THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "DIVISION BENCH-A"
AHMEDABAD

Before: Shri Ramit Kochar, Accountant Member &
Shri T.R.Senthil Kumar, Judicial Member

ITA No. 268/Ahd/2024
Assessment Year: 2010-11

Real Cargo Mumbai and / or The Partners/ Legal Representatives of the Partners of Real Cargo Movers as Stipulated u/s 189(1), 189(3) & 189(4) of the 1961 Act(Partners as per record:Shri Daudbhai K. Tintoiya, Shri Isakbhai L.Tintoiya, Shri Rashimbhai S. Tintoiya & Shri Abdulrahim I. Bandi) Near Water Tank, Tintoi, Modasa Aravalli-383315, Gujarat PAN:AAKFR2370L (Appellant)	v.	The Income Tax Officer, Ward-1, Modasa, Aayakar Bhawan Modasa, District Aravalli-383250, Gujarat. (Respondent)

Assessee by: Shri S.N.Divatia ,Advocate & Shri Samir Vora, Advocate
Revenue by: Shri Akhilendra Pratap Yadav,CIT-DR

Date of hearing : 01-08-2024
Date of pronouncement : 30-08-2024

आदेश/ORDER

This is second round of litigation before Income-tax Appellate Tribunal, Ahmedabad Bench, Ahmedabad. This appeal in ITA No.268/Ahd/2024 for assessment year 2010-11, is filed by the assessee before Income Tax Appellate Tribunal, Ahmedabad Division Bench, Ahmedabad has arisen from the appellate order dated 25.09.2023 passed by Ld. Commissioner of Income-Tax(Appeals), NFAC, Delhi u/s. 250 of the Income-tax Act,1961 , vide DIN & Order No. ITBA/NFAC/S/250/2023-24/1056508501(1), which has in turn arisen from the assessment order dated 18.12.2018 passed by the Assessing Officer u/s. 143(3) read with Section 254 of the Income-tax Act 1961.

2. The grounds of appeal raised by the assessee in Memo of Appeal filed with the Income Tax Appellate Tribunal, Ahmedabad Bench, Ahmedabad , reads as under:-

> *"1. The order passed u/s 250 passed on 25.09.2023 by NFAC, Delhi for AY 2010-11 upholding the disallowance of freight expenses of Rs. 8,29,90,590/- u/s 40(a)(ia) made by AO is wholly illegal, unlawful and against the principles of natural justice.*

2.1 The ld. NFAC has grievously erred in law and or on facts in not appreciating that there could not be compliance to the notices claimed to be issued mainly on account of closure of business at Tintoi long back, death of the tax consultant and closure of his office, non-availability of the details, documents/evidences etc, unawareness about the IT Portal details and notices uploaded on portal etc. Thus, there was a sufficient cause for failure to comply with the notices claimed to be issued by both the lower authorities.

2.2 The ld. NFAC has failed to appreciate that there was a sufficient cause for failure to respond to the notices of hearing and produce necessary details/documents.

3.1 The ld. NFAC has grievously erred in law and or on facts in upholding the disallowance of freight expenses of Rs. 8,29,90,450/0 u/s 40(a)(ia) made by A.O..

3.2 That the in facts and circumstances of the ld. NFAC ought not to have upheld the disallowance of freight expenses of Rs. 8,29,90,590/- u/s 40(a)(ia) made by A.O..
3.3 Without prejudice to above, the disallowance confirmed by both the lower authorities was highly excessive and calls for reduction.

It is , therefore, prayed that the disallowance upheld by the CIT(A) may kindly be deleted."

