आयकर अपीलीय अधिकरण, राजकोट न्यायपीठ

**IN THE INCOME TAX APPELLATE TRIBUNAL,**
**RAJKOT BENCH, RAJKOT**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER**
**And**
**SHRI T. R. SENTHIL KUMAR, JUDICIAL MEMBER**

आयकरअपीलसं./**ITA No. 134/Rjt/2022**

**निर्धारणवर्ष/Asstt. Year:2016-17**

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| Dipten Ahindra Bhowmick<br>Plot No-298, 2nd Floor,<br>Neelam Complex,<br>Office No. 14, Ward-12/B,<br>Gandhidham-370201<br><br>**PAN: ACUPB1435C** | Vs. | ITO<br>Ward-1,<br>Gandhidham |
| **(Applicant)** | | **(Respondent)** |

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| Assessee by : | Shri Gaurang Khakhar, A.R. |
| Revenue by : | Shri Shramdeep Sinha, CIT DR |

सुनवाईकीतारीख/**Date of Hearing : 24/11/2022**
घोषणाकीतारीख/**Date of Pronouncement: 04/01/2023**

**आदेश/O R D E R**

**PER WASEEM AHMED, ACCOUNTANT MEMBER:**

The captioned appeal has been filed at the instance of the assessee against the order of the Ld. Commissioner of Income Tax (Appeals) (in short the Ld. CIT(A)), National Faceless Appeal Centre, Delhi dated 11/06/2021 arising in the matter of assessment order passed under Section 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2016-17.

2. The assessee has raised following grounds of appeal:

*"1) On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding the delay in filing the appeal cannot be condoned. The appellant prays that the delay be condoned and appeal should be taken up for hearing.*

*2) On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in law as well as on facts in upholding disallowance of payment made of Rs.*

*7,54,7000/- u/s 40A(3) of the Income Tax Act, 1961. The appellant prays that the same may kindly be heard and allowed.*

*3) That the order passed by the Ld. CIT u/s.250 of the I.T. Act, 1961 was arbitrary, bad in law and unjust.*

*4) That the assessee craves leave to urge such other ground or grounds before or at the time of hearing of appeal."*

3. **The first** issue raised by the assessee is that the learned CIT(A) erred in holding that delay in filling the appeal cannot be condoned.

4. At the outset, we note that there was the delay in filing the appeal by the assessee for 556 days before the learned CIT (A) which was not condoned by him. However, we find that the learned CIT (A) has also decided the issue raised by the assessee on merit. It is the trite law that if the appeal is not maintainable in view of the fact that there was the delay in filing the appeal as the assessee couldn't justify the reason for the same. Thus the appeal filed by the assessee should have been dismissed in *limine* without going into the merit of the case. But what is arising from the order of the learned CIT (A) that the ld. CIT-A has decided the issue raised by the assessee on merit which implies that the learned CIT (A) by his action has condoned the delay but he has recorded just one line in his order that the delay is not condoned without any speaking order.

4.1 We also note that the Hon'ble Gujarat High Court in the case of S.R. Koshti Vs. CIT reported in 276 ITR 165 has held as under:

> ***18.*** *The position is, therefore, that, regardless of whether the revised return was filed or not, once an assessee is in a position to show that the assessee has been over-assessed under the provisions of the Act, regardless of whether the over-assessment is as a result of assessee's own mistake or otherwise, the CIT has the power to correct such an assessment under section 264(1) of the Act. If the CIT refuses to give relief to the assessee, in such circumstances, he would be acting de hors the powers under the Act and the provisions of the Act and, therefore is duty-bound to give relief to an assessee, where due, in accordance with the provisions of the Act.*
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> ***19.*** *In the present case, the respondent-CIT has nowhere stated that the petitioner is not entitled to the relief under section 10(10C) of the Act. In fact, the said position is undisputed. The Assessing Officer himself had passed an order under section 154 of the Act, granting such relief. In the circumstances, even the order under section 264 of the Act made on 29-3-2004, cannot be sustained.*

