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Court : Income Tax Appellate Tribunal ITAT Amritsar

Decided On : Jan-30-2002

Reported in : (2004)89ITD477(Asr.)

Judge : H Karwa, N Saini

Appellant : Ravinder Singh

Respondent : Assistant Commissioner of Income

Judgement :

1. This is an appeal by the assessee and is directed against the order of the CIT(A), Jammu, dt. 27th April, 2000, relating to the block period 1st April, 1987 to 9th Oct., 1997.

"1. That the learned CIT(A), Amritsar, has grossly erred in dismissing the appeal of the assessee under Section 249(3) r/w Section 249(4) of the IT Act on the ground that the assessee had not deposited the tax due on returned income.

2. That the learned CIT(A), Amritsar, did not appreciate that the assessee had complied with the provisions of Section 249(3) r/w Section 249(4) on 4th April, 2000, and that the delay in filing the appeal could be condoned in view of the Supreme Court decision in the case of CIT v. Filmistan Ltd (1961) 42 ITR 163 (SC).

3. That the learned CIT(A), Amritsar, has failed to appreciate that the assessee was prevented by a reasonable cause from making the payment of income-tax

due on returned income.

4. That the learned CIT(A), Amritsar, has failed to appreciate that a refund of more than Rs. 15 lacs was due to M/s Jaswant Singh & Co.

Amritsar (a group firm of assessee) from the Department since May, 1999, and that the same was not adjusted despite assessee's requests against assessee's demand." 3. Briefly stated, the facts of the case are that the assessee is an individual and block period was 1st April, 1987, to 9th Oct., 1997. The AO completed the assessment on 25th Oct, 1999, under Section 158BC of the IT Act, 1961, The IT Department conducted a search on 9th Oct., 1997, under Section 132 of the Act at the residential premises of the assessee and other residential/business premises of Narula group.

During the course of search, certain incriminating documents, cash, FDRs, etc., were found and seized. The Narula group is running a business network consisting crushers, hot mix plants, transport company, petrol pumps and individual transport vehicles, which are used in the business. The crushers are engaged in procuring boulder stones from the river bed and by mechanically crushing it into small pieces.

This small pieces of stone grit are sold to the hot mix plants, there it is mixed with bitumen and used for the preparation of the roads, for the Government, The petrol pumps provide the necessary diesel/mobile oil, etc., both to the crushers and hot mix plants as well as to the vehicles of the group owned by the individuals. The assessee was partner in M/s Narula Transport Co., M/s Narula Crushing Co., M/s Narula Stone Crushing Co., M/s Daljit Singh & Bros., Amritsar, and M/s Daljit Singh & Bros., Rajasansi, A notice under Section 158BC, dt. 5th March 1998, was issued requiring the assessee to file his return of block period within 30 days from the date of service of notice. The assessee filed his return of income for the block period declaring income of Rs. 1,03,270. The income-tax payable on the declared income was Rs. 61,940. The assessee requested the AO to adjust the demand. The note attached to the block return reads. "The demand may be adjusted out of cash seized Rs. 40,000 from the assessee at the time of raid and balance Rs. 21,940 may be adjusted out of the cash seized from S.Daljit Singh:" It was brought

to the notice of the AO that the amount of Rs. 11,64,000 was seized from the partners of the firm and other family members of the Narula group firms. The assessee-group also requested for adjustment of tax due against refunds due to other firms of the assessee-group amounting to Rs. 50 lacs approximately. It is stated that the AO did not issue the refunds to the assessee and has also not adjusted the aforesaid amounts towards the tax due of block income returned by the assessee-firm. The total income of the assessee was assessed at Rs, 4,70,250. The demand raised was Rs, 3,04,220.

3.1. Aggrieved by the order of the AO, the assessee filed an appeal before the CIT(A) on 25th Nov., 1999. The learned CIT(A) observed that the assessee has not paid the tax due on the income returned and he, therefore, dismissed the assessee's appeal in limine. The appeal was disposed of vide order, dt. 27th April, 2000.

3.2. Against the order of the CIT(A), the assessee is in further appeal before the Tribunal.

4. Before us, Shri Padam Behl, C.A. the learned counsel for the assessee, vehemently argued that the learned CIT(A) was not justified in dismissing the appeal in limine. The learned CIT(A) should have admitted the appeal of the assessee and should have decided the appeal on merits. It was further submitted that the tax due on the returned income was not paid upto the date of filing the return. However, it was paid before the appeal was finally taken up for hearing by the learned CIT(A). He also submitted that an amount of Rs. 40,000 has been paid on 7th July, 1998, and Rs. 25,000 has been paid on 4th April, 2000, towards the due tax. It was also brought to our notice that the balance tax of Rs. 2,39,220 has also been paid by way of adjustment out of the FDRs, seized during the search. The assessee of the FDRs, seized during the search. The assessee also moved an application before the CIT(A) under Section 249(4) r/w Section 249(3) seeking condonation of delay.