3. At the outset, the ld. Counsel for the assessee, Shri S. N. Divatia submitted that this appeal is filed belatedly by the assessee with ITAT by 83 days beyond the time prescribed u/s 253(3) of the 1961 Act. The ld. Counsel Shri S. N Divatia, drew our attention to the application for condonation filed by the assessee, praying for condonation of delay in filing this appeal belatedly with ITAT by the assessee beyond the time prescribed u/s 253(3) of the 1961 Act by 83 days. In the application filed by the assessee for condoning the delay, it is averred that the appellate order dated 25.09.2023 passed by ld. CIT(A) was e-communicated to the assessee on 25.09.2023

, but the same was downloaded by the assessee from the IT Portal only on 04.01.2024. It is averred that there was SMS message received from the department by former accountant on 04.01.2024 to submit online response in response to notice issued by Department which was notice for recovery of tax-demand, and at this stage on making further enquiry , the assessee became aware that the ld. CIT(A) has passed an ex-parte appellate order. The appeal was filed with ITAT on 15.02.2024, with delay of 83 days. It is also averred that the tax-consultants of the assessee who was looking after the tax-matter of the assessee expired, which is also the reasons for delay in filing this appeal belatedly with ITAT, as the firm of the tax-consultant closed down due to the aforesaid death and only one old peon used to come to office premises occasionally to hand over the documents to the clients. It is also averred that the assessee has also closed down its business, and partners have shifted after closing of the business , and hence they were not aware of the status of the pending matters.It is only after an alert message received from Income Tax Department on 04.01.2024 by the previous accountant who is of age of 70 years, about filing on-line response to notice issued by department which was in context of outstanding demand against the assessee firm, that it came to notice of the assessee after making further enquiry that an ex-parte appellate order has been passed by ld. CIT(A), and then steps

were taken to file appeal with ITAT.It is also averred that the matter being old, the partners are trying to locate the old records as well the AO is requested to provide the copies of relevant documents/records. Thus, in nut-shell, prayers are made to condone the delay in filing this appeal belatedly by the assessee with ITAT by 83 days beyond the time prescribed u/s 253(3) of the 1961 Act. The ld. CIT-DR fairly submitted that the matter is left to the discretion of the Bench, although the department has objection to the aforesaid delay. One of the reasons for the delay as averred by the assessee in its application for delay in filing this appeal was that the appellate order was posted on ITBA on 25.09.2023 but it was downloaded by the assessee on 04.01.2024(appeal filed with ITAT on 15.02.2024) when the SMS alert was received on the mobile of former accountant on 04.01.2024 asking assessee to submit online response to notice issued by the department which notice was in context of recovery of tax demand outstanding against the assessee, and at this stage the assessee came to know that an ex-parte appellate order was passed by ld. CIT(A), in our considered view, the aforesaid reason cited by the assessee is in the realm of plausible and possible reasons more especially that this is a period of switch over phase wherein the Revenue is moving towards effective utilisation of latest and advanced technologies while handling tax matters and processes at various levels and stages

including filing and processing of returns of income, filing and processing of various applications under various provisions of the statute, faceless assessments , faceless adjudication of appeals, appellate proceedings , and in this switchover phase, there is every possibility that there could be initial hiccups , difficulties, glitches and adaptability to newer technology , which could arise both for the Revenue as well for the assessee, and some time may be required for the things to stabilise and for its adaptability. The assessee has also cited other reasons for the delay in filing this appeal. Although, we are also of the view that the assessee was required to be more vigilant as it is the assessee who has filed the appeal. Under these facts and circumstances, we are of the considered view that the delay needs to be condoned and the appeals be heard on merits. When technicalities are pitted against the substantial justice, the Courts will lean towards advancement of substantial justice rather than technicalities. Under the facts and circumstances, and in the interest of justice, we condone the delay and proceed to adjudicate the appeal on merits in accordance with law. Reference is drawn to the decision of Hon'ble Supreme Court in the case of ***Collector of Land Acquisition, Anantnag v. Mst. Katiji (1987 AIR 1353(SC))***.

4. This is a second round of litigation before ITAT. In the first round of litigation, the ITAT remitted the matter back to

the file of the AO for denovo assessment, vide appellate order dated 27.02.2017 in ITA No. 986/Ahd/2015, by holding as under:

> *" 4. Heard both the sides reiterating their respective stand against and in support of the impugned disallowance . Learned counsel strongly argues that both the lower authorities have erred in making the impugned section 40(a)(ia) disallowance despite the fact that the assessee had placed on record all necessary details of his freight payees in questions. He invited our attention to page nos. 7 to 9 of the Paper Book in this regard whose contents are not disputed Even at revenue's behest. Learned counsel inter alia pleads thereafter that section 40(a)(ia) second proviso inserted in the Act vide Finance Act 2012 w.e.f. 01.04.2013 envisaging non-application of impugned disallowance in the case the assessee is not the one in default in light of section 201(1) squarely applies in facts of the instant case. The Revenue however opposes this contention by submitting that the second proviso is made applicable w.e.f. 01.04.2013 only. Learned counsel representing assessee at this stage quotes Tribunal's decision in Rajeev Kumar Agarwal vs. Addl. CIT-ITA No. 331/Agra/2013 decided on 29.05.2013 holding above stated proviso to be curative in nature with retrospective effect from 01.04.2005. He further quote Hon'ble Delhi High Court's decision in the case of IT vs. Ansal land mark Township (P) Ltd in Tax Appeal No. 2160/2015 decided on 26.08.2015 upholding above stated Tribunal's decision .*
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> *5.Learned departmental Representative fails to rebut this legal position. We thus accept assessee's legal contention and direct the Assessing Officer to pass a fresh order after conducting necessary verification as to whether qua freight payment in question or not.*

> *Needless to say the assessee shall be afforded adequate opportunity of hearing. It is made clear that we have not adjudicated upon assessee's other contentions of non-applicability of section 194C of the Act as well on various legal and factual pleas.It would be at liberty to re-agitate all such factual and legal plea in the course of consequential proceedings...."*

5. In second round, the AO framed the denovo assessment vide order dated 18.12.2018 passed u/s 254 read with Section 143(3) reiterating the additions made in the first round of litigation. This assessment order was challenged by the assessee before ld. CIT(A) . In the second round of litigation, the ld. CIT(A) dismissed the appeal of the assessee vide appellate order dated 25.09.2023. The assessee is now in appeal before ITAT in this second round of litigation. Before we proceed further, it is relevant to mention that it is observed by us that the assessee in its application for condonation, dated 14.02.2024 has stated that the business of the assessee stood discontinued. Similarly, it is observed that in the statement of facts(SOF) filed by the assessee before ITAT in para 2.6, it is stated that business of the appellate firm stood closed many years back. It is also stated that the partners have shifted. Even contradictory stand is taken , wherein at some places it is mentioned that partners of the assessee firm have shifted and at some place , they are referred to as ex-partners. The assessee is a partnership firm. The assessee has to make true, complete and correct disclosure of its status and

current state of affairs, which it failed to do so. The assessee has to come out with complete, correct and true facts and state of affairs as to whether it stood dissolved or it is an existing entity. This is a second round of litigation with ITAT. Before ld. CIT(A) even in the second round of litigation, the assessee did not mention this factum of closure of its business many years back. Thus, the assessee concealed this fact from the authorities. Reference is drawn to provisions of Section 176(3), 189(1) 189(3) and 189(4) of the 1961 Act. At this stage, it is relevant to cite Section 176(3) of the 1961 Act, which clearly stipulated that in case of discontinuance of business, it is obligatory on the part of the assessee to give notice to the AO of such discontinuance of business within fifteen days thereof. There is clearly a failure on the part of the assessee, as no such evidence is brought on record that the assessee did inform the AO about such discontinuance of its business. An evidence which could be produced but is not , shall be deemed to be against the person who withheld the same.Thus, there is a failure on the part of the assessee in making compliance of Section 176(3). The assessee is a partnership firm, and Reference is drawn to Section 189(1), which is relevant. Similarly Section 189(3) provides that in case the firm is dissolved or business discontinued, every person who has at the time of such discontinuance or dissolution a partner of the firm, and the legal representative of any such person who is

deceased , shall be jointly and severally liable for the amount of tax, penalty or other sum payable , and all the provisions of this Act, so far as may be , shall apply to any such assessment or imposition of penalty or other sum. Further reference is also drawn to provisions of Section 189(4), which stipulates that where such discontinuance or dissolution takes place after any proceedings in respect of an assessment year have commenced, the proceedings may be continued against the person referred to in sub-section (3)(i.e partners of the firm , and the legal representative of any such person who is deceased) from the stage at which the proceedings stood at the time of such discontinuance or dissolution , and all the provisions of this Act shall, so far as may be , apply accordingly. Provisions of Section 176(3) and Section 189 are reproduced hereunder:

