):**

However, your honor shall find that the lower authorities in the present case have not conformed to these settled principles by the courts, while making the impugned assessment u/s 144. Hence, the impugned order kindly be quashed or alternatively be set-aside to the AO to be made afresh or alternatively to the Id. CIT(A).

Hence, to do substantial justice, keeping all the facts and circumstances and considering the same sympathetically the impugned order therefore deserves to be quashed. Alternatively, it is therefore humbly prayed that the matter may

kindly be set aside and **restored to the file of the Id. CIT(A) or AO for consideration and decision afresh and oblige.”**

4. On the other hand, the Id. D/R supported the orders of the revenue authorities and submitted that the order of the Id. CIT (A) be upheld.

5. I have heard the rival contentions and perused the material available on record. At the very outset, I noticed that assessee was ex party before Ld. CIT (A). Before me it has been argued that assessee could not get reasonable opportunity of being heard from the LD. CIT (A). The Id. A/R relied upon his written submissions wherein a chart showing different notices and compliances made have been mentioned. The same is reproduced below :-

S.No.	Date of issuance of notice	Due date of hearing	Response date	Compliance by assessee	Remark
1.	24.12.2020	08.01.2021	09.02.2021	Requested for adjournment	Issued during COVID 19 period
2.	03.11.2022				Notice for enablement of Window
3.	11.06.2024	18.06.2024	03.07.2024	Requested for adjournment	
4.	28.06.2024	04.07.2024	03.07.2024	Requested for adjournment	
5.	09.07.2024	16.07.2024	31.07.2024	Requested for adjournment	

After hearing both the parties at length and after evaluating the documents placed on record and the orders passed by the revenue authorities, I noticed that the first notice

was given to the assessee in the month of December, 2020 which was complied with by the assessee, but thereafter there were long gap of almost 22 months when another notice on 3rd November, 2022 was issued for enablement of Window, which did not require any response neither there was any such option. Again, thereafter there was complete silence for around 19 months before issuing notices on 11.06.2024, 28.06.2024 and 09.07.2024 which shows that within a short span of time three notices were issued to the assessee but was not sufficient to collect all the documents and other required information for furnishing before Ld. CIT (A). In my considered view, the opportunity of hearing means opportunity of proper hearing and a reasonable time is to be granted to the respective party and even otherwise, the Ld. CIT (A) has passed an ex parte order and the principles laid down by the Hon'ble High Courts are that the issues between the parties is to be decided on merits. Therefore, without commenting anything on merits, I feel it proper and appropriate to restore the matter back to the file of Ld. CIT (A) for afresh decision.

6. Before parting, we may make it clear that our decision to restore the matter back to the file of Ld. CIT(A) shall in no way be construed as having any reflection or expression on the merits of the dispute, which shall be adjudicated by Ld. CIT(A) independently in accordance with law. Consequently, the appeal of the assessee is restored back to the file of the Ld. CIT(A) for afresh decision by providing adequate opportunity of being heard to the assessee and the appeal of the assessee is allowed for Statistical purposes.

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

Order pronounced in the open court on 26/09/2024.

Sd/-
(संदीप गोसाईं)
(SANDEEP GOSAIN)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 26/09/2024.

Das/

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Vimla Devi Agrotech Ltd., Kota.
2. प्रत्यर्थी / The Respondent- ACIT Ward 1(2), Kota.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 1065/JP/2024}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar