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# Appeal before CIT was to be admitted on basis of original return if revised return wasn't a valid return

**Summary – The Mumbai ITAT in a recent case of Mohammed Farooque Sarang, (the Assessee) held that Revised return filed not in compliance with requirements of section 139(5) was non-test and same could not constitute a return contemplated in section 249(4)(a)**

**Where appeal filed by assessee was not admitted by Commissioner (Appeals) by referring to clause (a) of section 294(4) due to non-payment of tax on income declared in return, since assessee had paid tax on returned income before passing of said order by Commissioner (Appeals), impugned order refusing to admit appeal was to be set aside**

**Facts**

- The assessee was an individual in whose case a search action under section 132(1) was carried out. For the assessment year under consideration, assessee had not filed its regular return under section 139(1) and it was only after a notice under section 153A was issued, assessee filed return of income declaring the total income at Rs. 1.55 crores. Subsequently, the assessee filed a revised return declaring an income of Rs. 6.32 crores. In the assessment finalized under section 143(3) read with section 153A the Assessing Officer determind the total income at Rs. 7.23 crores after making certain additions/disallowances on account of low withdrawals, unexplained credits and rent from property, etc.
- The assessee challenged the additions in appeal before the Commissioner (Appeals). The Commissioner (Appeals) referred to the provisions of section 249(4), which prescribed that no appeal would be admitted unless at the time of filing of appeal, assessee had paid the tax due on the income returned by him. The Commissioner (Appeals) referred to clause (a) of section 249(4) of the Act and noted that the assessee had not paid the tax on the income declared in the revised return and, therefore, the appeal was dismissed as unadmitted.
- On Second appeal:

**Held**

- The case of assessee falls in clause (*a*) of section 249(4) of the Act as assessee had filed a return of income. Thus, in terms of section 249(4)(a) of the Act, assessee ought to have paid the tax due on the income returned by him at the time of filing of appeal before the Commissioner (Appeals). The first issue in this appeal is what is the connotation of the expression 'return' contained in clause (*a*) of section 249(4). As per the revenue, compliance of section 249(4) of the Act has to be seen *vis-à-vis* the revised return filed by the assessee on whereas as per the assessee, the relevant return is the one filed origianlly.

- The revised return filed is claimed to be *non-est* in the eyes of law inasmuch as it could not have been filed in terms of section 139(5) of the Act. The assessee has made a statement at Bar that it has not filed a regular return as required under section 139(1) and further, even the return filed in response to notice issued under section 153A was filed belatedly. The aforesaid factual matrix has not been disputed by the revenue. Under these circumstances, if one has to examine the validity of the revised return then, in terms of section 139(5), read with section 153A(1)(a), has to be examined as to whether the original return, which is sought to be revised, was filed within the period specified or not.
- Ostensibly, the factual-situation shows that no return has been filed in pursuance of section 139(1) and even the return filed in response to notice under section 153A is belated and, therefore, under these circumstances, the revised return filed is not in consonance with the requirements of section 139(5). Under these circumstances, there is enough justification in the plea of assessee that the revised return filed is *non-est* in the eyes of law and the same is not relevant for the purpose of examining the applicability of section 249(4)(a) of the Act.
- At this stage, one may refer to the judgment of the Karnataka High Court in the case of *K. Nagesh* v. *Asstt. CIT* [2015] 57 taxmann.com 439/232 Taxman 507/376 ITR 473 wherein the issue related to refund of tax and interest due to the assessee having regard to section 240 of the Act. In the context of section 240 of the Act, the High Court held that the return contemplated therein was a valid return and the revised return which was not in compliance with section 139(5) of the Act was a *non-est* return and it could not be considered as the 'return' contemplated under section 240 of the Act.
- On a similar analogy in the present case, it has to be held that the revised return filed by the assessee is *non-est* as it is not in compliance with the requirements of section 139(5) and, therefore, the same would not constitute the return contemplated in section 249(4)(a). Therefore, the requirements of section 249(4) have to be examined with reference to the tax payable on the income declared in the return filed originally.
- The revenue pointed out that at the time of filing of appeal before the Commissioner (Appeals), admittedly the tax on the income returned was not paid. Under these circumstances, the rigors of section 249(4)(a) clearly come into operation and the appeal before the Commissioner (Appeals) deserved to be treated as unadmitted. It is also axiomatic that so far as the situation contemplated in clause (*a*) of section 249(4) of the Act is concerned, the Commissioner (Appeals) is not vested with any power to waive payment of the admitted tax and entertain the appeal in contrast to the situation contemplated in clause (*b*) to section 249(4) of the Act. However, the defense put up by the assessee is that the non-payment of admitted tax on returned income is a curable defect and once such a defect has been cured, there is enough justification for the appeal being admitted by the Commissioner (Appeals).
- The co-ordinate Bench in the case of *Smt. Banu Begum*, v. *Dy. CIT*[2012] 22 taxmann.com 235 (Hyd.) has observed that non-payment of admitted tax is a defect which can be cured by payment of tax. In fact, the Karnataka High Court in the case of *CIT* v. *K. Satish Kumar Singh* [2012] 19 taxmann.com

154/209 Taxman 502 opined that even after the dismissal of appeal by the Commissioner (Appeals) for non-payment of admitted tax, if assessee pays the admitted tax, even then the Commissioner (Appeals) may recall the order dismissing the appeal and consider the appeal on its merits. In view of the aforesaid proposition, in the present case too, since the assessee has claimed that it has paid tax on the returned income before passing of order by the Commissioner (Appeals), it will be in the fitness of things that the matter is remitted back to the file of Commissioner (Appeals) to be considered afresh on merits.

- In the result, assessee's appeal is allowed for statistical purposes.