

IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER

ITA No.564/Bang/2018
Assessment year : 2013-14

Smt. Sushila Devi Malu, LR of late Shri Ram Gopal K Malu, Plot No.13, 'Malu House', MSK Mill Road, Industrial Area, Kalaburagi – 585 102. PAN: ACXPM 9597R	Vs.	The Income Tax Officer, Ward 3, Kalaburagi – 585 103.
APPELLANT		RESPONDENT

Appellant by	:	Shri Sreehari Kutsa, CA
Respondent by	:	Dr. P.V. Pradeep Kumar, Addl.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	15.11.2018
Date of Pronouncement	:	20.11.2018

ORDER

Per N.V. Vasudevan, Vice President

This appeal by the assessee is against the order dated 24.11.2017 of CIT(Appeals), Gulbarga for the assessment year 2013-14.

2. The assessee in this case is an individual earning income from house property and income from business. For the AY 2013-14, she filed return of income declaring total income of Rs.1,68,93,667. An order of assessment dated 28.12.2016 was passed u/s. 143(3) of the Income-Tax Act, 1961 ["the Act"] determining the total income of assessee at Rs.2,69,27,824. Aggrieved by the additions made in the order of

assessment, the assessee filed appeal before the CIT(Appeals). The CIT(Appeals) noticed that the assessee had not paid taxes on the returned income and therefore in view of the provisions of section 249(4)(a) of the Act, the appeal filed by the L/H of the assessee, Smt. Sushila Devi Malu was not maintainable and accordingly the assessee's appeal was dismissed *in limine* unadmitted. Aggrieved by the aforesaid order of CIT(Appeals), the assessee has filed the present appeal before the Tribunal.

3. There is a delay of 23 days in filing the appeal which has been explained as due to sudden death of husband and the ignorance of the wife regarding the affairs of business of her husband. We are of the view that the delay in filing the appeal needs to be condoned accepting the reasons given in the application for condonation of delay and keeping in mind the judicial pronouncements referred to in the said application for condonation of delay.

4. As far as the merits of the appeal are concerned, the Id. counsel for the assessee submitted before us that the CIT(Appeals) has not decided the appeal of the assessee on merits for the reason that the taxes due on the returned income was not paid by the assessee. The assessee filed before us challans evidencing the payment of taxes on the income declared in the return of income. The Id. counsel for the assessee submitted that since the taxes due on the returned income are paid, the appeal should be admitted for adjudication. On the other hand, the Id. DR submitted that the payment of taxes needs to be verified.

5. We have considered the rival submissions. The provisions of Sec.249(4) of the Act reads as follows:

Section 249(4) : “No appeal under this Chapter shall be admitted unless at the time of filing of the appeal,—

(a) Where a return has been filed by the assessee, the assessee has paid the tax due on the income returned by him; or

(b) where no return has been filed by the assessee, the assessee has paid an amount equal to the amount of advance tax which was payable by him :

Provided that, in a case falling under Clause (b) and on an application made by the appellant in this behalf, the CIT(A) may, for any good and sufficient reason to be recorded in writing, exempt him from the operation of the provisions of that clause.”

6. The Mumbai ITAT in the case of *Bhumiraj Constructions Vs. ACIT 131 ITD 406 (Mumbai)* had an occasion to deal with a case where an appeal by the Assessee was dismissed for non-payment of tax due on the income declared in the return of income. The Tribunal firstly observed that there is a distinction between a mandatory and directory provision. If the non-compliance with the requirement of law exposes the assessee to the penal provision, then it is mandatory, but if no penal consequences follow on non-fulfillment of the requirement, then usually it is a directory provision. Omission to comply with a mandatory requirement renders the action void, whereas omission to do the directory requirement makes it only defective or irregular. On the removal of such defect, the irregularity stands removed and the status of validity is attached. The Tribunal relied on the following decision in coming to the above conclusion: *M.L. Srinivasa Setty & Sons vs. State of Karnataka (1991) 99 CTR (Kar) 77 : (1992) 193 ITR 548 (Kar)* and *CIT vs. Trehan Enterprises (2001) 168 CTR (J&K) 274 : (2001) 248 ITR 333 (J&K)*. The Tribunal thereafter observed that appeal filed without paying tax due on returned income is only defective, but not void. Thus, if tax is paid on the income returned, either before or at the time of or after the filing of return, it will be sufficient compliance with the provisions of sub-

s. (4) of s. 249. The prerequisite is that the payment of such tax, in the category of cases in which tax is paid after the filing of return, should be before the admission of first appeal. In case such tax is not paid upto the filing of appeal before the CIT(A), the same shall not be admitted. In other words, if the appeal is to be admitted by the first appellate authority, it is sine qua non that the assessee must have made the payment of tax on the income returned. If no payment of tax on the income returned is made at all and the appeal is filed, that cannot be admitted. If, however, the appeal is filed without the payment of such tax but subsequently the required amount of tax is paid, the appeal shall be admitted on payment of tax and taken up for hearing. The Tribunal examined the objective behind s. 249(4) and observed that the same is to ensure the payment of tax on income returned before the admission of appeal. If such payment after the filing of appeal but before it is taken up for disposal validates the defective appeal, then there is no reason as to why the doors of justice be closed on a poor assessee who could manage to make the payment of tax at a later date. The stipulation as to the payment of such tax ante the filing of first appeal is only directory and not mandatory. Whereas the payment of such tax is mandatory but the requirement of paying such tax before filing appeal is only directory. When the defect in the appeal, being the non-payment of such tax, is removed, the earlier defective appeal becomes valid. Once we call an appeal as valid, it is implicit that it is not time-barred. It implies that all the consequences which follow on the removal of defect are that the validity is attached to the appeal from the date when it was originally filed and not when the defect is removed. The Tribunal ultimately held that if tax due on income returned is paid even after disposal of the appeal by the CIT(A), if such payment is made the defect in the appeal due to non-compliance of a directory requirement of paying such tax before the filing of

the appeal, stood removed. *Ex consequenti* the appeal should have been revived by the first appellate authority.

7. In the present case, the taxes due on returned income is claimed to have been paid. Therefore, the appeal by the Assessee against the order of assessment should be admitted and adjudicated by the CIT(Appeals) on merits. In the decision referred to above, it has been held that if the admitted taxes are paid at a later point of time, then the appeal of the assessee should be considered as properly instituted and should be heard and decided by the CIT(Appeals) on merits. Following the aforesaid decision, we set aside the order of CIT(Appeals) and direct the CIT(A) to decide the appeal on merits, subject to verification of payment of taxes due on the returned income.

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

Pronounced in the open court on this 20th day of November, 2018.

Sd/-

(INTURI RAMA RAO)
Accountant Member

Sd/-

(N.V. VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated, the 20th November, 2018.

/ Desai Smurthy /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore.