INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI VIMAL KUMAR, JUDICIAL MEMBER

ITA Nos.242 & 249/Del/2024
(Assessment Year: 2013-14)

PME Power Projects India Ltd, 303, South Delhi House-12, Community Centre, Zamradpur, New Delhi (Appellant) **PAN:AAACP1698Q**	Vs.	DCIT, Circle-19(1) & (2), New Delhi (Respondent)

Assessee by :	Shri Gaurav Jain, Adv Ms. Bharti Sharma, Adv
Revenue by:	Shri Rajesh Dhanesta, Sr. DR
Date of Hearing	10/10/2024
Date of pronouncement	16/10/2024

O R D E R

PER BENCH

1. These appeals in ITA No.242/Del/2024 and 249/Del/2024 for AY 2013-14, arises out of the order of the Commissioner of Income Tax (Appeals)-7, New Delhi [hereinafter referred to as 'ld. CIT(A)', in short] in Appeal No. 10459/CIT(A)-7/Del/2016-17 dated 03.04.2017 against the order of assessment passed u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 19.01.2016 and 22.07.2016 u/s 271(1)(c) by the Assessing Officer, DCIT, Circle-19(1) & (2), New Delhi (hereinafter referred to as 'ld. AO').

2. At the outset, there is a delay in filing of appeal by the assessee by 2423 days. In this regard, the following sequence of events together with the relevant dates thereon would be relevant and tabulated as under:-

Dates	*Sequence of Events*
30.03.2015	*The assessee company filed its return of income for the impugned assessment year on 30.03.2015 u/s 139 of the Income Tax Act, 1961 ("Act") declaring an income of Rs. 107,56,68,480/- with self-assessment tax payable of Rs. 49,00,67,340/-.*
05.06.2015	*An Intimation order under section 143(1) the Act was received with demand payable of Rs. 42,47,54,300/-.*
30.09.2015	*Notice u/s 143(2) of the Act was issued to the assessee company.*
29.10.2015	*The AO vide order sheet entry dated 29.10.2015 asked the assessee to remove the defect in the return of income and pay taxes u/s 140A of the Act.* *However, the assessee due to financial difficulties could not pay the outstanding self-assessment tax and due to this failure, the AO treated the return of income filed by the assessee as invalid return u/s 139(9) of the Act.*
19.01.2016	*The Assessing Officer passed the assessment order u/s 143(3) of the Act and assessed the total income at Rs. 1,10,42,45,751/- as against the income declared of Rs. 1,07,56,68,480/- in the invalid return of income after making certain disallowances aggregating to Rs. 2,85,77,271/-.*
03.04.2017	*The ld. C1T(A) dismissed the appeal of the assessee company as non-maintainable u/s 249(4)(a) of the Act on the ground that the assessee has not paid the tax due on the income returned till date, therefore, the appeal is not maintainable.*
21.08.2017	*The AO passed an order u/s 154/155/143(3) of the Act to rectify the interest amount of Rs. 3,55,94,213/-.*
11.01.2018	*The department issued a show cause notice for initiation of prosecution proceedings u/s 276C(2) of the Act on account of willful evasion of payment of self-assessment tax.*
28.03.2019	*Sanction under 279(1) IT Act was granted by the PCIT-Delhi-07 for initiation of prosecution against the assessee company and subsequently a complaint was filed before the Ld. Additional Chief Metropolitan Magistrate, Tis Hazari Courts, Delhi.*
29.07.2019	*The Ld. ACMM took cognizance of offences and issued summons against the directors of the assessee company.*
20.09.2022	*The Hon'ble Delhi High Court vide order dt. 20.09.2022, in W.P.(CRL) No. 721/2021, stayed the criminal proceedings pending before the Ld. Additional Chief Metropolitan Magistrate after observing that the liability for payment of self-assessment tax arose due to notional income which is not a real income.*
06.02.2023	*The assessee company filed a rectification application dated 06.02.2023 and requested the ld. Assessing Officer for revision of the income of the assessee company by reducing the unrealized revenue/income on account of the pending/unrealized dues from the overseas debtors.*
10.10.2023	*Since the rectification application was pending for more than 6 months, the assessee company filed a writ petition seeking issuance of directions against the AO to dispose off the rectification application dated 06.02.2023. The*

	Hon'ble Delhi High Court vide order dated 10.10.2023 admitted the Writ petition and directed the Assessing officer to dispose off the rectification application within eight weeks' time from the date of this order.
24.11.2023	*The Assessing Officer disposed of the rectification application vide their rectification order dated 24.11.2023 wherein the request for rectification was rejected by the Assessing Officer on the grounds that mistake in the case of assessee was not obvious and apparent from records and also because of the reason that the rectification application was time-barred.*
24.01.2024	*The assessee company filed an appeal before the Hon'ble 1TAT, Delhi against the CIT(A) order dated 03.04.2017*

3. The assessee had filed a delay condonation petition explaining in detail the aforesaid events by stating that it was pursuing other remedies provided in the Act based on wrong professional advice given to it. The assessee had also relied upon the decision of *Hon'ble Supreme Court in the case of Motilal Padampat Sugar Mills Co. Ltd vs State of Uttar Pradesh & Ors reported in 118 ITR 326 (SC)* which emphasized that assessee cannot be presumed to have legal awareness and the principle of 'ignorantia juris non excusat' (ignorance of law is of no excuse) legal maxim was underscored. The said decision specifically held that there is no presumption that every person knows the law. It is often said that everyone is presumed to know the law, but that is not a correct statement: there is no such maxim known to the law and it would be contrary to common sense and reason if it were so. It is impossible to know all the statutory law and not very possible to know all the common law. The assessee also placed reliance on the following decisions of *Hon'ble Jurisdictional High Court in the case of Ardent Info Systems (P) Ltd vs PCIT reported in 152 taxmann.com 496 (Del HC) and Kamlesh Gupta vs Union of India reported in 130 taxmann.com 494 (Del HC)* wherein the aforesaid decision of Hon'ble Supreme Court was followed. The learned AR also placed reliance on various other decisions of Hon'ble High Courts and Tribunals in support of his proposition.

3.1. Per Contra, the learned DR vehemently objected to the condonation of delay by arguing that the assessee in the instant case is a very big company fully guided by the Professionals and all the cases relied upon by the learned AR were rendered where the assessees were individuals and not companies.

3.2. On going through the detailed explanation offered by the assessee for the condonation of delay and from the sequence of events listed above, we are convinced that there was 'sufficient cause' for the assessee in not preferring an appeal before this Tribunal in time and the delay had not been caused by any malafide in action or latches on the part of the assessee. We find that the expression 'sufficient cause' has been interpreted to mean a cause which is beyond the control of the party invoking the aid of the provisions of law and any cause that prevents a person from approaching the court within time is sufficient, and in doing so it is the test of reasonable man in normal circumstances which has to be applied. We find that the reliance placed on the decision of *Hon'ble Bombay High Court in the case of Vijay Vishan Meghani vs DCIT reported in 398 ITR 250 (Bom)* is well founded , wherein it was held that where assessee filed appeal before Tribunal with a delay of 2984 days by taking a plea that he was wrongly advised by his Chartered Accountant earlier not to file appeal, in view of fact that assessee produced affidavit of Chartered Accountant in support of his plea and said affidavit was not contested by revenue authorities, Tribunal was not justified in refusing to condone delay in filing appeal. We find that once 'sufficient cause' is shown and established beyond reasonable doubt, then the number of days / years of delay would not be a relevant consideration for the purpose of condonation of delay. In the instant case, as stated supra, 'sufficient cause' is clearly shown. Reliance placed on the following decisions by the learned AR before us for condonation of delay is well founded:-

a) Decision of Hon'ble Supreme Court in the case of Senior Bhosale Estate (HUF) reported in 112 taxmann.com 134 (SC) – delay of 1754 days condoned

b) Decision of Hon'ble Supreme Court in the case of N Balakrishnan vs M Krishnamurthy reported in (1998) 7 SCC 123 (SC) – delay of 883 days condoned

c) Decision of Hon'ble Bombay High Court in the case of Vijay Vishan Meghani reported in 398 ITR 250 (Bom) – delay of 2984 days condoned

d) Decision of Hon'ble Madras High Court in the case of CIT vs K S P Shanmugavel Nadar reported in 30 taxman 133 (Mad) – delay of 20 years condoned

e) Decision of Delhi Tribunal in the case of Smt Kamalpreet Singh vs ITO in ITA Nos. 1750 & 1751 /Del/2023 dated 15.5.2024 - delay of 1670 days condoned

f) Decision of Chennai Tribunal in the case of M/s Saravana Stocks Investments (P) Ltd vs DCIT in ITA No. 2803 /Chny/ 2019 dated 12.4.2023 – delay of 1526 days condoned

4. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we are inclined to condone the delay in filing of appeals before us and admit the appeals for adjudication.

5. The assessee has raised the following grounds of appeal in ITA No. 242/Del/2024 :-

"1. That the order passed by the Ld. Commissioner of Income Tax (Appeals) (herein after referred to as "the CIT(A)") dated 03.04.2017 dismissing the appeal of the assessee company as not maintainable, as per the provisions of Section 249(4)(a) of the Income Tax Act, 1961 (herein after referred to as "Act), is erroneous and bad in law and on facts.

1.1 That the Id. CIT(A) has erred in law and on the facts in dismissing the appeal by applying the provisions of Section 249(4)(a) of the Act which can only be applied in case of filing of valid return of income and in the present case since the Id. AO treated the return of income filed by the

assessee for the impugned assessment year as invalid return, therefore, the clause was not applicable and thus wrongly applied by the Id. CIT(A).

2. That the Ld. CIT(A) has erred in law and on the facts by dismissing the appeal of the assessee and thereby upholding the impugned assessment order dated 19.01.2016 without appreciating that the impugned assessment order is without jurisdiction, bad in law and deserves to be quashed since it was passed under section 143(3) whereas it ought to have been passed u/s 144 of the Act.

2.1 That the ld. CIT(A) has failed to appreciate the legal position that where the assessee has failed to file any valid return of income under the provisions of section 139, then the provisions of section 144 were attracted, and the Assessing Officer had to pass assessment order to the best of his judgment, without relying upon the alleged invalid return of income.

Without Prejudice to the above-mentioned grounds:

3. That the Id. CIT(A) has erred in law and on the facts in affirming the Impugned assessment order wherein the ld. AO assessed the income of the assessee company at Rs. 1,10,42,45,751/- as against returned income of Rs. 1,07,56,68,480/-.

3.1 That the Id. CIT(A) has failed to appreciate that once the Id. AO treated the return of income as invalid return, he could not assess the income declared by the assessee in such invalid return, in the assessment order.

4. That the Id. CIT(A) has erred in law and on the facts in dismissing the appeal of the assessee and thereby affirming the disallowance of the following business expenditures made by the Id. AO on ad-hoc estimation basis without giving sufficient and plausible reasons for making the said disallowances and also on the basis of conjectures and surmises, which is not maintainable in law: -

a) Foreign Travelling Expenses	*Rs. 4,11,472/-*
b) Sales & Business Promotion Exp	*Rs. 1,74,450/-*
c) Diwali Expenses	*Rs. 2,20,043/-*
d) Car Running Expenses	*Rs. 2,28,490/-*
e) Staff Welfare Expenses	*Rs. 1,87,126/-*
f) Consumable Stores	*Rs. 32,440/-*
g) Conveyance Exp	*Rs. 2,21,366/-*
h) IPO Expenses	*Rs. 2,61,75,175/-*
Total	***Rs. 2,76,50,562/-***

5. That the ld. CIT(A) has erred in law and on the facts in dismissing the appeal of the assessee and thereby affirming the disallowance of the

sundry creditors of Rs. 9,23,496/- made by the ld. AO u/s 41 of the Act without appreciating the fact that the said creditors were genuine and during the impugned year, there was no transaction with the said creditors.

