

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "H": NEW DELHI

Before Shri G.S. Pannu, Hon'ble President
and
Shri Anubhav Sharma, Judicial Member

ITA No. 6559/Del/2019
(Assessment Year: 2010-11)

Vikram Singh, C/o. Chaman Singh, B-6 (basement) JS Arcade, near Bikanerwala, Opp. Metro Pillar No. 65, Sector-18, Noida, Gautam Budh Nagar, UP (Appellant)	Vs. ITO, Ward-2(5), Noida (Respondent)
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PAN: **JMLPS3035M**

Assessee by :	Shri Rajat Garg, CA
Revenue by:	Shri Mrinal Kumar Dass, Sr. DR

Date of Hearing	20/01/2023
Date of pronouncement	21/02/2023

O R D E R

PER ANUBHAV SHARMA, J. M.:

1. The appeal has been preferred by the Assessee against the order dated 31.12.2018 of Ld. Commissioner of Income Tax (Appeals)-I, Noida (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal No. 425/2017-18/Noida arising out of an appeal before it against the assessment order dated 15.12.2017 passed u/s 144/147 of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the Id Assessing officer ITO, Ward-2(5), Noida (hereinafter referred as the Ld. AO).
2. Facts in brief are that a Non-PAN AIR information was received that the Assessee sold an immovable property of Rs. 2,62,35,074/- during the FY 2009-

10. To verify the transaction an information was called u/s 133(6) of the Act. However, Assessee did not respond. The Id AO observed on the basis of sale deed that the plot bearing Khata No. 267, Village-Duryai, Pargana & Tehsil-Dadri, Noida, Distt. Gautam Budh Nagar was sold. Therefore, proceedings u/s 147 of the Act was initiated and notice u/s 148 of the Act was issued after prior approval of Id Pr. CIT, Noida. The Assessee did not furnish return of income u/s 148 of the Act. The Assessee had also not furnished PAN. Notice u/s 142(1) along with questionnaire was issued. The Assessee submitted that the land sold was agricultural land and was of ancestral nature. The Assessee claimed that it was situated at a distance of 12 kms from the local limits of Dadri Municipality and the land sold by him does not fall in the definition of capital asset as defined in section 2(14) of the Act. However, no return of income for Assessment Year 2010-11 or PAN was submitted therefore, show cause notice u/s 144 of the Act was issued and no reply was received. The assessment was completed u/s 147/144 of the Act holding that land sold was capital asset and that the Assessee had failed to submit ITR for Assessment Year 2010-11 and thus long term capital gain of Rs. 1,31,17,537/- was added to the income of the Assessee. As it was challenged in appeal before the Id CIT(A), the Id First Appellate Authority did not decide the appeal on merits but passed the impugned order by dismissing the appeal for non compliance of mandatory provision of section 249(4) of the Act. The Assessee is now in appeal before the tribunal with the following grounds:-

1. *Ld. Assessing Officer had no jurisdiction on the assessee, so without jurisdiction assessment order is void-ab-initio.*
2. *Ld. CIT(A), had passed order u/s 250 without providing an opportunity of being heard and ex-party order had been made by CIT(A) any notice has not been served on Assessee.*
3. *Ld. CIT(A) has passed order by mentioning that assessee has not deposited his advance tax, but in our case assessee is senior citizen, so provision of advance tax is not applicable on him, so order of CIT(A) is void ab initio.*
4. *That on Facts and circumstances of the case and in Law, the assessing officer had erred in assessing the income tax of the*

appellant at Rs. 75,27,290.00, please be deleted. That the Ld. Assessing Officer had erred on facts and circumstances of the case and in law in making an addition on account from cash deposited in his saving bank account of Rs. 1,31,17,537.00.

5. *After sale of this agriculture land all amount was invested in construction of his residential home in his village.*
6. *Further grounds of appeal is submitted below at the end."*

3. Heard and perused the record.

4. On behalf of the Assessee the Id AR submitted that the Assessee is a Senior citizen and copy of PAN card showing date of birth on 05.03.1924 and the copy of Addhar Card showing the same date of birth, has been placed on record. The Id AR relied on the provisions of section 207 of the Act and submitted that as there was no liability for payment of advance tax the Assessee was not required to file the return of income, therefore, provision of section 249(4) of the Act were not applicable.

5. The Id DR however, relied on the order of the Id AO to submit that AO has passed a reasoned order holding that the Assessee was liable to file income tax return for Assessment Year 2010-11 and therefore as per section 249(4)(b) the Assessee was required to pay the amount equal to amount of advance tax, which was payable by him.

6. The Bench has given thoughtful consideration to the matter on record and the submissions. As for convenience section 249(4) and section 207 are reproduced below:-

"Section 249(4) in The Income- Tax Act, 1995

(4) 1 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, 2 in a case falling under clause (b) and] on an application made by the appellant in this behalf, the 3 Deputy Commissioner (Appeals)] 4 or, as the case may be, the Commissioner (Appeals)] may, for any good and sufficient reason to be recorded in writing, exempt him from the operation of the provisions of 5 that clause].”

"Liability for payment of advance tax.

207. (1) Tax shall be payable in advance during any financial year, in accordance with the provisions of sections 208 to 219 (both inclusive), in respect of the total income of the assessee which would be chargeable to tax for the assessment year immediately following that financial year, such income being hereafter in this Chapter referred to as "current income".

(2) The provisions of sub-section (1) shall not apply to an individual resident in India, who—

(a) does not have any income chargeable under the head "Profits and gains of business or profession"; and

(b) is of the age of sixty years or more at any time during the previous year.”