In the said application, it has been stated that the substantial refunds and other assets of assessee's group were lying in the possession of the Department for the adjustment towards the taxes due against the assessee. The assessee also filed

the details in this regard. It was also one of the contentions of the assessee before the CIT(A) that he was facing extreme financial stringency due to fall in business and seizure of substantial assets and withholding of substantial refunds, Sri Padam Behl, C.A., the learned counsel for the assessee, also submitted that the Department was holding the FDRs of the assessee-group since 9th Oct., 1997, and refunds since May, 1999.

At the same time, the request of the assessee was also pending before the Department for adjustment of refunds. Accordingly, it was submitted that the assessee had made constructive payments of demand in May, 1999, within the meaning of Section 249(4) of the Act, The assessee had done everything within its power to adjust the taxes due and the delayed execution of the assessee's requests must relate back to May, 1999, because the moneys always remained with the Department and adjustment could not take place due to inaction of the Department.

Reliance was placed on the decision of the Delhi Bench 'E' of the Tribunal in the case of Gopal Chand Khandelwal v. Asstt. CIT (1995) 52 ITD 661 (Del). Further reliance was also placed on the decision of the Orissa High Court in the case of CTT v. Kahpada Ghosh (1987) 167 ITR 173 (On) wherein it has been held that the Tribunal had committed no illegality in entertaining the appeals and in condoning the delay and remitting the case to the AAC on merits as assessee subsequently had paid the admitted tax. Shri Padam Behl, C.A. the learned counsel for the assessee, also submitted that the Madras Bench of the Tribunal in the case of J.K.K. Natarajah v. ITO (1980) 10 TTJ (Mad) 204 condoned the delay where taxes were paid before hearing of the appeal, while relying upon the decision of the Hon'ble Madras High Court in K.T.Kunjumon v. CTT (1999) 239 ITR 782 (Mad) submitted that if assets are seized, they had to be dealt with only in the manner and the mode prescribed under Section 158BC of the Act. It was also submitted that tax liability for the entire block period has to be determined and the liability so determined in the said manner has to be adjusted against the cash or other assets seized in the course of search conducted by the IT Department. Shri Padam Behl, C.A., the learned counsel for the assessee, submitted that in view of the decision of the Madras High Court in the case of K.T. Kunjumon v. CTT (supra) the

Department was under legal obligation to carry out the adjustment as requested by the assessee and non-execution of the request of the assessee cannot be attributed as a default of the assessee under s.249(4) of the IT Act, 1961. It was also submitted that in block proceedings the assets seized and refunds of the assessee had to be adjusted against the block assessment demands in view of the unambiguous provisions of Section 158BC(d) r/w Section 132B of the Act.

4.1. Without prejudice to the above, as an alternative submission, it was contended by the learned counsel for the assessee that the assessee may be deemed to have filed the appeal of the last day of the payment of tax i.e., on 4th April, 2000, and the delay in filing the appeal till that date may be condoned under Section 249(3) of the Act, Reliance was placed on the decision of the Hon'ble Supreme Court in the case of CTT v. Filmistan Ltd. (1961) 42 ITR 163 (SC). Further reliance was also placed on the decision of the Hon'ble Supreme Court in the case of Collector, Land Acquisition v. Mst Katiji and Ors. (1987) 167 3TR 471 (SC).

4.2. In view of the above referred to Supreme Court decisions and the fact that the entire taxes had been paid by the assessee at the time of final hearing of the appeal, it was submitted by the learned counsel for the assessee that the appeal may kindly be deemed to have been filed on the last date of the payment of the tax. According to him, there was sufficient cases within the meaning of Section 249(3) of the Act.

4.3. Shri S.J, Singh, the learned senior Departmental Representative, strongly supported the order of the CIT(A). He further submitted that Section 249(4) of the Act provides that no appeal shall be admitted unless at the time of filing of the appeal admitted tax has been paid or where no return has been filed, advance tax payable by the assessee has been paid. He further submitted that the provisions of Section 249(4) of the Act are substantive provisions emanating (sic) any assessee/appellant to fulfil and comply with the requirements and conditions laid down in Sub-section (4) of Section 249 of the Act if his appeal has to be admitted for consideration by the appellate authority. He, therefore, submitted that the provisions of Section 249(4) are mandatory and the assessee has failed to comply

with the mandatory provisions. He further submitted that the provisions of Section 249(3) and 249(4) are different provisions and could not be co-related. According to the learned senior Departmental Representative, Section 249(4) clearly lays down that no appeal is maintainable unless and until the tax on the admitted returned income is paid by the assessee. In that view of the matter, no question arises for condoning the delay in filing the appeal. He, therefore, submitted that the learned CIT(A) was justified in dismissing the appeal of the assessee in limine or unadmitted.

