

आयकर अपीलीय अधीकरण, न्यायपीठ – “C” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA
(समक्ष)Before श्री महावीर सिंह, न्यायीक सदस्य एवं/and श्री शामीम याहया, लेखा सदस्य)
[Before Shri Mahavir Singh, JM & Shri Shamim Yahya, AM]

आयकर अपील संख्या / I.T.A No.1397/Kol/2014
निर्धारण वर्ष/Assessment Year: 2004-05
&
आयकर अपील संख्या / I.T.A No.1399/Kol/2014
निर्धारण वर्ष/Assessment Year: 2005-06
&
आयकर अपील संख्या / I.T.A No.1401/Kol/2014
निर्धारण वर्ष/Assessment Year: 2006-07
&
आयकर अपील संख्या / I.T.A No.1403/Kol/2014
निर्धारण वर्ष/Assessment Year: 2007-08
&
आयकर अपील संख्या / I.T.A No.1406/Kol/2014
निर्धारण वर्ष/Assessment Year: 2009-10

Dr. Murari Mohan Kokey
(PAN: AFRPK1976K)
(अपीलार्थी/Appellant)

Vs. Income-tax Officer, Wd-55(3), Kolkata
(प्रत्यर्थी/Respondent)

Date of hearing: 15.10.2014
Date of pronouncement: 05.11.2014

For the Appellant: Shri S. M. Surana, Advocate
For the Respondent : Shri S. S. Alam, JCIT, Sr. DR

आदेश/ORDER

Per Shri Mahavir Singh, JM :

All these appeals by assessee are arising out of separate orders of CIT(A)-XXXVI, Kolkata in Appeal Nos. 156, 157, 160, 164 & 168/CIT(A)-XXXVI/Kol/Wd.55(3)/12-13 dated 21.03.2014 respectively. Assessments were framed by ITO, Ward-55(3), Kolkata for Ays 2004-05 to 2007-08 & 2009-10 u/s. 144/147 & 143(3) of the Income-tax Act, 1961 (hereinafter referred to as “the Act”) vide his separate orders dated 30.12.2011 respectively.

2. The first issue in these appeals of assessee is against orders of CIT(A) dismissing appeals of assessee as time barred ignoring the facts and circumstances of the case. Since grounds are identical and for the sake of convenience, we reproduce following ground nos. 2 and 3 of ITA No.1397/Kol/2014:

“2. For that the Ld. CIT(A) erred in dismissing the appeal as time barred ignoring the fact that the assessment order allegedly served by affixation was not received by the appellant nor the same was served by affixation by following due process of law.

3. For that on the facts and circumstances of the case the Ld. CIT(A) erred in confirming the assessment order which was passed in gross violation of principles of natural justice.”

3. Briefly stated facts are that these assessments were framed u/s. 144 read with section 147 of the Act dated 30.12.2011. The assessee preferred appeals against these assessment orders (ex parte) on 27.11.2012. According to CIT(A), these appeals were filed after a lapse of nearly 310 days. Hence, these appeals are barred in term of sec. 249 of the Act. The CIT(A), first of all, examined the assessment records and found that the assessment orders were served by way of affixation by Inspector of the Department on 06.01.2012 as is available in the assessment record. The Inspector’s Report was quoted by CIT(A), which is again being quoted hereunder for the sake of clarity:

“Having been directed by the ITO, —Ward-55(3), Kolkata to serve the assessment orders, Demand notices & Penalty notices in respect of Dr. Murari Mohan Koley, AFRPK1976K for AY 2004-05, 2005-06, 2006-07, 2007-08 and 2009-10 on 30/12/2011 at 6 P.M., I went to the residence of the assessee at 114/4/1A, Tollygunge Road, Kolkata-700026 on 02.01.2012 at 11.00 A.M. I found the doors locked. On local enquiry I got information that the assessee has gone to Vellore, Chennai for his wife’s treatment. Again I went to serve the orders on 04/01/2012 at 1.00 P.M. and found the doors locked. The same thing happened on 06/01/2012 when I went to the assessee’s residence at 4 .00 P.M. to find that the doors were locked.

I then affixed all the assessment orders, Demand notices & Penalty notices for A.Y 2004-05, 2005-06, 2006-07, 2007-08 and 2009-10 all dated 30/12/2011 at the door of entrance of the assessee’s flat no. 114/4/1A, Tollygunge Road, Kolkata-700026 on 06/01/2012 between 4.00 P.M. to 4.30 P.M.

Submitted alongwith affixation notice.”