6. That the Ld. CIT(A) has erred in law and on the facts in dismissing the appeal of the assessee and thereby affirming the disallowance of the Initial Public Issue ("IPO") expenses of Rs. 2,61,75,175/- made by the ld. AO treating the same as capital expenditure.

7. On the facts and circumstances of the case, the income aggregating to Rs.77,80,20,607/- did not accrue to the appellant or was notional income, which could not have been brought to tax notwithstanding inclusion thereof in the books of account as well as in the total income declared in the invalid return of income.

8. The appellant craves leave to alter, amend or any other grounds of appeal either before or during the course of hearing."

6. We have heard the rival submissions and perused the materials available on record. The learned AO observed that the assessee company is stated to be engaged in the business of manufacturing of power distribution transformers and EPC projects. The assessee filed its return of income for the Asst Year 2013-14 on 30.3.2015 u/s 139 of the Act declaring income of Rs 107,56,68,480/- with self assessment tax payable of Rs 49,00,67,340/-, which was duly processed u/s 143(1) of the Act on 5.6.2015. In the said return, the assessee had offered the income on mercantile basis based on the invoices raised on the debtors and booked sales thereon. But the monies were not realized at all by the assessee company. Even the invoices raised by the assessee company were not even acknowledged by the Debtors.

7. During the course of scrutiny assessment proceedings, the assessee was asked to remove the defect of filing the return without payment of self assessment tax, for which a defect notice in terms of section 139(9) of the Act was duly issued by the learned AO on 29.10.2015. The assessee sought time from the ld AO to make payment of the said taxes. Since the

invoices per se were not even acknowledged by the Debtors, the assessee could not realize the sale proceeds from the Debtors and accordingly did not have monies in its kitty to make payment of self assessment tax. For non-payment of self assessment tax, the learned AO treated the return filed by the assessee as an invalid return which fact is mentioned by him in para 1 page 2 of his order. The learned AO having treated the return filed by the assessee as non-est and invalid, proceeded to look into the very same return and made disallowance of various expenses and addition towards sundry creditors totaling to the tune of Rs 2,85,77,271/- and determined the total income at Rs 110,42,45,751/- which admittedly included the returned income of Rs 107,56,68,480/-. The assessee preferred an appeal before the learned CIT(A), who dismissed the appeal in limine on the ground that the tax due on the returned income was not paid by the assessee and hence in terms of section 249(4) of the Act, the appeal would not be maintainable. Aggrieved, the assessee is in appeal before us.

8. It is not in dispute that the Debtors / Customers had not paid the monies due to the assessee company against the invoices raised on them. First of all, the assessee had booked the sales income based on the invoices raised on the customers, who did not even acknowledge the invoices raised by the assessee. Hence the certainty of realization of sale proceeds from the Debtors become doubtful and accordingly, the income thereon ought not to have been offered by the assessee in the return. Once the return is treated as defective and invalid in terms of section 139(9) of the Act, the only recourse legally available to the learned AO is to frame the assessment u/s 144 of the Act. Whereas, in the instant case, the learned AO had framed the assessment u/s 143(3) of the Act by starting the computation of income from the income returned by the

assessee in the sum of Rs 107.57 crores. One of the condition prescribed in Explanation (aa) of section 139(9) of the Act for treating the return as defective is non –payment of self assessment tax as per the law prevailing at the relevant point in time and applicable for the year under consideration before us. Hence we hold that the learned AO was duly justified in treating the return filed by the assessee as invalid and defective. Having done so, he ought to have ignored the said return completely and ought not to have started the computation of income with the income returned by the assessee. This is the major mistake committed by the learned AO. Merely because the assessee co-operated in the assessment proceedings by furnishing the requisite details called for by the learned AO, it would not give way for the learned AO to frame the assessment u/s 143(3) of the Act. In our considered opinion, the learned AO should have framed the assessment only u/s 144 of the Act. The CBDT Instruction containing Standard Operating Procedures dated 13.11.2013 in this regard would be relevant which is reproduced hereinbelow:-

> ***"SECTION 139 OF THE INCOME-TAX ACT, 1961 - RETURN OF INCOME - TREATING E-RETURNS OF A.Y. 2013-14 WHERE UNPAID SELF-ASSESSMENT TAX EXISTS ON THE DATE OF FILING OF RETURN AS DEEMED DEFECTIVE RETURNS LETTER [F. NO. DIT(S)-II/CPC/2013-14/UNPAID SELF-ASSESSMENT TAX]/13798, DATED 13-11-2013***
>
> *Kindly refer to the above (Ref : System Letter of even no., dated 22-10-2013), the first batch of PAN-wise data for AY 2013-14 for assessees who have not paid self-assessment-tax (Rs. 100/- or more) on the day of filing of their e-returns was placed on i-Taxnet (http://10.152.2.10/) in the following path :*
>
> ***Resources → Downloads → DIT_SYSTEMS → Unpaid Self-Assessment-Taxes in e-Returns of AY 2013-14***

2. *I have been directed to inform you that in view of the confusion regarding issue of notice u/s. 139(9) and follow up a detailed Standard Operating Procedure (SOP) (Annexure) for handling such E-filed Returns where self assessment tax is not paid has been approved by CBDT. It is requested, that, the Assessing Officers in respective regions may be directed follow the SOP enclosed herewith.*

3. *This issues with the approval of Chairperson CBDT.*

ANNEXURE

Standard Operating Procedure for handling E-filed Returns where self-assessment tax is not paid