5. We have carefully considered the rival submissions and have also perused the orders of the authorities below, Admittedly, the learned CIT(A) has disposed of the appeal vide his order dt. 27th April, 2000.

It is an admitted fact that the assessee had paid the due taxes before the said date. This fact has been brought to the notice of the learned CIT(A). The assessee has also brought to the notice of the AO as well as the CIT(A) that the substantial refunds and/or other assets of the assessee-group were lying in the possession of the Department for adjustment towards the taxes due against the assessee. It is noticed that following assets/refunds were lying with the Department as on the date of filing the appeal which could have been adjusted against the tax due. It is further noticed that a substantial portion of the same has been adjusted against the various demands of the assessee-group, The details furnished by the assessee are reproduced hereunder: Mutual Fund Units lying seized and released in lieu of payment actually made.

From the above, it would be clear that a sum of Rs. 29,88,884 was lying with the Department as on November, 1999, when the appeal was filed before the CIT(A). There is no one denying this fact that the aforementioned refunds/assets have been adjusted against various block assessment demands and other regular assessment demands. It is true that if these assets/refunds had been adjusted as per the request of the assessee, the entire tax due against the block assessment demand would have been reduced to nil. It is also worth mentioning that the Department was holding the FDRs of the assessee-group since 1997, and refunds since May, 1999, and at the same time, the assessee also made the request

before the Department for adjustment of refunds. In other words, the assessee had tried his level best to adjust the taxes due since May, 1999, because the moneys always remained with the Department and the adjustment could not have been made due to inaction of the Department.

5.1. In *Gopal Chand Khandelwal v. Asstt. CIT (supra)* the facts of the case were that the assessee had filed the return on 23rd Nov., 1992, declaring an income of Rs. 8,03,980. The AO completed the assessment at Rs. 17,71,520 vide his order, dt. 30th March, 1993. Against the said order, the assessee preferred an appeal before the CIT(A). The CIT(A) observed that the assessee has not paid the tax due on the income returned and, therefore, the appeal cannot be admitted as per provisions of Section 249(4) of the Act. Therefore, he dismissed the assessee's appeal in limine. When the matter came up for consideration before the Tribunal, the Delhi Bench 'E' of the Tribunal held that when the assessee himself requested for treating the cash seized as the tax paid by him, there is no necessity of application of Section 132B of the Act. The relevant observations of the Tribunal are reproduced hereunder: "5. From these facts it is clear that the assessee requested soon after the search that whatever tax was due on the income surrendered be adjusted out of the amount seized from him and the balance should be refunded to him. No refund was granted and, therefore, while filing the return, the assessee treated the entire cash seized as tax paid by him. The amount of cash seized was ultimately adjusted against the tax liability of the assessee for this assessment year.

The tax due on the income returned was Rs. 4,25,241 while the cash seized from the assessee and ultimately adjusted against his tax liability was Rs. 5,50,000. Therefore, on these facts, it cannot be held that the tax was not paid on the income returned so as to debar the assessee from filing of appeal as per Section 249(4). If there was delay by the Revenue in adjusting the seized amount as 'tax paid' by the assessee, the assessee cannot be blamed for such delay.

The assessee had applied soon after the search for adjusting the seized cash against his tax liability. If it was not so adjusted, the assessee cannot be held responsible.

5.1. The learned Departmental Representative has submitted that the cash seized cash be adjusted only as per provision of Section 132B r/w Rule 112C. He submitted that these provisions laid down certain procedures and the tax can be adjusted only when the case of the assessee falls within such parameters.

5.2. We have gone through the provisions of Section 132B and Rule 112C. Such provisions empower the Revenue to apply the assets seized and retained against the tax liability of the assessee unilaterally.