"L.—Discontinuance of business, or dissolution
176. Discontinued business.—
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(3) Any person discontinuing any business or profession shall give to the 2 [Assessing Officer] notice of such discontinuance within fifteen days thereof.
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*** "

"189. Firm dissolved or business discontinued.—
(1) Where any business or profession carried on by a firm has been discontinued or where a firm is dissolved, the 4 [Assessing Officer] shall make an assessment of the total income of the firm as if no such discontinuance or dissolution had taken place, and all the provisions of this Act, including the provisions relating to the levy of a penalty or any other sum chargeable under any provision of this Act, shall apply, so far as may be, to such assessment.

(2) Without prejudice to the generality of the foregoing sub-section, if the 4 [Assessing Officer] or the 5 [Commissioner (Appeals)] in the course of any proceeding under this Act in respect of any such firm as is referred to in that sub-section is satisfied that the firm was guilty of any of the acts specified in Chapter XXI, he may impose or direct the imposition of a penalty in accordance with the provisions of that Chapter.

(3) Every person who was at the time of such discontinuance or dissolution a partner of the firm, and the legal representative of any such person who is deceased, shall be jointly and severally liable for the amount of tax, penalty or other sum payable, and all the provisions of this Act, so far as may be, shall apply to any such assessment or imposition of penalty or other sum.
(4) Where such discontinuance or dissolution takes place after any proceedings in respect of an assessment year have commenced, the proceedings may be continued against the person referred to in sub-section (3) from the stage at which the proceedings stood at the time of such discontinuance or dissolution, and all the provisions of this Act shall, so far as may be, apply accordingly.

(5) Nothing in this section shall affect the provisions of sub-section (6) of section 159"

5.2 The assessee did not comply with the notices issued by ld. CIT(A) and it is a matter of record that ld. CIT(A) issued as many as 8 notices which remained non compliant by the assessee , and the ld. CIT(A) was compelled to pass an ex-parte appellate order dated 25.09.2023 based on the material on record mainly statement of fact(SOF) filed by the assessee. The assessee has not responded to any of 8 notices issued by ld. CIT(A). However, claim is made in the paper book that the assessee filed documents listed at page 79-109,128-169 and 177-225 before ld. CIT(A). In any case it is a disputed fact. However, the assessee did not mention about closure of its business in the statement of fact(SOF) filed before ld. CIT(A). This is a new fact brought by the assessee on record before the ITAT, w.r.t. discontinuance of its business many years back,

in the statement of fact(SOF) filed along with its appeal before ITAT, as well in the application for condonation of delay filed with the ITAT. These are especial facts which are within the knowledge of the assessee and the same were withheld by the assessee from the Revenue. It was the duty of the assessee to have brought complete, true and correct facts on record before the authorities, as to whether the assessee firm stood dissolved or the business stood discontinued. The assessee has filed appeal in its own name, which indicate that the assessee firm was not stood dissolved, but at certain places, the partners are referred to as Ex-partners. Making general/bald statements in statement of facts and in application for condonation that the business stood discontinued shall not suffice and discharge the onus cast on the assessee. Further, this requires inquiry by the authorities below. It is was incumbent on the assessee to have brought complete , true and correct facts about the correct and uptodate status of the constitution of the assessee firm along with the complete details of discontinuance of business of dissolution of the firm itself etc., but the same was not done as there was failure on the part of the assessee, and merely a bald/general statements are made for the first time in SOF and application for condonation of delay, filed before ITAT. There are huge additions being made by the authorities below to the tune of Rs. 8,29,90,590/- against the assessee, and

huge demand is outstanding against the assessee. Thus, by any stretch of imagination , it could not be accepted that this act of non informing the department about discontinuance of business or dissolution of the firm , as the case may be, was omission or oversight by the assessee , rather it was a deliberate malicious act of concealment of relevant and vital fact, which is deprecated. Under these facts and circumstances, we are of the considered view, that complete inquiry is required in this regard thereto keeping in view provisions of Section 176(3), 189(3) and 189(4), and the assessee is directed to furnish complete , true and correct facts in connection thereto before ld. CIT(A), whose powers are co-terminus with the powers of the AO, as we will see in the later part of this order, that for the reasons cited and discussions thereof, we are inclined to set aside the appellate order dated 25.09.2023 passed by ld. CIT(A), and restore the matter back to the file of ld. CIT(A) for denovo adjudication of the appeal of the assessee .