4. The CIT(A) has not condoned the delay and dismissed the appeal as time barred by observing in para 3.3 of his appellate order as under:

“3.3 Therefore, the appeal has been filed after a lapse nearly 310 days. The appeal filed much beyond the time prescribed in section 249 of the I.T Act. The reason given for filing of late appeal [Non-receipt of order served by affixture] can not be accepted as the assessee was assisted by Authorized Representative for his proceeding. The assessment year of the current year was reopened as a result of assessment done for A.Y. 2008-09, in which the maintenance of an undisclosed bank account, as per AIR

Information was obtained. The issues dealt with, were same as that in those year. However, the assessee left for his wife's treatment, without responding to the notices, when the assessment was about to be time barred. Subsequently penalty notices u/s 271(1)(c) and 271(1)(b) were fixed which were received by the assessee on 14.06.2012, in which reference to the penalty notice issued on 30.12.2011 alongwith assessment order was referred to. This again clearly indicates that the assessee was certainly aware of the completion of assessment proceeding at least as on 14.06.2012. In spite of it the appeal was filed on 27.11.2012. Subsequently, another notice by Speed Post was sent to him on 15.06.2012, for penalty. Subsequently, penalty u/s. 271 (1)(c) and 271(1)(b) were imposed on 26.06.2012. The penalty orders were served by Speed Post in assessee's address on 12.07.2012. All these taken together clearly indicates that the assessee was very well aware regarding the completion of order. However the assessee choose for whatever reason, not to comply to the notices issued and avoid receipt of notice directly at his address or through authorized representative, causing the department to serve the notice through either affixation or by post. Similar conduct was also noticed during appellate proceeding, when the assessee never received the notices directly, and the notices had to be served on persons claiming to be his relatives, by Notice server or sent by Speed Post, again to be received by others. Therefore, as the appeal has been filed belated and sufficient cause for such delay is not there the appeal is dismissed as being time barred."

5. The CIT(A) after dismissing the appeal as time barred also gone into merits of the case and decided the issue. Aggrieved against dismissing the appeal as time barred and not condoning the delay, assessee raised the following grounds:

"4. For that on the facts and circumstances of the case the assessment order being not completed within the statutory period of limitation, the assessment order should have been cancelled by the Ld. C.I. T(A).

5. For that the Ld. C.I.T(A) erred in confirming the addition of Rs. 12,58,000/- being the entire gross sum deposited in the Bank Account with Axis Bank and should have accepted the claim of the assessee for making the addition by allowing peak credit ignoring the explanation filed by the assessee particularly when there was no evidence to suggest that the appellants made investment out of the cash withdrawals made from the same bank.

6. For that the Ld. C.I.T(A) erred in not deleting the deposits of Rs. 2,10,780/- made by cheque ignoring the explanation filed by the assessee.

7. For that the Ld. C.I.T(A) erred in not allowing the claim of Rs. 50,000/- made u/s. 80D made by the assessee for which necessary evidences were filed and the Ld. C.I.T(A) even failed to give any finding on the said disallowance even though specific ground was taken against the said disallowance.

8. For that on the facts and circumstances of the case the addition of Rs. 12,58,000/- Rs.2,10,780/- and Rs. 50,000/- should have been deleted by the Ld. C.I.T(A).

9. For that the Ld. C.I.T(A) erred in not dealing with the appeal of the assessee with regard to the charging of interest U/s. 234B since the said interest was charged U/s. 234B(1) which could have been charged only under sec. 234B(3)."

6. At the time of hearing, Ld. counsel Shri S. M. Surana, Advocate stated that assessee's wife is suffering from Cancer and she was under treatment of Christian Medical College, Vellore and he has filed certificate dated 29.07.2012 i.e. Discharge Summary issued by Christian Medical College, which reads as under:

“Dr. Soma Koley 47 yrs. H/F, WIFE OF DR. MURARI MOHAN KOLEY, OF 114/4/1A, TALLY GAUNJ ROAD, KOLKATA-700026, W.B., INDIA, bearing hospital id no. 978400C, admitted in to this hospital on 02/07/2012 at 7:30 am. & discharged on 29/07/2012 at 9:00 Am., under professor director & head, Dr. Ashok Chacko, MD, DM, MNAMS, at ISDSC ward cabin no. 4 in the DEPT. OF CIINICAL GASTROENTEROLOGY & HEPATOLOGY; she had under gone investigation, blood examination, upper GI endoscopy, colonoscopy, capsule endoscopy C.T. scan & MRI whole abdomen along with enteroscopy. She under gone CXR pa view, ECG, echo cardiography, IVU, & intestinal multiple biopsy & bone densiometry.