But when the assessee himself requested for treating the cash seized as the "tax paid" by him, there is no necessity of application of Section 132B. The only purpose of the assets seized by the Revenue under Section 132(1) and retained under Section 132(5) is to utilise the same against the tax liability of the assessee whenever it may arise. Therefore, when the assessee himself, requests that the amounts seized may be treated as tax paid by him, we believe that there cannot be and should not be any objection to the Revenue in accepting such a request. In view of the above, we hold that the CIT(A) was not justified in holding that the assessee has committed the default within the meaning of Section 249(4). Accordingly, we set aside the order passed by the CIT(A) and restore the matter back to his file for disposal of appeal afresh on merits." From the above observations of the Tribunal, it is clear that in that case also, the assessee had applied soon after the search for adjusting the seized cash, against his tax liability, the Tribunal held that it could not be said that the tax was not paid on the income returned so as to debar the assessee from filing the appeal as per Section 249(4) of the Act.

5.2. At this juncture, we may also refer to the provisions of Section 158BC(d) of the Act, which read as under : "158BC. Where any search has been conducted under Section 132 or books of account, other documents or assets are requisitioned under Section 132A, in the case of any person, then : (d) the assets seized under Section 132 or requisitioned under Section 132A shall be retained to the extent necessary and the provisions of Section 132B shall apply subject to such modifications as may be necessary and the references to 'regular assessment' or 'reassessment' in Section 132B shall be construed as references

to 'block assessment'." Vide amendment w.e.f. 1st June, 1999, Section 140A(1). was amended. The amended provisions read as under : "140A(1). Where any tax is payable on the basis of any return required to be furnished under Section 139 or Section 142 or Section 148 or, as the case may be, Section 158BC, after taking into account the amount of tax, if any, already paid under any provision of this Act, the assessee shall be liable to pay such tax together with interest payable under any provision of this Act for any delay in furnishing the return or any default or delay in payment of advance tax, before furnishing the return and the return shall be accompanied by proof of payment of such tax and interest." From the above provisions of Section 140A(1), it would be clear that the moment the assessee files a return declaring an income under Section 1158BC, he becomes liable to pay the tax due thereon and in case of non-payment, he shall be treated as an assessee in default. In the context of ss, 158BC(d) and 132B of the IT Act, 1961, the Hon'ble Madras High Court in the case of K.T. Kunjumon v. CIT (supra) has held as under : "The block assessment, as already held by me, is a special provision which overrides all other provisions of the Act. The intention of the Parliament is that block assessment under Chapter XIV-B should proceed in a different channel and once it proceeds in a different track, the liability arising out of the said chapter has first to be determined and adjusted against the seized assets under Section 132B of the Act. No doubt, the AO is empowered to recover existing liability from the assets seized, but however, the AO would be empowered to adjust existing tax liability against the seized assets only if there is any surplus amount remaining after adjustment of block assessment liability against the seized assets and retained by the AO. The priority under the scheme, in my view, is that the AO has to first determine the tax liability under block assessment and adjust the tax liability against the assets retained and if there is any surplus, the existing liability can be adjusted against such surplus. The AO, in the instant case, has not adhered to the priority contemplated under the scheme of the Act and any interpretation de hors the scheme of block assessment, in my view, is not warranted." In our view, there is merit in this contention of the learned counsel for the assessee that in view of the decision of the Madras High Court in the case of K.T. Kunjumon v. CIT (supra), the Department was under legal obligation to carry out the adjustment as requested by the assessee and non-execution of the request of the assessee

cannot be attributed as a default against the assessee under Section 249(4) of the Act. In other words, in block proceedings, the assets seized and refunds of the assessee had to be adjusted against the block assessment demands in view of unambiguous provisions of Section 158BC(d) r/w Section 132B of the IT Act, 1961. Thus, in view of the decision of the Delhi Bench 'E' of the Tribunal and the judgment of the Hon'ble Madras High Court in the case of K.T. Kunjumon v. CIT (supra), the Department ought to have adjusted the assets seized and refunds of the assessee against the block assessment demand.

5.3 In the case of CIT v. Filmistan Ltd. (supra), the Hon'ble Supreme Court held that the memorandum of appeal filed within the prescribed time but tax paid after expiry of limitation the appeal will be a proper appeal, it will be within time and no question of limitation will arise.

In other words, it was held that the appeal cannot be held to be incompetent merely because tax was not paid. The Hon'ble Supreme Court further observed that the appeal is deemed to have been filed on the date when the tax is paid. It was also held that admissibility of appeal will depend on sufficiency of cause for delay. Para. 2 of the judgment reads as under : "2. Appeals are provided against assessments under Section 30 of the Act. There is a proviso to Section 30(1) in regards to the payment of taxes in the following words : 'Provided that no appeal shall lie against an order under Sub-section (1) of Section 46 unless the tax has been paid.' The controversy between the parties revolves round the words "no appeal shall lie". The contention which was raised before us was that these words mean that there is no right of appeal till the tax is paid, and, therefore, if the tax has not been paid the memorandum of appeal cannot be filed and if filed it is merely a waste paper.

