

IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'C', BANGALORE

BEFORE SHRI. ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

AND

SHRI. VIJAYPAL RAO, JUDICIAL MEMBER

I.T.A No.1257/Bang/2013
(Assessment Year : 2005-06)

M/s. Fiza Developers & Inter Trade P. Ltd,
No.25/1, Residency Road,
Bangalore
PAN : AAACF5868N

.. Appellant

v.

Deputy Commissioner of Income-tax,
Circle -11(3), Bangalore

.. Respondent

Assessee by : Shri. S. V. Ravishankar, Advocate
Revenue by : Shri. Sunil Kumar Agarwala, JCIT

Heard on : 25.08.2015
Pronounced on : 27.08.2015

ORDER

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER :

In this appeal filed by assessee directed against an order dt.17.06.2013, its grievance is that the CIT (A) dismissed its appeal for non-payment of tax due on returned income.

02. When the matter came up before us, Ld. Counsel for the Assessee submitted that the total tax due as per the return filed was Rs.87,14,679/- out of which, Rs.16,90,412/- stood credited on account of TDS. As per the Ld. AR though it was true that assessee had not paid full amount of tax at the time of filing the return or before the appeal was filed, it was later paid in full. Ld. AR

pointed out that CIT (A) had at para 4 of its order mentioned that taxes were paid by the assessee in 2010.

03. Per contra, Ld. DR submitted that assessee having not paid the admitted tax before filing the appeal before CIT (A), the latter was justified in dismissing the appeal.

04. We have perused the orders and heard the rival contentions. Copy of the return filed by assessee show that the total amount of tax payable was Rs.87,14,679/-. TDS against the above amount was Rs.16,90,412/-. Assessee has enclosed self-assessment tax challan for Rs.45,79,085/- paid on 28.01.2010, Rs.25,00,000/- paid on 31.03.2006 and Rs.36,33,854/- paid on 30.05.2006. Thus the admitted tax stood fully paid by 2010. CIT (A) dismissed appeal of the assessee for the sole reason that admitted taxes were not paid relying on sub-section (4)(a) of Section 249 of the Act. That, once admitted tax is paid, appeal has to be decided on merits in a settled position of law by virtue of judgment of Hon'ble jurisdictional High Court in the case of CIT v. K. Satish Kumar Singh (2012) 209 Taxman 0512 . Para 4 & 5 of this judgment is reproduced hereunder:

4. Section 249 of the Act deals with form of appeal and limitation. Sub-Section (4) of Section 249 of the Act reads as under:

"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 Commissioner (Appeals) may, for any good and sufficient reason to be recorded in writing, exempt him from the operation of the provisions of that, clause.

Therefore, from the aforesaid provision, it is clear when the return has been filed by the assessee, unless the assessee pays the admitted tax due on the income returned by him, no appeal shall be entertained and admitted. Therefore, if admitted tax is not paid which falls under Clause (a) of Sub-Section (4) of Section 249 of the Act, the Commissioner (Appeals) is not vested with any power to waive payment of such admitted tax and entertain the appeal. The order of dismissing the appeal in such circumstances is automatic. Therefore, the appeal dismissed under Clause (a) of Sub-Section (4) of Section 249 of the Act for non-payment of admitted tax due on the income returned by the assessee cannot be found fault with. However, if after such dismissal, if the assessee pays the admitted tax and requests the Appellate Authority to recall the order dismissing the appeal in limine and to consider the appeal on merits under the aforesaid provision or under any other provision of the Act, there is no prohibition or legal impediment for the Appellate Authority to recall its earlier order and entertain the appeal and decide the same on merits.

5. The Apex Court in the case of Vijay Prakash D. Mehta v. Collector of Customs [1989] [175 ITR 540](#)(SC) dealing with the similar provisions under the Customs Act has held that the right of 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 of appeal is a statutory right and it can be circumscribed by the conditions in the grant. It is not the law that adjudication by itself, following the rules of natural justice, would be violative of any right, constitutional or statutory without any right of appeal, as such. If the statute gives a right to appeal upon certain conditions, it is upon fulfilment of those conditions that the right becomes vested in, and exercisable by, the appellant. If discretion is vested, then there is an obligation to act judicially and properly. The purpose of such restriction is to act in terrorem to make the people comply with the provisions of law. Therefore, the object of stipulating conditions such as demand of admitted tax is a condition precedent for entertaining the appeals

and admitting the appeals is to see that the appellant obeys the law, Though the right of appeal is conferred under a statute, the said right is subjected to the restrictions imposed under the very same statute. There cannot be any absolute right de hors the provisions of the statute. Therefore, in the instant case, the statute has conferred a right of appeal. It also in unequivocal terms expressly has stated that in cases where the assessee files a return and admits the liability to pay tax on the income returned, unless he pays the said admitted tax due on the income returned, he may not exercise the statutory right of appeal. As is clear from Clause (b) of Sub-Section (4) of Section 249 of the Act in all cases falling under Sub-Section (4) of Section 249, no discretion is vested with the Appellate Authority. Therefore, in cases falling under clause (a) of Sub-Section (4) of Section 249 of the Act, if the said condition is not fulfilled by the assessee, the appeal shall not be admitted and the only order that can be passed is dismissal of the appeal in limine. Keeping in mind, the object with which these provisions are introduced, once the assessee realises his obligations under the Statute, the purpose with which these provisions in terrorem are introduced under the Act, obeys the statutory obligations, pays the tax, then he may not be denied the right of appeal which the Statute has provided to him. In the absence of any express words circumscribing the powers of the Tribunal, the Tribunal has the ample power to recall its earlier order dismissing the appeal in limine and to hear the appeal on merits. If the admitted tax had been paid, the Appellate Authority ought to have admitted the appeal and hear the appeal on merits. Of course, while recalling the order, it is open to the authority to find out whether the said application is made bona fide, is there any unreasonable delay in approaching the Tribunal and other matters. But once the conduct of the assessee is not such as to disentitle him to exercise his right of appeal by obeying the law, that is by depositing the admitted tax liability, the Appellate Authority should be liberal in entertaining these applications and hear the appeal on merits and pass appropriate orders, in accordance with law. In the light of what we have stated, the order passed by the Tribunal cannot be found fault with. Accordingly, the appeal is dismissed.

Following the above judgment, we set aside the order of CIT (A) and remit the issue back for consideration in accordance with law.

05. In the result, appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 27th day of August, 2015.

Sd/-

Sd/-

(VIJAYPAL RAO)
JUDICIAL MEMBER

(ABRAHAM P GEORGE)
ACCOUNTANT MEMBER

MCN*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By Order

Assistant Registrar