The data of cases where self Assessment Tax is not paid has already been forwarded to the field AOs through i-taxnet/ E-filing AO Portal. Jurisdictional AO should issue notice u/s 139(9) and consider giving further period if an application requesting the same is made by assessee. Standard template for issuance of such notice is provided in ***Annexure A****. The assessee after payment of self assessment tax will have to upload their revised/ corrected returns through the return u/s 139(9) mechanism on e-filing website (this involves uploading the return again with details of payment of self assessment tax).*

CPC has now developed the functionality of issuing notice u/s 139(9) on this issue also. In future, following procedure is being prescribed for handling E-filed Returns where self assessment tax is not paid:

1. *CPC on taking up a case for processing will identify the defective returns on account of non-payment of self assessment tax and issue notice under section 139 (9) to the assessee informing them of the defect in their returns and advising them to upload corrected return through e-filing portal within 15 days. Handling of such defects will form a part of the defective return handling procedures at CPC.*

2. *The data of cases where defective notice under section 139(9) has been issued from CPC and where self assessment taxes have not been paid within 15 days shall be forwarded to the field AOs along with the CPC communication reference details, through i-taxnet/ E-filing AO Portal every month.*

3. *Jurisdictional AO should issue follow-up letters as per the template attached in* ***Annexure B*** *to the assessee and ensure payment of the tax if not already done and uploading of*

corrected return on the e-filing portal.

4. *Assessee after payment of self assessment tax will have to upload their revised/ corrected returns through the return u/s 139(9) mechanism on e-filing website (this involves uploading the return again with details of payment of self assessment tax).*

5. *Directorate of Systems will refresh the list of cases where Self Assessment /Tax remains unpaid every fortnight after removing cases where return u/s 139(9) has been received. The revised list of cases shall be forwarded to the field AOs through I-taxnet/ E-filing AO Portal every month for further follow up.*

Note: Presently when the assessee selects the option u/s 139(9) in the e-filing utility, the utility asks for the CPC communication reference number. In respect of the cases where notice is issued from the assessing officer's end, this requirement can be bypassed. Further, when the notice is sent from CPC a unique password is also generated and communicated to the assessee through the email communication. This password is to be disclosed while uploading the XML in respect of defective returns. In the e-filing server, generation of the ITR V is suppressed in case of a defective return which is uploaded through this facility.

ANNEXURE A

To

_____

_____

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Dear Sir/Madam,

Subject : Notice under section 139 (9) of Income Tax Act, 1961 - Your Return of Income for AY 2103-14

The return of income filed by you for AY _____ is considered defective u/s 139(9) of the Income Tax Act, 1961 as tax determined as payable in the return of income filed has not been paid.

You are herewith afforded an opportunity to rectify the above mentioned defects within a period of fifteen days from the receipt of this notice by paying your taxes and filing your return containing details of payment of taxes using the link ***"e-File in response to notice u/s 139(9)"*** *under the* ***"e-File"*** *section of the e-filing portal at http://incometaxindiaefiling.gov.in as per the prescribed procedure.*

Yours faithfully

Assistant Commissioner/ Deputy Commissioner/ITO

ANNEXURE B

To

_____

_____

_____

Dear Sir/Madam,

Subject: Follow-up of Non-payment of Self Assessment tax - Your Return of Income for AY 2012-13/2013-14

The return of income filed by you for AY _____ vide e-filing acknowledgement number _____. dated _____ is considered defective u/s 139(9) of the Income Tax Act, 1961 as tax determined as payable in the return of income filed has not been paid. In this connection a notice under section 139(9) has already been communicated to you through email by CPC, Bangalore through communication reference number _____ dated _____ Although a time of 15 days was allowed to you to correct the above defect, as per our records no corrected return has been uploaded by you so far and the said defect continues.

You are herewith required to rectify the above mentioned defects at the earliest under intimation to this office failing which the e-return filed by you may be treated as invalid and you may be liable for penal consequences for non-filing of return as per the provisions of law. The procedure for submission of a corrected return in response to notice u/s 139(9) has already been indicated in the e-mail communication from CPC.

Yours faithfully

Assistant Commissioner/ Deputy Commissioner/ITO"

9. The CBDT Instruction dated 12.12.2017 providing guidelines for framing of assessment in respect of defective returns are reproduced below:-

"SECTION 143, READ WITH SECTIONS 144 & 139, OF THE INCOME-TAX ACT, 1961 - ASSESSMENT - GENERAL - PASSING OF

ASSESSMENT ORDER IN RESPECT OF DEFECTIVE RETURNS SELECTED FOR SCRUTINY UNDER CASS CYCLE 2016

LETTER [F.NO.SYSTEM/ITBA/CASS/DEFECTIVE RETURNS/17-18/], DATED 12-12-2017

During CASS Cycle 2016, some of the returns of income which earlier were treated as defective as per provision of section 139(9) of Income Tax Act, 1961 ('Act')either for the reason that the taxes as per the return were not paid or for any other reason specified therein were also selected for scrutiny.

2. *The proviso to section 139(9) of the Act states that—*

> *"Provided that where the assessee rectifies the defect after the expiry of the said period of fifteen days or the further period allowed, but before the assessment is made, the Assessing Officer may condone the delay and treat the return as a valid return."*

As per proviso to section 139(9), an assessee can rectify the defects till the time assessment order is passed provided the delay in complying with notice under section 139(9) of the Act is condoned by the AD. Therefore, to regularize proceedings in scrutiny cases where assessee has already removed the defects as specified u/s 139(9), in such cases under scrutiny, before passing the assessment order u/s 143(3), AD shall condone the delay in removing the defects by the assessee u/s 139(9) and consider such returns as valid.