In our opinion, the meaning of the words "no appeal shall lie" in the proviso is not that no memorandum of appeal can be presented.

All that it means is that the appeal will not be held to be properly filed until the tax has been paid. If, for instance the memorandum of appeal is filed on the 20th day, i.e., 10 days before the period of limitation expires and the tax is paid within the rest of the 10 days appeal will be a proper appeal, it will be within time and no

question of limitation will arise but if the tax is paid after the period of limitation has expired it will be taken to have been filed on the day when the tax is paid even though the memorandum of appeal was presented earlier and within the period of limitation. The question will then have to be decided whether there was sufficient cause for condonation of delay and that is exactly what the Tribunal had ordered and that in our opinion is the effect of the proviso to Section 30(1) r/w Sub-section (2) of Section 30 of the Act. It is unnecessary, therefore, to refer to the two cases referred to by the High Court, i.e., *Raja of Venkatagiri v. CIT* (1955) 28 ITR 189 (AP) and *Kamdar Bros. v. CIT* (1955) 27 ITR 176 (Pat)".

In the aforesaid judgment, it has been held that if the tax is paid after the period of limitation is expired, it will be taken to have been filed on the day when the tax is paid even though the memorandum of appeal was presented earlier and within the period of limitation.

The Hon'ble Supreme Court further observed that the question will then have to be decided whether there was sufficient cause for condonation of delay. In the instant case, admittedly, the assessee has paid the entire due tax before the disposal of the appeal by the CIT(A). At the same time, the CIT(A) has also rejected the application of the assessee filed under Section 249(3) of the Act for condonation of delay. As we have already held hereinabove that the Department ought to have adjusted the assets seized/refunds against the block assessment demands. It has also been observed above that the assessee had filed the applications before the AO and the CIT(A) requesting therein for making the adjustments. However, the Departmental authorities did not make any adjustment as requested for by the assessee. It is worth noticing that a sum of nearly Rs. 30 lacs was lying within the Department as on November, 1999, when the appeal was filed. In the case of *CIT v. Kalipada Ghosh* (supra), the Hon'ble Orissa High Court held that the Tribunal was justified in admitting the appeal and remanding the matter back to the file of the CIT(A) for decision on merits. In the said case, the assessee filed appeals for the asst. yrs. 1974-75 and 1975-76. The AAC held that the appeals were incompetent as the assessee had not paid the admitted tax under Section 249(4) of the Act.

The Tribunal found that the assessee has subsequently deposited and admitted tax and that the provision was a new one, directed the AAC to admit the appeal for being disposed of on merits. The Hon'ble Orissa High Court held that the Tribunal was fully justified in allowing the appeal of the assessee. In the instant case also, it is an admitted fact that the provisions relating to the block assessment are new one and not well-known to all concerned and in that view of the matter also, the CIT(A) should have admitted the appeal for taking decision on merits.

5.4. In our view, there is merit in the alternative contention of the learned counsel for the assessee that the learned CIT(A) should have condoned the delay in filing the appeal under Section 249(3) of the Act. The assessee submitted that from the day one the assessee had requested the Departmental authorities that whatever tax was due may be realised out of the assets seized and the refunds due to him. As we have already noted above that ultimately the Department made the adjustments in the month of April, 2000. It is clear that the due taxes had already been paid by the assessee before 27th April, 2000 on which date the appeal of the assessee was dismissed by the CIT(A) in limine.

In our view, there is a merit in the contention of the learned counsel for the assessee that the CIT(A) ought to have condoned the delay in filing the appeal, particularly keeping in view the facts and the circumstances of the present case as well as the ratio laid down by the Hon'ble Supreme Court in the case of Collector Land Acquisition v. Mst.

Katiji and Ors. (supra). In the said case, it has been held by the Hon'ble Supreme Court that "When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in injustice being done because of a non-deliberate delay." 5.5. We have already noted above that the assessee was facing extreme financial stringency due to fall in business and seizure of substantial assets and withholding of substantial refunds. In that view of the matter also, it can be said that there was a sufficient cause for the delay, if any, in filing the appeal and the learned CIT(A), should have condoned the delay in filing the appeal.

5.6. The net result of the above discussion is that the order of the CIT(A) deserves to be set aside and we accordingly do so. The delay, if any, in filing the appeal stands condoned. Consequently, we send the matter back to his file with the direction to him to decide the issues raised by the assessee in his appeal, on merits and in accordance with law after affording a due and reasonable opportunity of being heard to both the parties.

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