Ultimately we came to conclusion of diagnosis, she is suffering from chron's disease of intestine. which is a incurable disease & needs long run, lifelong very costly treatment, otherwise this disease prone to small intestinal cancer.”

In term of this, Ld. counsel for the assessee stated that no doubt the assessee received penalty notices as well as penalty was imposed but he could not concentrate on income tax matter properly. For this, he substantiated his argument that even the assessment was framed ex parte due to non-representation by the assessee for the same reason. Ld. Counsel for the assessee also stated that the assessment order was served through affixture but actually it was not received by assessee. When he came to know about the proceedings, he obtained the copy of assessment order from the AO and filed this appeal before CIT(A) allegedly belated by 310days. In term of the above, Ld. counsel for the assessee stated that there is no delay in filing appeal but to be on safer side and without prejudice to the same, the assessee filed a condonation petition stating reasonable cause as assessee's wife was under treatment and they went to Christian Medical College, Vellore for her treatment and this has disturbed the entire life cycle of assessee. This fact is evident from the certificate issued by Christian Medical College i.e. Discharge Summary dated 29.07.2012. On the other hand, the Ld. Sr. DR Shri S.S. Alam, JCIT only argued that the assessment order was served through affixture and assessee was aware about the proceedings going on.

7. We have heard rival submissions and gone through facts and circumstances of the case. First of all it is immaterial to discuss, whether assessment order was served through affixture validly or not but the assessee obtained the copy of assessment order from the AO for the first time and filed appeal within the limitation period after obtaining this assessment order. It is also a fact that the assessee's wife was under treatment for cancer at Christian Medical College,

Vellore during this period of delay. This is evident from the medical certificate issued by Christian Medical College, Vellore. We find that the cause is reasonable for filing of appeal belatedly i.e. after expiry of limitation period, if there is any. In such circumstances, we condone the delay before CIT(A) and direct him to admit the appeal.

8. Further, in the present case before us the CIT(A) has not condoned the delay but he has adjudicated the issues on merits as is evident from the impugned appellate order. We are of the view that in case CIT(A) chose not to condone the delay, he has no business to adjudicate the appeal on merits. For this, we are of the view that first of all, the appeal should be admitted for making a decision on merits because the right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi judicial adjudications. The right to appeal is statutory right and it can be circumscribed by the conditions in the grant. If the statute gives a right to appeal upon certain conditions, it is upon fulfillment of those conditions that the right becomes vested in and exercisable by the appellant. Here the assessee's appeal is delayed as alleged by CIT(A) and without admitting the appeal he has adjudicated the same on merits. Once the appeal is not admitted nothing is pending before him. A judgment of Hon'ble Bombay High Court (under the old Act of 1922) in the case of CIT Vs. Mysore Iron & Steel Works (1949) 17 ITR 478 (Bom), wherein it is held as under:

“Now, the scheme under Sections 30 and 31 of the Act is fairly clear. An assessee has a statutory right to present an appeal within thirty days without any order being required from the Appellate Assistant Commissioner for admission of that appeal. But if the time prescribed expires, then that statutory right to present an appeal goes ; and an appeal can only be entertained provided it is admitted by the Appellate Assistant Commissioner after condemning the delay. Therefore before an appeal could be admitted in this case, an order from the Appellate Assistant Commissioner was requisite that the delay had been condoned, and it was only on such an order being made that the appeal could be entertained by the Appellate Assistant Commissioner. Now Section 31 deals only with such appeals which are presented within the prescribed period or admitted after the delay has been condoned, and the procedure laid down in Section 31 with regard to the hearing of appeals only applies to such appeals. Therefore, in my opinion, when the Appellate Assistant Commissioner refused to condone the delay, there was no appeal before him which he could hear and dispose of as provided under Section 31 of the Act. Section 33 then gives the right of appeal to the assessee from an order made by the Appellate Assistant Commissioner either under Section 28 or under Section 31. Therefore the Legislature did not give the right of appeal to the assessee against an order made by the Appellate Assistant Commissioner under Section 30 of the Act.

Now Mr. Banaji has contended that in refusing to condone the delay, the Appellate Assistant Commissioner has really dismissed his appeal and confirmed the order of assessment. In my opinion, that is an entirely erroneous contention because the Appellate Assistant Commissioner can only confirm an assessment and make an order of

confirmation or dismissal of the appeal provided the appeal is presented within time or been admitted after condonation of delay and is heard and disposed of on merits. In this case we do not reach the stage of Section 31 at all. The appeal never came to be admitted, and no question can possibly arise of an order made by the Appellate Assistant Commissioner confirming the assessment made by the Income-tax Officer.

Mr. Banaji has relied on two judgments of the Patna High Court which, in my opinion, really have no bearing on the facts before us. One is Kunwarji Ananda v. Commissioner of Income-tax, Bihar and Orissa (1). There a Full Bench of the Patna High Court considered an order made by the Assistant Commissioner that the appeal did not lie because it fell under Section 23(4) of the old Income-tax Act ; and the Court held that such an order fell under Section 31 of the old Act as it was an order disposing of the appeal. Now, it is important to note that in that case the appeal was admitted. It was within time, and after it was admitted, a preliminary issue was raised as to whether the appeal lay as it fell under Section 23(4) of the old Income-tax Act. It was from the order on the preliminary point that an appeal was preferred to the Commissioner, and on those facts that Court held that it was an order under Section 31 of the old Act. But as I have pointed out earlier, in the case before us there is no question of the appeal being disposed of either on the preliminary point or on merits, because the appeal was never admitted.

Then there is the case of Maharani Gyan Manjari Kuari v. Commissioner of Income-tax, Bihar and Orissa (2). That was a case where the assessee had failed to prefer an appeal in the prescribed form to the Appellate Assistant Commissioner of Income-tax, and the Appellate Assistant Commissioner refused to admit the appeal holding that the appeal was not in the prescribed form. The Patna High Court merely followed the earlier decision of their own Court to which I have referred and came to the conclusion that the order made by the Appellate Assistant Commissioner was an order under Section 31. We have looked in vain through this judgment to find any reason suggested why the order made by the Appellate Assistant Commissioner refusing to entertain the appeal because it was not in proper form fell under Section 31 of the old Act. With respect to the Patna High Court, we

(1) (1931) I. L. R. 11 Pat. 187.

(2) [1944] 12 I. T. R. 59.

cannot accept that decision if the effect of the decision is that even though an Appellate Assistant Commissioner may refuse to entertain an appeal, that order should be deemed to be an order disposing of the appeal under Section 31 as if the appeal had been admitted. But there is a direct decision of the Allahabad High Court, and that is reported in Shivnath Prasad v. Commissioner of Income-tax, Central and United Provinces (1). Although the case was under the old Act, it dealt with the very question with which we are dealing now and there also the Assistant Commissioner had refused to condone the delay and the Allahabad High Court held that the order made by the Assistant Commissioner was not under Section 31 but it was an order made under Section 30 and, therefore, no appeal lay to the Appellate Tribunal. We, with respect, entirely agree with the view taken by the Allahabad High Court and also the reasoning on which that decision is based.

The result is that we must hold that there is no appeal from the order of the Appellate Assistant Commissioner refusing to condone the delay under Section 30, sub-section (2), of the Income-tax Act.”

In view of the above decision of Hon'ble Bombay High Court, we are of the view that the CIT(A), once not admitted the appeal as barred by limitation, he should not have adjudicated on merits. The findings given by CIT(A) on merits will have no bearing on fresh adjudication by CIT(A), in the set aside appellate proceedings. In term of the above, we set aside the orders of the CIT(A) and remand the matter back to the file of CIT(A) for fresh adjudication on merits.

9. In the result, all the appeals of assessee are allowed for statistical purposes.

10. Order is pronounced in the open court on 05.11.2014

Sd/-

शामीम याहया, लेखा सदस्य
(Shamim Yahya)
Accountant Member

Sd/-

महावीर सिंह, न्यायीक सदस्य
(Mahavir Singh)
Judicial Member

Dated : 5th November, 2014

वरिष्ठ निजि सचिव Jd.(Sr.P.S.)

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

1. अपीलार्थी/APPELLANT – Dr. Murari Mohan Koley, 114/4/1A, Tollygunge Road, Kolkata-700 033.
2. प्रत्यर्थी/ Respondent – ITO, Ward-55(3), Kolkata.
3. आयकर कमिशनर (अपील)/ The CIT(A), Kolkata
4. आयकर कमिशनर/ CIT Kolkata
5. विभागिय प्रतिनीधी / DR, Kolkata Benches, Kolkata

सत्यापित प्रति/True Copy,

आदेशानुसार/ By order,

सहायक पंजीकार/Asstt. Registrar.