3. In pending cases as on date, where the defect specified u/s 139(9) of the Act has not been rectified by the assessee, the AD would be required to immediately initiate proceedings under section 144 of the Act by issuing a show-cause as per the first proviso to that section after taking a view that assessee has failed to make a return under section(s) 139(1)/139(4)/139(5) of the Act. However, if assessee, till the date of passing assessment order by the AD, rectifies the defect u/s 139(9) in the return, such cases would also be dealt with in the manner specified in para 2 above and AD would also proceed to pass order u/s 143(3) of the Act in those cases. However, in returns, where defect is not removed by the assessee till the time of passing assessment order, proceeding in those cases would be concluded by passing order u/s 144 of the Act.

4. In view of the above decision, AD is required to take following steps where assessee has not yet responded to defective return notice u/s 139(9) of the Act—

- ***(i) The AD will intimate the assessee about the defective status of return and ask him to rectify the defects through the E-filing portal or communicate it to the AD. Simultaneously proceedings under section 144 of the Act would also be initiated in these cases.***

(ii) ***If the defects as specified are removed, the AD will treat the return as valid and proceed accordingly.***

(iii) ***If the defects are not removed and return remains invalid, the AD will proceed to pass order u/s 144 of the IT Act as if no return was filed by the assessee. However all the steps pre-requssite for passing order u/s 144 of the Act are required to be followed scrupulously by him.***

5. *This is issued with the prior approval of Member (IIT&C), CBDT.*

(EMPHASIS SUPPLIED BY US)

10. The learned DR vehemently argued that the assessee had contemplated to come out with Initial Public Offer (IPO) and had also incurred IPO expenses which was disallowed by the learned AO in the assessment. The assessee is a big company and hence it cannot be accepted that it was ill advised by the Professionals in offering the income in the return on mercantile basis but later seeking reduction of the same in the assessment proceedings. The assessee sought time till Feb 2016 to make good the payment of self assessment tax. The fact of invoices not getting acknowledged by the Debtors was never brought before the learned AO by the assessee. The assessee had duly co-operated with the learned AO by furnishing the requisite details and hence there was no need for the learned AO to frame the assessment u/s 144 of the Act. Accordingly he argued that the learned AO was duly justified in framing the assessment u/s 143(3) of the Act. The learned DR also vehemently pleaded that the CBDT Instructions are not mandatory on the departmental authorities. The learned DR argued that the assessee had colorable device by not paying the tax due on the returned income and trying to create a new story before the Tribunal that the monies were not received from the Debtors.

11. The learned AR before us buttressed the aforesaid arguments of the learned DR by drawing our attention to the order passed by the Hon'ble Jurisdictional High Court in assessee's own case in WP (CRL) 721/2021 & CRL M.A. 5244/2021 dated 20.9.2022 staying the prosecution proceedings launched on the assessee for non-payment of self assessment tax. For the sake of clarity, the entire order of Hon'ble High Court is reproduced below:-

> *"Mr. Jain, learned counsel for the petitioner states that in the present case, the petitioner has declared an income of Rs. 107 crores for the financial year 2012-13 (assessment year 2013-14) and as per self assessment assessed tax as 49 crores and paid advance tax of Rs. 9 crores. Out of this, when the income of Rs. 107 crores was calculated, the petitioner also included Rs. 495 Crores which was to be received from four debtors which are as follows:-*

Debtors	*Rs.*
ZESCO	*246 Crores (approx)*
Uttar Haryana Bijli Vitran Nigam Ltd	*Rs. 130 crores*
ZENT Enterprises, Zimbabwe	*USD 33.1 Million*
Domestic debtors	*Rs. 42 crores*

> *He states that the entire Rs. 495 crores as enumerated above has not been received and the petitioner is in litigation with all the above four debtors. He further submits that on account of non-realization of its debts, the petitioner has been declared an 'NPA'.*
>
> *Mr. Jain further submits that all this above information has duly been shared with the respondent.*
>
> *He states that on account of non-payment of tax, he has been declared as a wilful defaulter and proceedings under Section 276C read with 278B and 278E of the Income Tax Act, 1961 have also been initiated against him.*
>
> *In this view of the matter, he states that the entire exercise undertaken by the petitioner based on a wrong understanding of the Income Tax Act and provisions needs to be quashed.*

Mr. Chandra, learned counsel for the respondent states that all these arguments are available to the petitioner at the time of final arguments.

The petitioner further states that when he has not received monies from the debtors, then how can it be assessed to tax? Mr. Chandra, learned counsel states that he may be given some time to address arguments on this aspect.

The counsel has relied on a judgment passed by this Court titled "The Liquidator Polymerland India P. Ltd. Vs. The Deputy Commissioner of Income Tax" (ITA 268, 269 & 270/2008) decided on 19.05.2015, wherein it was held that:-

> *"4. The judgment Shoorji Vallabhdas & Co. (supra) has been recently follows in CIT V. Excels Industries Ltd. MANU/DE/8071/2007: (2008) 358 ITR 245 inchere it was reiterated that income tax is levied on real income and not hypothetical income. Therefore, entries inspired by realistic prospects of their realisation cannot per se constitute the basis of a valid levy. This view finds support in the Division Bench ruling of this Court in CIT V. Gases MANU/DE/8071/2007 (2008) Goyal MG 303 ITR 159, Furthermore, this Court is of the opinion that having once accepted the assessee's explanation, with respect to the income not in fact accruing and therefore not liable to be taxed for the previous period 1998-99, the Revenue could not have in the absence of any compelling reason, treated an identical subject matter for succeeding years as it did. In view of the foregoing discussions the impugned order of the ITAT is set aside. The appeal consequently succeed and allowed."*
>
> *The counsel has also relied on "Commissioner of Income Tax, Bombay City I vs. Shoorji Vallabhdas and Co." [(1962) 46 ITR 1441 wherein the Supreme Court has opined that:-*
>
> *"..... No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income, if income does not result at all, there cannot be a tax, even tough in book-keeping, an entry is made about a hypothetical income" which does not materialize. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there s obviously neither accrual nor*

> *receipt of. Income, even though an entry to that, effect might,, incineration circumstances, have been made in the books of, account. This is exactly what has happened in this case, as it happened in the Bombay case, which was approved by this court. Here too, the agreements within the previous year replaced the earlier agreements, and altered the rate in such a way as to make the income different from what had been entered in the books of account A mere book-keeping entry cannot be income, unless income has actually resulted, and in the present case, by the change of the terms the income which accrued and was received consisted of the lesser amounts and not the larger. This; was not a. gift by the assessee firm to the manager companies. The reduction was a part of the agreement entered into by the assesses firm to secure a long-term managing agency arrangement for the two companies which it had floated."*

Relying upon the said judgments and based upon the fact Rs. 495 Crores is yet to be released by the petitioners, till the next date of hearing. the proceedings before the Ld. AC MM in CC No. 4612/2019 titled "ITO v. PME Power Solutions (India) Ltd. & Ors" are stayed."

11.1. The learned AR also submitted that even if a particular receipt is offered to tax in the return of income, the same could still be claimed to be not chargeable to tax for various reasons as per law. He submitted that merely because assessee had participated in the assessment proceedings, that would not pave way for the learned AO to frame assessment u/s 143(3) of the Act. He submitted that there is no estoppel against the statute and relied on the decision of *Hon'ble Jurisdictional High Court in the case of CIT vs Bharat General Reinsurance Co. Ltd reported in 81 ITR 303 (Del)* . It is also trite law that jurisdiction to assess a particular income cannot be conferred on the Ld. AO even by consent of the parties. It has to be done as per the statute.

11.2. We find that the Hon'ble Jurisdictional High Court in the case of *Vijay Gupta* v. *CIT reported in 386 ITR 643 (Del)* was, although dealing with ambit and scope of section 264 of the Act , based its findings on the

principle following from Article 265 of the Constitution of India and opined that when it is not in dispute that an amount of tax is recovered beyond the entitlement, technicalities cannot create a road block for the assessee. Thus, the fundamental reason for interference is founded upon Article 265 of the Constitution of India. If it could be established with accuracy and precision that amount of tax is paid beyond permissible limit or not payable at all, it falls within the ambit of error apparent on the face of record. The only caveat, for that purpose is that no long drawn argument should be required to establish the error and such error should be clear, apparent and palpable. Hence the learned AO ought to have considered the plea of the assessee in the rectification proceedings u/s 154 of the Act by applying the theory of 'real income' which has already been decided by the *Hon'ble Supreme Court in the case of CIT vs Shoorji Vallabhdas and Co. reported in 46 ITR 144 (SC)* . In the said decision, the Hon'ble Supreme Court held that :-

> *"In Chamanlal Mangaldas & Co.'s case (supra), the assessee was also the managing agent of a company, and under the agreement was entitled to receive commission at a certain rate. By another agreement, the commission earned by the managing agent for the calendar year 1950 was reduced by Rs. 1 lakh. That agreement took place during the previous year, and the resolution of the board of directors of the managed company was also in the previous year. It was, however, made final on April 8, 1951, at a meeting of the board of directors, but that was beyond the previous year. The High Court of Bombay held that by reason of the resolution during the currency of the previous year, the right of the assessee to commission ceased to be under the original agreement and depended upon and arose only after the decision of the board of directors to reduce the commission. The assessee was, therefore, not held liable on the larger sum which, it was held, was only a hypothetical income, which it might have earned if the old agreement had continued to subsist. The facts of the present case are almost identical, and the principle applied by the Bombay High Court governs this case. The reason is plain.* ***Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an***

> ***entry is made about a "hypothetical income", which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account.*** *This is exactly what has happened in this case, as it happened in the Bombay case Commissioner of Income-tax v. Chamanlal Mangaldas & Co. [1956] 29 ITR, which was approved by this court. Here too, the agreements within the previous year replaced the earlier agreements, and altered the rate in such a way as to make the income different from what had been entered in the books of account.'* ***A mere book-keeping entry cannot be income, unless income has actually resulted, and in the present case, by the change of the terms the income which accrued and was received consisted of the lesser amounts and not the larger.*** *This was not a gift by the assessee firm to the managed companies. The reduction was a part of the agreement entered into by the assessee firm to secure a long-term managing agency arrangement for the two companies which it had floated.*
>
> *In our opinion, the High Court was right in coming to the conclusion that on the facts of this case the larger income neither accrued nor was received by the assessee firm.*
>
> ***(EMPHASIS SUPPLIED BY US)"***

12. Admittedly, the assessee in the instant case, had not cured the defect by making payment of self assessment tax due on the returned income. Hence the learned AO is duty bound to frame the assessment only u/s 144 of the Act as per the aforesaid Instruction of CBDT. The *Hon'ble Supreme Court in the case of Commissioner of Customs vs Indian Oil Corporation Ltd reported in 165 ELT 257 (SC) dated 17.2.2004* had held that Circulars and Notifications issued by the Board are binding on the departmental authorities. Admittedly, the aforesaid instructions of CBDT were issued to the subordinate authorities in terms of powers vested u/s 119 of the Act under the caption "Instructions to subordinate authorities'. Hence the aforesaid instructions of CBDT are fully binding on the departmental authorities. At the cost of repetition, we would like to

state that the aforesaid Instructions clearly state that in the event of defective return filed by the assessee, then the same need to be ignored and assessment is to be framed u/s 144 of the Act by the learned AO. Further as per the reading of provisions of section 144 of the Act, it is very clear that if a person fails to make the return required u/s 139(1) of the Act and has not made a return or a revised return u/s 139(4) or 139(5) of the Act , then the learned AO , shall after taking into account all relevant material which he had gathered, shall, after giving the assessee an opportunity of being heard, make the assessment of total income or loss to the best of his judgement and determine the sum payable by the assessee on the basis of such assessment. Thus in view of provisions of section 139(9) read with section 144 of the Act, the assessment order in the case of the assessee ought to have been passed u/s 144 instead of section 143(3) of the Act in view of the fact that the return of income was considered an invalid return by the learned AO u//s 139(9) of the Act, which is deemed to be treated as non-est return, meaning thereby – as if no return was filed or the return was not in existence at all. This is also already decided by the *Co-ordinate Bench of this Tribunal in the case of Shri Om Prakash Jakhotia vs ACIT in ITA Nos. 968 to 971/Del/2021 dated 21.2.2022 for Asst Years 2009-10 to 2012-13* respectively. The Ground No. 2 raised thereon is reproduced below:-

> *"2. That the Ld. Assessing Officer (herein after referred to as "the Ld. AO") as well as Ld. CIT (A) have failed to appreciate the legal position that where the assessee had failed to file any return of income under any of the provisions of section 139 of the Income Tax Act, 1961 (here in after referred to as "the Act") and had also failed even in terms of the notice issued under section 142(1), then the provisions of section 144 are attracted and the Ld. AO has the power to pass an order to the best of his judgement. In such scenario, the assessment order passed under section 143(3) of the Act is illegal and void ab initio. "*

12.1. It was held by the Tribunal as under:-

"36 We have heard the arguments of both the parties and also considered their written submissions and material placed on record before us which was referred to at the time of hearing.

37 In so far as admission of additional grounds as raised by the assessee for the A.Y 2009-10 and AY 2011-12, are concerned, we find that same are purely legal in nature and are arising out of facts appearing in the impugned assessment orders for the A.Y 2009-10 and AY 2011-12. The Assessing Officer at the very firstand second page of his order has stated that no return of income has been filed by the assessee till the date of the assessment order and has proceeded to assess him under section 143(3) of the Act. Thus, the legal grounds do not require any investigation and the same are being admitted for the purpose of our adjudication.

38 The relevant facts qua this legal and jurisdictional issue raised have already been discussed in detail in the earlier paras and also the detailed submissions made by the parties and the judgments relied upon during the course of hearing have been considered by us.

39 The main argument of the assessee is that the by the Assessing Officer under section 153A r.w.s. 143(3) ought to be quashed since no return of income under section 139(1)/ 153A was filed by the assessee and, therefore, the assessment could only be made under section 144 of the Act. assessment made

40 The Ld. CIT-DR vehemently argued that this is merely a technical 40feet and is protected by the provisions of section 292B of the Act According to her, this could be a typographical error or an inadvertent error and no cognizance of the same should be given. The essence of tre order needs to be seen which very clearly mentions that it is consequent to no return having been filed by the assessee. The Assessing Officer at paras 1 and 1.2 at page nos. 1 and 2 of his order very clearly mentioned that no return of income has been field by the assessee and in fact at para 18, page no. 56 of his order, he initiated penalty proceedings for non-filing of returns.

41 It is also a fact that nowhere in the assessment order has the Assessing Officer mentioned the provisions of section 144 of the Act. In fact what very clearly goes against the Assessing Officer is the fact that vide his show cause notice dated 23.08.2019which is enclosed at page no. 425 of the common PB, he explicitly stated that he had perused the returns of income and that he was seeking information based on the same. The Assessing Officer, it appears while proceeding with the matter was of the belief that the returns of income have been filed and proceeded to examine the income based on that presumption. He sought information on many occasions based on the seized documents and did not refer to the provisions of section 144 anywhere in the order. He even mentioned in his order that the assessee co-operated in the assessment

proceedings and furnished the replies to every notice issued by him. It is trite that the provisions of section 144 are distinct from section 143(3) of the Act and have separate consequences as highlighted in the submissions of the Ld. Counsel in foregoing para 31. These are two separate independent forms of assessments. Assessment under section 143(3) is made consequent to notice under section 143(2) issued based on the return filed by the assessee. In this case, no return of income has been field admittedly and, therefore, no notice under section 143(2) was issued for examining the return.

42 A bare perusal of the section 144 of the Act shows that where no return has been filed under section 139(1) or section 139(4), 139(5) and consequent to notice under section 142(1), the assessment shall be made under section 144 and would be termed as best judgment assessment.

43 The reliance on the judgment of the Hon'ble Supreme Court in the case of CIT v Segu Buchiah Setty [1970] 77 ITR 539 [23-04- 1970] is very pertinent. And the relevant portion is reproduced as under:

> *"The clear import of section 23(4) is that on committing any one of the defaults mentioned therein the Income-tax Officer is bound to make the assessment to the best of his judgment. In other words, if a person fails to make the return required by a notice under section 22(2) and he has further not made a return or a revised return under sub-section (3) of the same section, the Income- tax Officer must make an assessment under this provision."*

44 The same view has been expressed by the various High Courts and Tribunals relied upon by the Id. Counsel in the following decisions:

a. Maya Debi Bansal v. CIT [1979] 117 ITR 125 (Calcutta HC);

b. Prabhat Mills Stores Co. Ltd. [1966] 59 ITR 197 (Calcutta)[21-01-1964];

c. CIT v Laxminarain Badridas [1937] 5 ITR 170 (Privy Council)[19-02-1937]

d. Gulab Badgujar (HUF) v. Income Tax Officer [2019] 179 ITD 807 (Pune - Trib.)

e. Commissioner of Income-tax, Chennai v. T. Rangroopchand Chordia [2016] 241 Taxman 221 (Madras HC)

f. Dr. K.M. Mehaboob v. DCIT [2012] 26 taxmann.com 54 (Kerala HC)

g. S. Kumar Enterprises (Synfabs) Ltd. v. JCIT [2005] 4 SOT 412 (MUM)

h. Des Raj Nagpal [2015] 170 TTJ 37 (Amritsar - Trib.) (UO) [23-03-2015]

i. Meenakshi Devi v. Asstt. CIT in ITA Nos. 96/Agra/2004 & 29/Agra/2005; order dated 28.02.2005 (Agra ITAT)

j. Mohan Lal Balai [2001] 73 TTJ 876 (Jodhpur Trib.)[15- 10-2001]

k. LAL CHAND & CO. [1986] 24 Taxman 228 (Chandigarh) (Mag.) [31-08-1985]

45 It is also trite that the consequences of assessments under section 143(3) and 144 are distinct and different. Assessment under section 143(3) is made after perusal of return of income and seeking evidences in respect of the incomes and expenditure disclosed in such return of income. A best judgment assessment u/s 144 is made without the benefit of return of income and the Assessing Officer can resort to a rejection of books of account and estimation of income. In a best judgement assessment, the interest is calculated under section 234A of the Act till the date of completion of the assessment whereas in assessment under section 143(3), the terminal date of calculating interest is the date of filing of return. Under section 246A of the Act, separate appeal is provided for the assessment made under section 144 of the Act. In the case of a best judgment assessment, as per the provision of section 142(3), there is no requirement of any opportunity of being heard to the assessee in respect of the material gathered by the Assessing Officer whereas in an assessment under section 143(3) whatever evidence is being gathered has necessarily to be confronted. Thus, very different consequences flow from an assessment under section 144 of the Act.

46 It quite clearly comes out that the mention of nature of the order as section 153A r.w.s. 143(3) was not a technical mistake or an error which can be cured by resorting to the provisions of section 292B of the Act. The Assessing Officer even though recording that no return had been filed and no notice under section 143(2) had been issued, continued to proceed as if he was making an assessment under section 143(3) of the Act. Hence, the order made under section 153A/ 143(3) is not legally tenable and ought to have been made under section 144 of the Act. There is a clear distinction between the two forms of orders i.e. section 143(3) and section 144 and therefore, in the present case, the orders ought to have been passed under section 144 of the Act. Hence the orders so passed by the Assessing Officer u/s 143(3) for the A.Y 2012-13 and under section 153A read with section 143(3) for the A.Ys 2011-12 and 2009-10 suffer from an incurable jurisdictional defect and cannot be upheld. On this count alone the assessment orders in respect of A.Ys 2012-13, 2011-12 and 2009-10 do not survive and are liable to be quashed."

13. Further we find from the documents placed on record that in Asst Years 2014-15 and 2015-16, the assessee did not offer the sales income with respect to these Debtors on accrual basis in the returns filed. The learned AO specifically sought for explanation from the assessee in the scrutiny assessment proceedings as to why the said sales income be not brought to tax in the hands of the assessee company on accrual basis. The assessee gave detailed explanations in this regard and the learned AO was duly convinced with the explanations offered by the assessee and no addition was made towards the said sales revenue in the assessments framed u/s 143(3) of the Act on 30.12.2016 and 16.10.2017 for Asst Years 2014-15 and 2015-16 respectively. These documents are enclosed in Pages 69 to 86 of the Paper Book containing the income tax returns , computation of income, replies filed before the learned AO and copy of assessment orders u/s 143(3) of the Act. When this was put to learned DR, he submitted that the learned AO accepting to the stand of the assessee in subsequent years is of no relevance and stated that there is no resjudicata in income tax proceedings. Though the principle of resjudicata does not apply to income tax proceedings, still the 'principle of consistency' cannot be given a go-by by the revenue. This has been held by the *Hon'ble Supreme Court in the case of Radhasaomi Satsang vs CIT reported in 193 ITR 321 (SC)* as under:-

> ***"13.*** *We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.*
>
> ***14.*** *On these reasonings in the absence of any material change justifying the revenue to take a different view of the matter—and if there was no change it was in support of the assessee—we do not think the question*

should have been reopened and contrary to what had been decided by the Commissioner in the earlier proceedings, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under sections 11 and 12.

15. *The counsel for the revenue had told us that the facts of this case being very special, nothing should be said in a manner which would have general application. We are inclined to accept this submission and would like to state in clear terms that the decision is confined to the facts of the case and may not be treated as an authority on aspects which have been decided for general application.*

16. *We direct the parties to bear their respective costs."*

13.1. The case before us is also very peculiar and hence the aforesaid decision rendered in peculiar facts and circumstances of that case would squarely apply to the peculiar facts prevailing in assessee's case before us.

14. In view of the aforesaid detailed observations and in view of the CBDT Instructions referred supra and various judicial precedents relied upon hereinabove, we have no hesitation to quash the assessment proceedings framed u/s 143(3) of the Act by the learned AO in the peculiar facts and circumstances of the instant case. We hold that the learned AO should not tax the income offered on mercantile basis in respect of unrealized Debtors. Since assessee had taken a stand that it had offered the sales revenue in its books but had not realized the sale proceeds from the Debtors, in the event of assessee writing off the debts due as bad debts in the books in future, the same shall not be allowed as deduction u/s 36(1)(vii) of the Act or under any other provisions of the Act. Further we hold that in the event of changed circumstances where there arises a certainty of realization of the sale proceeds from the Debtors, the assessee shall offer the same to tax in the return filed for

that year. With these observations, the grounds raised by the assessee are allowed in ITA No. 242/Del/2024.

ITA No. 249/Del/2024 – Asst Year 2013-14 – Penalty Appeal

15. In view of our decision hereinabove on quantum proceedings, the concealment penalty u/s 271(1)(c) of the Act would have no legs to stand in the eyes of law. Hence the grounds raised thereon are allowed.

16. In the result, both the appeal of the assessee are allowed.

Order pronounced in the open court on 16/10/2024.

-Sd/-	-Sd/-
(VIMAL KUMAR)	**(M. BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 16/10/2024
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi