

Appeal to be admitted if defect of non-payment of tax is removed by assessee later on

Summary – The Bangalore ITAT in a recent case of Smt. Sushila Devi Malu., (the Assessee) held that In terms of sub-section (4) of section 249, payment of tax is mandatory but requirement of paying such tax before filing appeal is only directory and, therefore, when defect in appeal, being non-payment of such tax, is removed, earlier defective appeal becomes valid

Facts

- For relevant year, the Assessing Officer completed assessment under section 143(3) making certain additions to assessee's income.
- The assessee filed appeal before the Commissioner (Appeals). The Commissioner (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), the appeal filed by the assessee was dismissed in limine as unadmitted.
- On second appeal:

Held

- The Tribunal in the case of *Bhumiraj Constructions v. ACIT* [131 ITD 406 \(Mum.\)](#) 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-fulfilment 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 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-section (4) of section 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 section 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 an appeal is called 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 Commissioner (Appeals), 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.
- In the instant 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, the order of CIT (Appeals) is set aside and the Commissioner (Appeals) is directed to decide the appeal on merits, subject to verification of payment of taxes due on the returned income.
- In the result, the appeal by the assessee is allowed for statistical purposes.