> ***20.*** *A word of caution. The authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If an assessee, under a mistake, misconception or on not being properly instructed, is over-assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected. This Court, in an unreported decision in case of Vinay Chandulal Satia v. N.O. Parekh, CIT [Spl. Civil Application No. 622 of 1981 dated 20-8-1981], has laid down the approach that the authorities must adopt in such matters in the following terms:*
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> > *"The Supreme Court has observed in numerous decisions, including Ramlal v. Rewa Coalfields Ltd. AIR 1962 SC 361, State of West Bengal v. Administrator, Howrah Municipality AIR 1972 SC 749 and Babutmal Raichand Oswal v. Laxmibai R. Tarte AIR 1975 SC 1297, that the State authorities should not raise technical pleas if the citizens have a lawful right and the lawful right is being denied to them merely on technical grounds. The State authorities cannot adopt the attitude which private litigants might adopt."*

4.2 From the above it is revealed that the income of the assessee should not be over assessed even there is a mistake of the assessee. As such the legitimate deduction for which the assessee is entitled should be allowed while determining the taxable income.

4.3 We also note that the Hon'ble Gujarat High Court in the case of Vareli textile industry versus CIT reported in 154 Taxman 33 wherein it was held as under:

> *It is equally well-settled that where a cause is consciously abandoned (as in the present case) the party seeking condonation has to show by cogent evidence sufficient cause in support of its claim of condonation. The onus is greater. One of the propositions of settled legal position is to ensure that a meritorious case is not thrown out on the ground of limitation. Therefore, it is necessary to examine, at least prima facie, whether the assessee has or has not a case on merits.*

4.4 In view of the above and after considering the facts in totality, we are of the view that it is a fit case where the delay in filing the appeal by the assessee before the learned CIT-A deserves to be condoned. Accordingly, we proceed to decide the issue raised by the assessee on merit.

5. **Next issue** raised by the assessee is that the learned CIT(A) erred in confirming disallowance of Rs. 7,54,700/- on account of cash payment under section 40A(3) of the Act.

6. The facts in brief are that the assessee is an individual engaged in the business of trading of wheat and other allied business. The assessee is also working as commission agent for various parties. The return of the assessee for the year under consideration was selected for limited scrutiny to verify the genuineness of "cash in hand".

7. The AO during the assessment proceeding found that the assessee has made cash payment over Rs. 20,000/- to M/s Showman Project against purchases of goods. Such payment exceeding Rs. 20,000/- in a day aggregates to Rs. 7,54,000/- only. Thus, the AO invoked the provision of section 40A(3) of the Act and made the disallowances of Rs. 7,54,700/- only.

8. The aggrieved assessee preferred an appeal to the learned CIT(A).

9. The assessee before the learned CIT(A) submitted that for the year under consideration i.e. A.Y. 2016-17, he furnished return after demonetization period showing substantial cash in hand as on 31-03-2016. Therefore, the return of income was selected for limited scrutiny to verify the genuineness of cash in hand. In this regard, he furnished necessary details and the AO after the verification accepted the genuineness of cash balance Rs. 41,18,857/- as on 31-03-2016. However, the AO in the assessment order made disallowances under section 40A (3) of the Act on account of cash payment exceeding Rs. 20000/- in a day. Thus, the AO exceeded his jurisdiction by extending the scope of verification and consequently in making the disallowances on account of cash payment.

10. However the learned CIT (A) confirmed the order of the AO by observing as under:

> *"The reply of the appellant has no force as the payments were a part of the appellant assessee's ledger as remarked by the AO. It certainly was an expense even if the net effect was taken.*
>
> *To assume that the agent was acting on behalf of principal would not absolve the agent from the statutory provisions of the Act.*
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> *The only exceptions are contended in Rule 6DD which are as under:-*

*1. Salary of Employee after deducting TDS where, employee is **temporarily posted** for a continuous period of fifteen days or more in a place other than his normal place of duty or on a ship & that employee does not have any bank accounts at that place.*

*2. Where any payment is made to an employee or the heir of any such employee, on or in connection with the **retirement, retrenchment, resignation, discharge or death** of such employee, on account of **gratuity, retrenchment compensation or similar terminal benefit** and the **aggregate** of such sums payable to the employee or his heir **does not exceed Rs 50,000.***

*Since the appellant does not fall in any category of exceptions as such the reply has no force.*
*7. The addition is upheld, appeal stands dismissed, delay is not condoned."*

11. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

12. The learned AR before us filed paper book running from page 1 to 47, compilation case laws and contended that the case of the assessee was selected under limited scrutiny and therefore the scope of the scrutiny was Ltd to the extent of verification of cash balance until and unless some approval is obtained from the higher authorities for converting limited scrutiny into regular scrutiny. But, the AO has not done so and therefore, no addition under the provisions of section 40A(3) of the Act is warranted.

13. On the other hand, the learned DR vehemently supported the order of the authorities below.

14. We have heard the rival contentions of both the parties and perused the relevant materials available on record before us. Admittedly, the case of the assessee was selected under "Limited Scrutiny" scheme as evident from the notice issued u/s 143(2) of the Act, placed on page 35 of the paper book-I. Before going into the fact of the case on hand, we note that the CBDT in instruction No.20/2015 dated 29/12/2015 has laid down that the Assessing Officer in case of "Limited Scrutiny" can only examine those issues for which the case has been selected or the issue mentioned therein. If the AO notice that there is a potential

escapement of income which exceeds Rs. 5 Lacs, he may convert the "Limited Scrutiny" into "Complete Scrutiny" with previous approval of PCIT in writing. The relevant portion of the instruction stands as under:

> ***"3.*** *As far as the returns selected for scrutiny through CASS-2015 are concerned, two type of cases have been selected for scrutiny in the current Financial Year- one is 'Limited Scrutiny' and other is 'Complete Scrutiny'. The assessees concerned have duly been intimated about their cases falling either in 'Limited Scrutiny' or 'Complete Scrutiny' through notices issued under section 143(2) of the Income-tax Act, 1961 ('Act'). The procedure for handling 'Limited Scrutiny' cases shall be as under:*
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> *a. In 'Limited Scrutiny' cases, the reasons/issues shall be forthwith communicated to the assessee concerned.*
>
> *b. The Questionnaire under section 142(1) of the Act in 'Limited Scrutiny' cases shall remain confined only to the specific reasons/issues for which case has been picked up for scrutiny. Further, the scope of enquiry shall be restricted to the 'Limited Scrutiny' issues.*
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> *c. These cases shall be completed expeditiously in a limited number of hearings.*
>
> *d. During the course of assessment proceedings in 'limited Scrutiny' cases, if it comes to the notice of the Assessing Officer that there is potential escapement of income exceeding Rs. five lakhs (for metro charges, the monetary limit shall be Rs. ten lakhs) requiring substantial verification on any other issue(s), then, the case may be taken up for 'Complete Scrutiny' with the approval of the Pr. CIT/CIT concerned. However, such an approval shall be accorded by the Pr. CIT/CIT in writing after being satisfied about merits of the issue(s) necessitating 'Complete Scrutiny' in that particular case. Such cases shall be monitored by the Range Head concerned. The procedure indicated at points (a), (b) and (c) above shall no longer remain binding in such cases. (For the present purpose, 'Metro charges' would mean Delhi, Mumbai, Chennai, Kolkata, Bengaluru, Hyderabad and Ahmedabad)."*

15. The CBDT further amended the para 3(d) of the above mentioned instruction via instruction no. 05/2016 dated 14-07-2016 with additional requirement that the AO will form a reasonable view with regard to the potential escapement of income. The relevant portion of the instruction stands as under:

> ***"2.*** *In order to ensure that maximum objectivity is maintained in converting a case falling under 'Limited Scrutiny' into a 'Complete Scrutiny' case, the matter has been further examined and in partial modification to Para 3(d) of the earlier order dated 29.12.2015, Board hereby lays down that while proposing to take up 'Complete Scrutiny' in a case which was originally earmarked for 'Limited Scrutiny', the Assessing Officer ('AO') shall be required to form a reasonable view that there is possibility of under assessment of income if the case is not examined under 'Complete Scrutiny'. In this regard, the monetary limits and requirement of administrative approval from Pr. CIT/CIT/Pr. DIT/DIT, as prescribed in Para 3(d) of earlier Instruction dated 29.12.2015, shall continue to remain applicable.*
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> ***3.*** *Further, while forming the reasonable view, the Assessing Officer would ensure that:*
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> *a. there exists credible material or information available on record for forming such view;*
>
> *b. this reasonable view should not be based on mere suspicion, conjecture or unreliable source; and*

*c. there must be a direct nexus between the available material and formation of such view.*

***4.*** *It is further clarified that in cases under 'Limited Scrutiny', the scrutiny assessment proceedings would initially be confined only to issues under 'Limited Scrutiny' and questionnaires, enquiry, investigation etc. would be restricted to such issues. Only upon conversion of case to 'Complete Scrutiny' after following the procedure outlined above, the AO may examine the additional issues besides the issue(s) involved in 'Limited Scrutiny'. The AO shall also expeditiously intimate the taxpayer concerned regarding conducting 'Complete Scrutiny' in such cases."*

16. Coming to the case on hand, the AO made addition on account of cash payment in violation of section 40A(3) of the Act whereas on perusal of notice under section 143(2) of the Act, we note that the notice for "Limited Scrutiny" was issued for examination of "cash in hand". There was no mentioning/whisper about examination of the fact with regard to "cash payment" in violation of section 40A(3) of the Act. Further, there no whisper in the order of the authority below that the limited scrutiny was converted into complete scrutiny. The Ld.DR before us has also not brought anything on record justifying that the "Limited Scrutiny" was converted by the Assessing Officer under normal scrutiny after obtaining necessary approval from the appropriate authority. Accordingly, we hold that the Assessing Officer has exceeded his jurisdiction by making disallowances of cash payment as per the provision of section 40A(3) of the Act.

17. The right course of action for the AO was to take the approval from the competent authority for expanding the scope of Limited Scrutiny to the regular assessment but he failed to do so. Thus, in our considered view inaction of the AO should not cause any inconvenience to the assessee. In holding so we draw support and guidance from the order of the Hon'ble Chandigarh Tribunal in case of Rajesh Jain vs. ITO reported in 162 taxman 212 where it was held as under:

*"The jurisdiction of the Assessing Officer in such cases where the notices are issued for limited scrutiny is confined to the claims he has set out in the notice for verification. This position of law was further elaborated by the CBDT in its Circular No. 8/2002, dated 27-8-2002.*

*The CBDT Circular clarifies that the Assessing Officer does not have the powers to make the entire assessment of income in limited scrutiny cases. Now question had to be decided when the Assessing Officer does not have the powers while making limited scrutiny assessment to decide such issues which are not covered by the limited scrutiny notice, the Commissioner (Appeals) on appeal against limited scrutiny assessment can exercise the powers in excess of the power vested with the Assessing Officer. There is no doubt that the power of the Commissioner (Appeals) is co-terminus with the power of the Assessing*

*Officer. So, however, in the instant case, when the Assessing Officer did not have the power to make a full-fledged assessment in limited scrutiny cases, the Commissioner (Appeals)'s power could not be enlarged beyond the power of the Assessing Officer in limited scrutiny cases. So, it was considered appropriate to remit the issue relating to allowance of depreciation in respect of the plinth to the file of the Assessing Officer for the purpose of fresh decision in accordance with law. Since the notice under section 143(2)(i ) was issued for limited scrutiny, the Assessing Officer was precluded from considering any other issue while making the assessment under section 143(3) under limited scrutiny. The decision of the Commissioner (Appeals) in considering the other claim of the assessee not covered in the notice issued under section 143(2)(i) for limited scrutiny was contrary to the provisions of the Act and, accordingly, was set aside."*

18. In view of the above and after considering the facts in totality as discussed above, we are not convinced with the finding of the authorities below. As such the entire issue should have been limited to the extent of the dispute raised in the notice issued under section 143(2) of the Act for the limited scrutiny but the AO in the present case has exceeded his jurisdiction as discussed above. Thus, we hold the addition made by the AO without having valid jurisdiction cannot be sustained. Hence, the ground of appeal of the assessee is allowed.

19. In the result, the appeal filed by the assessee is **allowed.**

**Order pronounced in the Court on 04/01/2023 at Ahmedabad.**

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| **Sd/-** | **Sd/-** |
| **(T. R. SENTHIL KUMAR)** | **(WASEEM AHMED)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Ahmedabad; Dated 04/01/2023

*Tanmay, Sr. PS* ***TRUE COPY***

**आदेशकीप्रतिलिपिप्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. संबंधितआयकरआयुक्त/ Concerned CIT
4. आयकरआयुक्त(अपील) / The CIT(A)
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण/ DR, ITAT,
6. गार्डफाईल / Guard file.

**आदेशानुसार/** BY ORDER,

**उप/सहायकपंजीकार** (Dy./Asstt.Registrar)
**आयकरअपीलीयअधिकरण, अहमदाबाद / ITAT, Ahmedabad**