7. Perusal of the aforesaid provisions of section 207 of the Act show that it talks about payment of advance tax in regard to total income which would be chargeable to tax. However, an individual resident of 60 years or more who, any time during the previous year, was not having any income chargeable under the head “profit and gains” of business or profession, is not required to pay the advance tax. When read in context of section 249(4)(b) it has to be observed that where no return has been filed by the assessee, then in that case at time of appeal before the CIT(A), the assessee has to pay an amount equal to the amount of advance tax which was ‘payable by him’. However, here no advance tax was payable as the assessee was over 60 years of age and not having any income from P&G. Further, the proviso to the Section 249(4) of the Act provides that if sufficient reason are brought on record in writing the CIT(A) may exempt the Assessee from the operation of provision of clause 249(4)(b) of the Act.

8. The record does not show if the Assessee has claimed before the Id CIT(A) that it was entitled to any exemption by virtue of section 207. The impugned

order was passed in the absence of Assessee and the impugned order dated 31.12.2018 in paragraph Nos. 2 to 12 mention that inspite of notice being issued the same could not be served on the Assessee and therefore, there was no representation of the Assessee before the Id CIT(A) and who proceeded to dismiss the appeal by invoking provision of section 249(4)(b) of the Act without giving taking into consideration the facts which assessee claims made him not liable to pay the advance tax.

9. In the light of the aforesaid circumstances, the Bench is of considered opinion that the Assessee should be given an opportunity to put across its claim of exemption from the application of section 249(4) of the Act before the Id CIT(A). The bench can rely on the Hyderabad bench's order in **ITA No. 159/Hyd/2019 in case of Late Smt Raful Ghani Vs. Asstt. CIT**, wherein, the Bench was confronted with similar situation. It observed the facts in para No. 3 and 4 as under:-

"3. Since this information was received by the Assessing Officer and it was found that the assessee has not filed any return of income for the relevant A.Y declaring capital gains on the consideration received towards her share (50%) as per the joint development agreement, the Assessing Officer reopened the assessment and after examining the assessee's contention about the exemption u/s 54F of the Act, the Assessing Officer held that since the assessee has not filed her return of income for the relevant A.Y and has not claimed the exemption u/s 54F of the Act, the same is not allowable to the assessee. He accordingly computed the long term capital gain of Rs.56,62,800/- and brought it to tax.

4. Aggrieved, the assessee preferred an appeal before the CIT (A). The CIT (A) observed that the assessee has not filed the return of income nor has given any reason as to why the assessee did not file the ROI and has not paid the advance tax payable by the assessee as is required to admit an appeal under the provisions of section 249(4)(b) of the Act. Therefore, he held that the appeal of the assessee is not admissible and dismissed it in limini. Aggrieved, the assessee is in appeal before the Tribunal by raising the following grounds of appeal:

"1. The order of the learned Commissioner of Income-Tax (Appeals) is erroneous both on facts and in law.

2. The learned Commissioner of Income-Tax (Appeals) erred in holding that the appeal filed by the appellant is not maintainable.

The learned Commissioner of Income-Tax (Appeals) ought to have seen that according to the appellant no tax is payable by him and that, therefore, no advance tax liability arises and in view of the same, the provisions contained in Sec.249(4)(b) have no application.

3. The learned Commissioner of Income-Tax (Appeals) erred in holding that the appellant is liable to pay any advance tax and that there was failure as mentioned in Sec.249(4)(b) of the LT. Act. As an alternate the learned Commissioner of Income-Tax (Appeals) ought to have provided property opportunity.

4. The learned Commissioner of Income-Tax (Appeals) ought to have considered each of the grounds agitated before him and decided the appeal on merits.

5. The learned Commissioner of Income-Tax (Appeals) ought to have considered that the Assessing officer wrongly worked out the capital gain; did not allow the amount of deduction claimed u/s 54 of the IT Act and if the Assessing officer had correctly worked out the income there would not have been any tax payable.

6. Any other ground that may be urged at the time of hearing”.

10. The Bench held in para 7 as under:-

"7. Having regard to the rival contentions and the material on record, we find that the provisions of section 249 (4) (b) are applicable to the case on hand since the assessee has not filed the return of income, nor has paid the advance tax payable by her. Therefore, she ought to have filed an application under the proviso to section 249 (4) (b) of the Act for exemption from the application of section 249(4)(b) of the Act. In such circumstances, The CIT (A) had no choice but to dismiss the appeal as it was defective. However, purely in the interest of justice and taking the prayer of the assessee into consideration, we set aside the issue to the file of the CIT (A) with a direction to the assessee to file the application under the proviso to section 249(4)(b) of the Act within a period of one month from the date of receipt of this order and thereafter, the CIT (A) shall dispose of such application of the assessee and decide on the issue of exemption from the application of the provisions of section 249(4)(b) and thereafter, the CIT (A) shall also decide the appeal on merits. Needless to mention that the assessee shall be given a fair opportunity of hearing."

11. In the light of the aforesaid the impugned order is set aside and the issue is restored to the file of the Id CIT(A) to decide the question of applicability of

section 249(4) of the Act on merits of claim of the assessee, after giving an opportunity of hearing to the Assessee.

12. The appeal is allowed for statistical purposes.

Order pronounced in the open court on 21/02/2023.

-Sd/-
(G.S. Pannu)
Hon'ble President

-Sd/-
(Anubhav Sharma)
Judicial Member

Dated: 21/02/2023
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