6. We have observed that in the second round of litigation, the ld. CIT(A) issued as many as eight notices to the assessee, but there was no compliance on the part of the assessee. The ld. CIT(A) passed the appellate order on merits based on material on record mainly Statement of Fact(SOF) filed before ld. CIT(A), by holding as under:

" 5……The appellant filed only submissions alongwith filing of appeal which have considered. However, the assessment in question being consequent upon the Hon'ble ITAT directions, it is to be seen from the angle of those directions only. Since, the AO could not find anything on record which shows that the payees have disclosed receipts from appellant in their return of income, there is no scope to deviate from the finding of the AO and accordingly, the order of the AO is confirmed.

6.Regarding applicability of section 194C of the Act, the CIT(A) in earlier proceedings has discussed in detail wherein he has observed that the entire facts of the case, it is noted that the claim of the appellant that it was acting as a commission agent is not supported by facts. All the freight received by it has been recorded in the books of accounts on the receipt and subsequently the payment has also been recorded on the payment side. Secondly, the transporters are fixed and they are being employed on regular basis which is apparent from the sizable payments made to those transporters. The contract need not be written but it can be oral also. All these facts clearly shows that provisions of Section 194C are clearly attracted in the case. Thus, no question of deviating from the findings of the earlier CIT(A) on the issue of applicability of provisions of section 194C of the Act. Accordingly, it is held that the provisions of section 194C of the Act are applicable in the present case.

7. In the result, the appeal is dismissed."

6.2 As could be seen that ld. CIT(A) dismissed the appeal of the assessee ex-parte based on material on record mainly statement of fact(SOF) filed by the assessee while filing appeal with ld. CIT(A). During appellate proceedings in the second round of litigation, the ld. CIT(A) issued as many as 8 notices

seeking compliance from the assessee(details of notices as well date of compliance is mentioned in page 4 of ld. CIT(A) appellate order), but there was complete non-compliance by the assessee. Now, the assessee has come forward and filed by an appeal before ITAT, and plea is taken in SOF filed before the ITAT about non-appearance before ld. CIT(A) in the second round of litigation, as under:

> *" 2.5 During the appellate proceedings , it is claimed that various notices of hearing were issued as listed in para-5 of the impugned order but no response was made. Hence it was disposed on the basis of SOF.*
>
> *2.6 The appellant submits that the business of the appellant firm is closed many years back, even the tax consultant who was appearing has expired and inspite of making a detailed search at his office, no documents or case records could be found. Even his office remains closed except one old man could be contacted. The ex-partners have also shifted to Mumbai and visit Tintoi occasionally. None of them was aware about the proceedings going on or even the password and other details. Recently, the previous accountant of the appellant-Shri Subhash A Shah aged 70 years , residing at Dakor received on 04.01.2024 an alert on his mobile No. XXXXXXXXXX(number withheld) from IT Department about the notice/letter for AY 2010-11 issued and asking to submit online response. It was found that it was a notice for recovery of demand which led him to make inquiry about the nature of demand etc. when they came to know about the orders passed ex-parte. Even today the partner's are not having sufficient details/documents /evidences with them and they are trying their best to procure the same from various sources because the old*

> *record is not traceable at the office of the previous tax consultant being closed after the death of Shri Girish A Mehta. The appellant has also asked the AO to furnish copy of the documents/orders from his record vide letter dtd. 29.01.2024 and filed in the office AO on 30.01.2024. Therefore,……..”*

6.3Thus, it could be seen that the assessee did not participated at all in the appellate proceedings conducted before ld. CIT(A), for the reasons cited in SOF. This is second round of litigation. Huge additions were made by the AO even in second round of litigation and huge demand of tax and interest was raised by Revenue against the assessee. The assessee filed its appeal before ld. CIT(A) challenging the additions as were made by the AO in second round of litigation, and it is for the assessee to have remained vigilant once the appeal was filed by it before ld. CIT(A). The assessee and its partners were fully aware of the huge additions to the tune of Rs. 8,29,90,590/- made by the AO, and consequential demand outstanding against it. Moreover, this is second round of litigation , and still the assessee acted negligently by not complying with the notices issued by ld CIT(A).It could not be accepted that the assessee and/or its partners(or legal representatives) were not aware of the proceedings conducted by ld. CIT(A). Moreover, the assessee did not intimate department about the discontinuance of its business, and it is for the first time before ITAT in SOF , it is stated that the

business was discontinued many years back. The assessee and/or its partners(or legal representative) acted negligent during the course of appellate proceedings before ld. CIT(A) in the second round of litigation and their act is deprecated. The assessee should not be allowed to take benefit of its own wrong as it acted in complete defiance of law on both the counts. The assessee has now filed paper book before the ITAT containing 225 pages, and the ld. Counsel for the assessee has raised challenge to the additions both on merits as well on law. It is equally true that the ld. CIT(A) passed an ex-parte appellate order based on material on record including SOF. The assessee did not comply with any of the eight notices issued by ld. CIT(A). It is also equally true that the Act of the Court should not prejudice anybody. The mandate of the 1961 Act is to compute and collect correct taxes from correct assessee and for the correct assessment year. The assessee has now come forward to argue against the additions as were made by authorities below, and paper book containing as many as 225 pages are filed before ITAT. The assessee has also stated the reasons for its non compliances before ld. CIT(A), which have been cited by us in the preceding part of this order. The true, complete and correct facts are to be brought on record and the onus is on the assessee to bring the same on record. Even before us contradictory statements are made with respect to dissolution of the assessee firm vis-a-vis

discontinuance of the business of the assessee firm. Under these facts and circumstances, and in the interest of justice as well now the inquiries are to be conducted Keeping in view Section 189(1), 189(3) , 189(4) read with Section 176(3)(owing to failure on the part of the assessee to intimate Revenue in stipulated time about discontinued business), it is considered fit and appropriate that in accordance with principles of natural justice, one more opportunity is required to be given to the assessee , and hence the appellate order passed by ld. CIT(A) dated 25.09.2023 is set aside and the matter can go back to the file of ld. CIT(A) for fresh adjudication of the appeal of the assessee on merit in accordance with law after giving opportunities to both the parties. The assessee on his part is also directed to comply with the direction/notices of CIT(A) , and in case of failure of the assessee, the ld. CIT(A) shall be free to pass such appellate order as deemed fit in accordance with law on merits. Thus, the matter is restored back to the file of ld. CIT(A) for fresh adjudication of the appeal of the assessee on merit in accordance with law. Needless to say powers of ld. CIT(A) are co-terminus with the powers of the AO. The ld. CIT(A) shall also conduct inquiries or cause inquiries to be made by the AO, as may deem fit(Refer: Section 250(4)), keeping in view provisions of Section189(1), 189(3) , 189(4) read with Section 176(3), before disposing of the appeal. Keeping in view peculiar facts arising in this appeal as

enumerated above, we have refrain from adjudicating on merits both on factual as well legal aspects. We clarify that we have not commented on the merits of the issues in the appeal, and all the contentions are kept open. Thus, the appeal of the assessee is allowed for statistical purposes. We order accordingly.

7. In the result, the appeal of the assessee in ITA No. 268/Ahd/2024 for assessment year 2010-11 is allowed for statistical purposes.

Order pronounced on 30th August, 2024 in accordance with Rule 34(4) of the Income-tax Appellate Tribunal Rules, 1963 at Ahmedabad.

Sd/-	**Sd/-**
(T.R.SENTHIL KUMAR)	**(RAMIT KOCHAR)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad : Dated : 30/08/2024

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद