

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH : COCHIN**

**BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI SOUNDARARAJAN K., JUDICIAL MEMBER**

ITA No. 557/Coch/2024

Assessment Year : 2014-15

Shri M.P. Veerachandra Chettiyar, Plot No. 30, Soumya Nivas, Panorama Residency, Kumaranasan Road, Kadavanthra, Kochi – 682 020. PAN: ABSPV4230A	Vs.	The Income Tax Officer, Ward – 1(5), Range – 1, Non-Corporate Ward – 1(5), Kochi.
APPELLANT		RESPONDENT

Assessee by	:	Smt. Divya Ravindran, Advocate
Revenue by	:	Smt. Leena Lal, Snr. AR

Date of Hearing	:	26-11-2024
Date of Pronouncement	:	27-01-2025

ORDER

PER SOUNDARARAJAN K., JUDICIAL MEMBER

This is an appeal filed by the assessee challenging the order of the NFAC, Delhi dated 09/04/2024 in respect of the A.Y. 2014-15 and raised the following grounds:

“A. The CIT(A) has erred in law in confirming the Assessment Order passed by the Assessing Officer assessing the total income at Rs. 78,80,270/- as against returned income of Rs. 5,51,920/- for AY 2014-15.

B. That CIT(A) erred in confirming the order of the Assessing Officer for the want of corroborative evidence and submission of the appellant.

C. The appellant could not participate in the appellate proceedings due to the reasons beyond the control of the appellant. The appellant was not in knowledge of the notices sent to the mail id of the Authorised Representative of the appellant nor in the e-filing portal of the appellant, which was never operated by him.

D. The appellant had no bonafide intention to evade the notices, the appellant had already raised reasonable grounds before the Appellate Authority during the filing of Form 35 in the e-filing portal of the appellant.

*E. It is respectfully submitted that the fault ' of the Authorised Representative should not be visited upon the appellant, as the taxation matters of the appellant was dealt by the AR during the assessment proceedings. There are catena of judgments which held that the fault of the CA/AR should not be visited on the assessee; In *Subhakaran & Sons v. N.A. Kazi, 5th ITO, And Others (1985) 152 ITR 231*, the Hon'ble Bombay High Court held that the mistake had been admitted by the chartered accountants and they had also requested that the assessee should not suffer for no fault of theirs and for a sheer mistake arising out of oversight on the part of the chartered accountants/ Authorised Representative.*

*F. When the Commissioner (Appeals) dismisses the appeal of appellant in limine for non-prosecution of appeal by the appellant; 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 appellant. What cannot be permitted in law to be done directly, cannot be permitted to be done indirectly either, as is well settled as held in *Hon'ble Bombay High Court in the case of CIT vs. Premkumar Arjundas Luthra (HUF) [2016] 240 taxman 133* . The Ld. CIT(A) is required to apply her mind to all issues which arise from impugned order before him/her whether or not same had been raised by appellant and further, that CIT(A) is obliged to dispose of the appeal on merits after*

conducting an enquiry with the Jurisdictional Assessing Officer and calling for the available records with the Assessing Officer as the appellant has already submitted all relevant documents before the Assessing Officer.

G. Without prejudice to the above contention, it is respectfully submitted that the addition made under section 56(2)(vii)(b)(ii) of the Act is arbitrary and unjustified.

H. The appellant had raised a ground before the CIT(A) that section 56(2)(vii)(b)(ii) of the Act shall apply only to the property which is in the nature of capital asset of the recipient. If the property is stock in trade, raw material and consumable stores of any business of such recipient section 56(2)(vii)(b)(ii) of the Act is not applicable.

I. The Ld CIT(A) is not justified in law in including the property, being stock in trade of the appellant under the scope of Section 56(2)(vii)(b) of the Income Tax Act as immovable property even when explanation (d) defines property with illustrative definition only projecting upon "Capital Assets.

J. The Hon'ble Supreme Court in the case of Union of India vs Bharti Airtel Ltd. (SLP No.8654 of 2020), had held that books of accounts and records are the primary documents to be relied upon. The relevant paragraph of the decision is extracted hereunder:

"46. We need not multiply the authorities referred to in the concerned judgments, and cited before us as in our opinion, these decisions have not dealt with the cardinal aspect of statutory obligation fastened upon the registered person to maintain books of accounts and record within the meaning of Chapter VII of the 2017 Rules, which are primary documents and source material on the basis of which self-assessment is done by the registered person including about his eligibility and entitlement to get ITC and of OTL. Form GSTR-'2A is only a facilitator for taking an informed decision while doing such self-assessment. Non-performance or non-operability of Form GSTR-2A or for that matter, other forms, will be of no avail because the dispensation stipulated at the relevant time obliged the registered person to submit returns on the basis of such self-assessment in Form GSTR-3B manually on electronic platform. The provision contained in Section 39(9) of the 2017 Act and Rule 61 of the Rules framed thereunder, as applicable at the relevant time, apply with full vigor

to the returns filed by the registered person in Form GSTR-3B.”

K. The interpretation of the Hon'ble High Court and Supreme Court clearly conclude that as long as the transactions has been conceded in the books of accounts even as sales or other receipts in the books of accounts of the appellant, the same could never be seen as a suppressed entry.

Further, in the case of State of Kerala v. Supreme Food Industries, OT Rev, Revision No: 2 of 2013 against the Tribunal's appellate order in TA(VAT) Nos. 1344/ 11. 1335/11 &1536/ 11, the Hon. High Court of Kerala upheld the decision of Hon. Tribunal as concluded in Paragraph 8th as follows:

“.....In the present case now before us, admittedly the transactions find a place in the books of accounts and no specific instance of any suppression has been unearthed. In the above circumstances, we cannot accept the pleas advanced before us the learned State Representative.” The Hon. High Court specifically mentioned and confirmed the decisions of the Hon. Supreme court of India and repeatedly reminded the lower authorities in paragraph 4th, 5th and 6th of the judgement.

“...per contra, the learned counsel appearing for the assessee relying on the decisions of the Supreme Court in Cement Marketing Co. of India Limited Vs. Asst. Commissioner of Sales Tax (1980, 45 STC 197 and Sree Krishna Electricals V. State of TN 2009, 23 VST 249(SC) and the decision of this Court, in Kollannur Agencies V Asst. Commissioner (Asst.) 1991, 80 STC 177 argued that the Tribunal acted illegally in sustaining the penalty order and there is no ground to impose the penalty on ground referable to any contumacious conduct. Reference was also made to Sultan gold International V. State of Kerala 2012 (2) KLT 158 to point out that when the concept of tax liability under Section 6(2) is only the net tax payable, it goes without saying that in all type of assessments the tax payable is the net tax on sales turnover after granting rebate of the tax payable under Section 6(2)on the purchases. He further pointed out that the Revenue and the dealer before are bound by the interprets Judgement in Supreme Food Industries Vs. State of Kerala 2012. 47 VST, 487 on the same issue relating to another year and the present attempt of the Revenue, as affirmed by

the Tribunal, amounts overreaching the judgement of the Jurisdictional High Court which is binding on the parties.”

“5. We are in complete agreement with the ration in the judgement delivered interprets Supreme Food Industries(Supra). The nature of the transactions of the assessee regarding the deep freezers that it provided to its distributors was pointedly considered after looking into the agreements. This Court then held that it is more in the nature of a sale. That being so, we are of the view that the entitlement of the assessee to Input Tax Credit is an eligibility in terms of the relevant statutory provisions as annunciated in that precedent.”

Now, as held in Cement Marketing Co. of India Ltd(Supra), if the view of the Revenue as taken before us is accepted, the result would be that even if the assessee raises a bonafide contention that a particular item is not able to be included in the taxable turnover, he would have to show it as form part of the taxable turnover in his return and pay tax upon it on paying of being held liable for penalty in case his contention is ultimately found by the court to be not acceptable. It was noted that the Legislature could never have surely intended that when the inclusion or exclusion of any particular item was itself a debatable issue. In the instant case the issue was decided by this Court interprets-Supreme Food Industries Supra in 2011, June. In Kollannur Agencies (Supra) also, this Court had concluded that if the assessing authority was of the view that, the return submitted by the assessee was incorrect or untrue, the assessing authority could have made a best judgement assessment and such a best judgement assessment, however is not possible in a case where the assessee had shown the details of the particular sale which was not disclosed in the return, in his trading account. An assessing authority under such circumstances has no power to levy penalty, it was held. In Sree Krishana Electricals(Supra). the apex Court further noted that when items which were not included in the turnover where found incorporated in the dealers' books of accounts, the non-inclusion of certain items in the turnover but disclosed in the dealers own account cannot give rise to imposition of penalty. Following the aforesaid precedents, we have no doubt that the penalty order which the dealer had challenged before the Tribunal, had to be set aside since the levy of such

penalty was not authorised by the relevant statutory provisions."

The Court further went on to clearly explain the way a fiscal statute is working and the way proposal is to be served for penal action of any forms and the method of computation.

L. The appellant prays that the ground raised by the CIT(A) may kindly be considered as the part of grounds before the this Hon'ble Tribunal.

M. Appellant craves leave to file additional grounds at the time of hearing.

N. The appeal may kindly be remanded back to the CIT(A) as the appellant due to the reasons beyond the control of the appellant was not able to participate in the appellate proceedings.

O. For these and other grounds that may be urged at the time of hearing the appellant humbly prays that the Hon'ble Income Tax Appellate Tribunal, Cochin Bench may kindly be pleased to set-aside the Assessment Order under section 143(3) r.w.s 263 and order u/s. 250 under the Income Tax Act 1961 and render justice."

2. The brief facts of the case are that the assessee is an individual doing real estate business and filed his return of income on 30/07/2014 and thereafter the return was processed and order u/s. 143(3) of the Act was made. The assessee at the time of assessment had prepared the cash flow statement and voluntarily offered an additional income of Rs. 9,38,951/-. In the assessment, the AO had added a sum of Rs. 7,52,296/- and treated the said amount as unexplained cash credit. Thereafter, the Ld.PCIT had reopened the assessment u/s. 263 of the Act for the reason that the assessee had purchased three immovable properties showing a higher stamp duty value but registered the same for a lesser consideration. The AO pursuant to the order of the Ld.CIT(A), had verified the documents and added an amount of Rs. 63,90,000/- as income from other sources. The assessee explained the fact that he had purchased the properties as trading stock which was purchased for a very cheap rate because of some peculiar circumstances. As against the said order, the assessee filed an appeal

before the Ld.CIT(A) and submitted that the order of the AO is not correct. The assessee further submitted that the AO had not considered the written submissions filed before him while passing the assessment order.

3. The Ld.CIT(A) had dismissed the appeal for the reason that the assessee had not appeared and filed any reply to the various notices issued to him. As against the said order, the assessee is in appeal before this Tribunal.

4. At the time of hearing, the Ld.AR submitted that the AO had not granted an effective opportunity. Further, the Ld.CIT(A) had also failed to consider the issue on merits but dismissed the same on the ground that the assessee had not appeared and submitted any response to the various notices issued by them. The Ld.AR submitted that the assessee was not aware of the various notices issued by the Ld.CIT(A) since the hearing notices were sent to the email ID of the authorised representative. But unfortunately, the authorised representative had not brought to the notice of the assessee about the hearings and further submitted that the assessee had some ailments and took medical treatment and therefore the assessee was not able to follow up the matter with the authorised representative and further submitted that non-response to the various notices is neither wilful nor wanton, but due to the above said bonafide reasons and prayed to grant one more opportunity to appear before the Ld.CIT(A).

5. The Ld.DR relied on the order of the lower authorities and submitted that the assessee had not responded to the 9 notices issued by the Ld.CIT(A) and therefore no leniency could be shown to the assessee and prayed to dismiss the appeal.

6. We have considered the arguments of both sides and perused the materials available on record.

7. We have also considered the reasons stated by the assessee for the non-appearance before the Ld.CIT(A) and we accept the same as a genuine one. Further the appeal was not decided on merits and therefore, in order to render substantial justice, we are setting aside the order of the Ld.CIT(A) and restore the appeal to the file of Ld.CIT(A) with the direction to dispose the appeal on merits after granting a reasonable opportunity of being heard to the assessee.

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

Order pronounced in the open court on 27th January, 2025.

Sd/-
(INTURI RAMA RAO)
Accountant Member

Sd/-
(SOUNDARARAJAN K.)
Judicial Member

Bangalore,
Dated, the 27th January, 2025.
/MS /

Copy to:

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|---------------|---------------------|
| 1. Appellant | 2. Respondent |
| 3. CIT | 4. DR, ITAT, Cochin |
| 5. Guard file | 6. CIT(A) |

By order

Assistant Registrar,
ITAT, Cochin